In The

Supreme Court of Virginia

RECORD NO: 150278

CPM VIRGINIA, LLC,

Appellant,

v.

MJM GOLF, LLC,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENTS AND AUTHORITIES

1. MJM's Brief ignores the Contract.

The Contract alone, not the Record, nor the previously unintroduced document that MJM has attached as Exhibit 1 to its Brief, governs the responsibilities and liabilities of the parties with regard to the Property and the soil cover. The Contract states explicitly, "The parties acknowledge and agree that all terms of the bargain between them are as set forth herein; that there are no oral statements, terms, conditions, or warranties not set forth herein and that any addition, deletion or amendment hereto must be in writing, signed by all parties." Appendix, 218 ¶ L. Nowhere within the four corners of the Contract does CPM warrant that the Property will be covered by 18 inches of soil cover prior to closing or at any time thereafter. Appendix, 212-218.

The Contract explicitly states, "MJM shall have one hundred twenty days from the date of the execution hereof for performance of due diligence to **satisfy itself** as to… **soil conditions**" and "if MJM has discovered any item which it feels unacceptable, it may choose as its **sole option** to declare the contract void" or provide Seller notice and an opportunity to cure, but "Buyer's sole remedy for noncompliance by Seller shall be cancellation of this contract." Appendix, 215 § IV. (Emphasis added.) The

due diligence clause specifically lists "**soil conditions**" within the limited remedies section. *Compare* Appendix at 215 § IV (explicitly listing "soil conditions") *with* Appendix 216 § VIII(B)(which makes no mention of soil conditions). MJM did not seek to cancel the contract during the due diligence period; therefore, MJM has no remedy. Appendix, 215. The Contract also explicitly states "both parties shall have met and determined in good faith the specific obligation of each of them with regard to **ash placement** and golf course construction" which "shall be set forth in a development plan agreed upon and signed off on by both parties." Appendix, 215 § V. MJM has never presented a development plan stating that CPM is responsible for ensuring placement of 18 inches of soil cover.

Section VIII(B) of the Contract states that it applies to conditions "during the period of Seller's ownership of the Property" and warrants that prior to the Contract closing, "Seller has no knowledge or reason to believe there has been any breach of environmental laws." Appendix, 216, § VIII(B). MJM did not present evidence to show that CPM had knowledge of a breach of environmental law and it is impossible that CPM could have breached Section VIII(B) by failing to place 18 inches of soil cover, because the environmental regulations cited by MJM as requiring the placement of 18 inches of soil cover do not require placement of the "final cover system"

until 6 months after the final placement of ash. See 9VAC20-85-140; 9VAC20-85-120. The final placement of ash occurred after the contract closing.

MJM ignores the Contract, hardly citing to the Contract at all in its Brief, and argues instead, "[t]he record clearly delineates the responsibility of MJM and CPM with regards to the Property, as stated on pages 5 through 6 of this Brief." Brief of Appellee at 39. The document upon which MJM relies on pages 5 through 6 is the alleged "Exhibit D to the Contract" which is not part of the Record and has never been previously introduced. Brief of Appellee at 5-6. See also, CPM's Motion to Strike and for Sanctions.

The alleged Exhibit D is irrelevant. MJM is not mentioned. It is not a development plan signed by both parties. It does not contain any warranties regarding soil cover.

2. MJM's argument that CPM failed to preserve issues for appeal is erroneous.

MJM argues that CPM failed to preserve two issues: 1) that "MJM agreed to accept responsibility for activities dealing with the fly ash on the Property" and 2) that the "survival clause does not transform warranties of present condition into warranties of future performance". Exceptions #1 and #2 in CPM's Exceptions to Trial Order state as follows:

> "**Exception #1:** The Court's failure to state explicitly which language of the warranties section of the Contract CPM breached and the Court's finding that CPM breached the environmental warranties are both clear error."
>
> **"Exception #2:** Judge Smith's finding that the environmental warranties were unambiguous and that CPM warranted that 18 inches of topsoil cover was placed on top of the amended ash is clear error."

Within Exception #3, CPM also stated: "nowhere within the four corners of the Contract does CPM" represent "that the amended ash was covered by 18 inches of topsoil."

