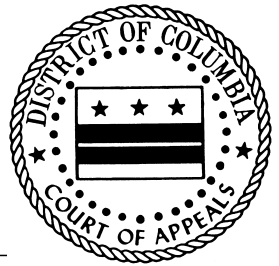


Nos. 21-CV-665 & 21-CV-666



DISTRICT OF COLUMBIA COURT OF APPEALS

Clerk of the Court
Received 01/19/2023 02:21 PM
Filed 01/19/2023 02:21 PM

HENRIETTA CONDOMINIUM ASSOCIATION, et al.,

Appellants/Cross-Appellees

v.

S2 U STREET, LLC

Appellee/Cross-Appellant.

On Appeal From The Superior Court Of The District Of Columbia
Civil Division
No. 2020 CA 003007 (R)(RP)

REPLY BRIEF FOR APPELLEE/CROSS-APPELLANT

S2 U STREET, LLC

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ARGUMENT

a. S2 U Street Is Entitled To Damages From Date Of Contract As Equitable Owner Of Property

In their Brief, Appellants/Cross Appellees (“Henrietta Appellants”) argue, *inter alia*, that Appellee/Cross Appellant S2 U Street, LLC (“S2 U Street”) was a stranger to the dispute herein until the settlement on the purchase of the subject real property on April 21, 2021, and should not be entitled to damages before that date, if at all. The trial court, although making no direct or clear ruling on that point, appeared to agree, stating, “[n]ow, essentially, the current plaintiff, S2 U Street, comes into the picture after it purchases the property from the previous Plaintiff, Mr. Lester Reese...S2 U Street purchased the property in April 2021, five months ago.” Tr. 12:15-21, Aug. 27, 2021.

Thereafter, the trial court names the types of damages sought by S2 U Street, i.e., lost profits, increased interest payments, lost use of property, property taxes not yet due, and lost parking lot rent, and concludes those claims “to be speculative.” Tr. 13:15, Aug. 27, 2021.

The trial court appears to ignore the undisputed fact that S2 U Street entered into a fully ratified, valid, binding contract to purchase the subject property on January 23, 2020, see Supp. App. 44, fourteen months prior to the settlement on the sale and a full year and a half prior to the hearing on damages. At the time of

the contract S2 U Street made a down payment of \$50,000. See *id.* Settlement was to take place 60 to 120 days after the contract date, and S2 U Street was prepared to go to settlement within that period. See Supp. App. 45. S2 U Street had entered into the contract to purchase the property after an investigation of the public records as to the property title and boundaries, and in reliance on them. See Supp. App. 49. By virtue of the contract to purchase, on January 23, 2020, S2 U Street became the equitable title owner of the subject Property. See *Ward v. Wells Fargo Bank*, 89 A.3d 115, 122 (D.C. 2014) (contract of sale transfers equitable title to purchaser); *Lindsey v. Prillman*, 921 A.2d 782 (D.C. 2007); *Trustee 1245 13th St., NW #608 v. Anderson*, 905 A.2d 181 (D.C. 2006).

Prior to the closing date under the contract, Henrietta Appellants made known their claim to ownership of the subject property. It is that wrongful claim which rendered the sale uninsurable under standard financing. See Supp. App. 44-45. Accordingly, it was at that time S2 U Street's damages from Henrietta Appellants' trespass and conversion of property began to accrue and continued through the time of entry of summary judgment on May 12, 2021, and on to the time of the hearing on August 27, 2021. S2 U Street attempted to mitigate the damages by seeking alternative financing and, in April 2021, was able to obtain it, but at a higher rate than would have applied, but for Henrietta Appellants' wrongful claim. See Supp. App. 45-46. Thus, S2 U Street was not a stranger to

the claim prior to the settlement date, but the equitable title owner of the property who was damaged from the date of the contract by Henrietta Appellants in the manner and amounts set forth in the Statement of Damages submitted to the trial court, Supp. App. 35-76.

b. S2 U Street's Damages Are Not Speculative

In agreeing with Henrietta Appellants' argument that all damages were speculative, the trial court did not make any particular findings about the line item damages sought by S2 U Street. Rather, the trial court erroneously dismissed them all as speculative and "unsupported to the extent that it should be supported...." Tr. 13:22-23, Aug. 27, 2021. In making this pronouncement, the trial court, by omission, admitted that the damages claimed did have evidentiary support, but not to the unidentified "extent" required. Indeed, the trial court intimated that damages were not proper in this case at all:

The apparent remedy here, is for [S2 U Street] to secure quiet title. They have secured that remedy That is the remedy that [S2 U Street] are entitled to receive. Their request for any monetary damages are speculative."