Regarding the first allegation, CPM has no burden to prove, or preserve for appeal, the argument that MJM was contractually obligated to CPM to place the final cover system because CPM has never argued that MJM breached an obligation to place the final cover system. CPM cited to the plain language of the Contract stating "MJM desires to develop and/or operate a golf course and is willing to do so **subject to the terms and conditions imposed upon CPM to develop the said golf course, thereby satisfying the various commitments made by CPM**[.]**"** (Emphasis added). Appendix, 213 § 2. CPM also cited to a letter written by the Virginia Department of Environmental Quality to MJM, stating that MJM requested a reduction of the soil cover requirement from 18 to 24 inches and granting the request. See Appendix, 257. The VDEQ letter and Section

II of the Contract are inconsistent with MJM's argument that CPM warranted and assumed sole responsibility for ensuring placement of the final cover system. Why would MJM ask for a reduction of the soil cover requirement from VDEQ, and draft a contract stating it will "satisfy the various commitment made by CPM", if CPM had assumed sole responsibility for compliance with the final cover requirement and had warranted the property's future compliance with all environmental laws and regulations?

With regard to the second allegation, the Circuit Court did not find that CPM warranted future performance. The Circuit Court found CPM breached the contract because it failed to place the final cover "prior to closing." Appendix, 736 ¶ 3. This ruling was erroneous because the environmental regulations did not require placement of a "final cover system" until months after the closing. See 9VAC20-85-140; 9VAC20-85-120. In its Opposition to CPM's Petition for Appeal, MJM first argued that CPM warranted future performance, stating the provisions of Section VIII(B) were "in full affect after closing, and are currently in effect now." See MJM's Opposition at 22. According to MJM, if a hurricane were to strike the Property in the year 2065, CPM would be responsible for restoring the Property to compliance with all then existing state and federal regulations. This interpretation is unreasonable.

3. MJM's counterclaim sounds solely in contract.

For the first time in this litigation, MJM has argued that its counterclaim for setoff and recoupment sounds in both contract and in tort. Brief of Appellee at 24. MJM misunderstands and misapplies Virginia law. Whether a cause of action sounds in contract or tort depends upon "the source of the duty violated." Richmond Metro. Auth. v. McDevitt St. Bovis, Inc., 256 Va. 553, 558 (1998). In McDevitt, this Court held, "We have acknowledged that a party can, in certain circumstances, show both a breach of contract and a tortious breach of duty. However, 'the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract.'" Id. (internal citations omitted); See also Rotonda Condo. Unit Owners Ass'n v. Rotonda Associates, 238 Va. 85, 90 (1989)("Association sought only to recover damages for the economic losses associated with the cost of repairing the defects in the common elements. Such economic losses are not recoverable in tort; they are purely the result of disappointed economic expectations. The law of contracts provides the **sole redress** for such claims.") (Emphasis added). Here, the Circuit Court held, "This is a contract and a breach of contract" and specifically found; "It's a breach of a duty, but a duty that's **not a common law duty** but a duty that was imposed by

contract….” Appendix at 713. (Emphasis added). MJM seeks to offset and recoup costs against its option to pay CPM under the Contract based upon costs incurred by Dominion. MJM has not alleged personal injury, non-economic damages, or other common law injury. MJM’s alleged losses are solely economic. Therefore, MJM’s claim sounds solely in contract and the collateral source rule is inapplicable.

4. The application of the collateral source rule in this case is punitive.

MJM argues that the application of the collateral source rule is not punitive because CPM is the “wrongdoer” and therefore MJM should be entitled to reap a windfall from its dealings with Dominion. Brief of Appellee at 17-18. The argument is not logically consistent.

In addition, the argument that CPM would reap a windfall ignores the terms of the Contract between MJM and CPM and the surrounding facts. CPM has agreed to pay MJM an amount equal to MJM’s “net capital investment” by electing the option to repurchase. Appendix, 8 ¶ C. Any funds that MJM spent repairing the soil cover would be incorporated into the purchase price calculation. Id. The fact that MJM received millions of dollars from Dominion is outside of CPM’s control. CPM was never informed of any alleged soil cover inadequacies prior to filing this lawsuit,

nor did Dominion and MJM inform CPM of their secret "maintenance agreement." Appendix, 97 (ln. 8-22).