Tr. 13:16-22, Aug. 27, 2021.

In fact, each item of damages requested was supported by the Affidavit of Lee Simon and authenticated exhibits reflecting the damages and the manner in which each item was calculated, Supp. App. 43-76. Among the documents was evidence of the original 2.65% interest rate secured by S2 U Street prior to

Henreitta Appellants' cloud on title, as well as evidence for the subsequent loan at a 3.75% interest rate (the only financing available for purchase of the property with the cloud on title).

It is undisputed that Henrietta Appellants used the parking area – part of the disputed area – until June 2021 – (a month after Summary Judgment was granted against them and they were ordered to remove encroachments and return the area to S2 U Street.) The Affidavit of Lee Simon supports that parking spots were being rented in the area for \$150.00 a month. Supp. App. 47. The measure of damages for trespass when there is continuous use of the premises is the reasonable rental value. *Hinton v. Sealand Brokerage, Co.*, 917 A.2d 95 (D.C. 2007).

Property taxes accrue by law and are charged as liens against the property. Even though Henrietta Appellants claimed the property as exclusively theirs, they did not pay the property taxes. The trial court erred in saying that property taxes were not due. By law, property taxes accrued and were required to be paid for the year and one-half period between January 23, 2020, and the date of the hearing in August 2021. These damages are not mere conjecture. They are facts.

The lost rent and value of the land were supported by documentary exhibits and the Affidavit of Lee Simon based on experience and sound business principles and projections which S2 U Street intended to be explored through its witness. On behalf of S2 U Street, undersigned counsel informed the court that she had a

witness to testify. Tr. 3:21-22, Aug. 27, 2021. However, the trial court denied any proffer or evidence from the witness: “This is not an evidentiary hearing. I’m sorry. You submitted – each of you submitted lengthy memorandum. I’ve read the them,” Tr. 13:23-25. Thus, without prior warning the trial court determined to handle the matter of damages in summary fashion.

The trial court erred in denying all damages as speculative. All damages claimed were foreseeable consequences of Henrietta Appellants pursuing their wrongful claim of adverse possession of S2 U Street’s Property. What is required to support S2 U Street’s damage claim is some evidence which would allow the trier of fact to make a reasoned judgment rather than mere guesswork as to amount of damages. Probable and inferential considerations are a proper basis for an award, as well as direct and positive proof. *Magdalene Campbell & Fort Lincoln Civic Ass’n v. Fort Lincoln New Town Corp.*, 55 A.3d 370, 388-89 (D.C. 2012), citing *Hawthorne v. Canavan*, 756 A.2d 397, 401 (D.C. 2000); *NCRIC, Inc. v. Columbia Hosp for Women Med. Ctr.*, 957 A.2d 890, 904 (D.C. 2008); *Trs. Of the Univ. Of D.C. v. Vossoughi*, 963 A.2d 1162, 1175, 77-78 (D.C. 2009).

S2 U Street did provide evidence to support its damage claims and was denied the ability to give further support though witness testimony at the hearing. The trial court’s summary denial of all claims, without any real consideration of the evidence, can only be viewed as arbitrary and capricious, and the order of

denial should be overturned and the case remanded to the trial court for further consideration on the issue of damages.

/s/ Kathryn Erklauer

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2023, a copy of the Reply Brief of Appellee/Cross and Second Supplemental Appendix was served on all counsel of record through e-filing.

/s/ Kathryn Erklauer

District of Columbia Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a “CV” docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

- An individual’s social-security number
- Taxpayer-identification number
- Driver’s license or non-driver’s’ license identification card number
- Birth date
- The name of an individual known to be a minor
- Financial account numbers, except that a party or nonparty making the filing may include the following:

- (1) the acronym “SS#” where the individual’s social-security number would have been included;
- (2) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
- (3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
- (4) the year of the individual’s birth;
- (5) the minor’s initials; and
- (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Kathryn Erklauer
Signature

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21-CV-0665 and 21- CV-0666
Case Number(s)

1/19/2023
Date