MJM's allegation that CPM is the "wrongdoer" ignores several key facts. First, the Contract explicitly provided that MJM had an obligation to conduct due diligence as to "soil conditions" but MJM performed no due diligence. Appendix, 93-94, 188 (ln. 8-16). Presumably, had MJM performed the due diligence it was contractually obligated to perform, it would have discovered any of the alleged soil cover inadequacies, if they in fact existed, and would have either provided CPM notice and an opportunity to cure those inadequacies or canceled the Contract. MJM also contractually obligated itself explicitly, "**to construct the golf course pursuant to the previously issued conditional use permit from the City…."** (emphasis added.) Appendix, 7 § II. Consistent with this responsibility, MJM sent a letter to VDEQ on January 31, 2007, the day after the contract closing, informing VDEQ of the transfer of ownership and requesting an amendment to the original submittal documents allowing 18 inches of topsoil cover, as opposed to 24 inches of topsoil cover, to be placed on the amended ash. Appendix, 257-258. Nevertheless, MJM alleges that CPM was solely responsible for ensuring placement of the soil cover. MJM makes this allegation despite their being no language within

the Contract to support the argument that CPM was solely responsible for the soil cover. Appendix, 6-12.

The allegation by MJM that "CPM breached the CPM/Dominion Contract" in an effort to "[keep] its costs down and its profits up" is entirely unsupported. Brief of Appellee at 18. First, if CPM breached its contract with Dominion, why did Dominion not bring a lawsuit against CPM to recover the costs it expended on the alleged soil cover inadequacy? Why would Dominion instead remedy the soil cover inadequacy without providing any notice to CPM? Second, Judge Smith specifically found that CPM did not have an intention to deceive MJM or Dominion stating, "I'm not saying, you know, misrepresentation, there is nothing that rises to fraud here that shows that it was intentional." Appendix, 713. CPM hired a licensed professional engineer to determine whether the soil cover was adequate and the engineer certified that there was 18 inches throughout the Property. Appendix, 255-256. MJM was aware of CPM's engineer and his methods and made no objections. Appendix, 159-160. Finally, as discussed in more detail in part 5 below, MJM did not present a prima facie case to show that CPM failed to place 18 inches of soil cover. The Record and Contract do not support MJM's characterization of CPM as "the wrongdoer."

5. MJM did not present a prima facie case.

MJM alleges "CPM failed to make a Motion to Strike at the conclusion MJM's evidence, consequently failing to preserve the issue about whether MJM had proven a prima facie case. Therefore, the only reasonable inference is that CPM itself believed that MJM had made a prima facie case." Brief of Appellee at 34. No Virginia case law states that a party who chooses not to present evidence at the close of the opposing party's evidence must make a Motion to Strike or waive the ability to argue that the opposing party failed to present a prima facie case. CPM presented no evidence at the close of MJM's case, and stated to the Court, "Your Honor, I would like to do it today. I would like you to rule from the bench." Appendix at 203. The transcript of the May 8, 2014 hearing makes clear that CPM did not believe MJM had presented a prima facie case.

MJM did not present a prima facie case. MJM could not show where in the Contract CPM warranted the placement of 18 inches of soil cover. MJM's only evidence of the alleged inadequate soil cover were measurements taken after July of 2008. CPM did not conduct any work at the property after April of 2007. MJM's argument that CPM had the burden to produce evidence to show "that rain or other such factors could actually wash away over 100,000 tons of topsoil" ignores the law and the facts.

Brief of Appellee, 33. First, MJM did not present evidence that 100,000 tons of soil was missing. MJM's depth measurement show, at most, that the soil cover was no longer evenly distributed across the Property at a depth of 18 inches. Erosion, compaction, subsidence, MJM's own "shaping activities", and other environmental factors could easily have caused soil movement that led to these results. See Appendix, 117-118 (ln 25, 1-6), 223.

MJM bore the burden of proving a breach of contract and failed to do so. The Court cannot assume, because less than 18 inches of soil covered portions of the golf course in July of 2008, less than 18 inches of soil cover existed in those same areas in April of 2007. Soil is not static. The physical movements of soil are within the realm of expert testimony. MJM called Mr. Hatcher, a geotechnical engineer, but MJM did not ask Mr. Hatcher whether it could be concluded within a reasonable degree of engineering certainty that the soil cover measurements in July of 2008 were caused by a failure to place adequate soil cover in April of 2007. Appendix, 124-130. Mr. Hatcher provided no opinion on this topic; therefore, MJM could not possibly prove a prima facie case. Id.

CPM did not need to present evidence regarding the possibility of erosion and environmental factors as a potential cause of the lack of soil cover, because MJM's witnesses testified as to these facts. See Appendix,

140 (ln. 17-20), 153 (ln. 8-12), 185 (ln. 12-21), 186 (ln. 1-7), 223. MJM's own witnesses confirmed that erosion played a significant role in the soil cover problems. From the evidence presented, it is impossible to know the extent to which erosion, MJM's own activities, or other factors, caused the alleged soil cover problems, or to conclude that CPM failed to place 18 inches of soil cover.

CONCLUSION

WHEREFORE, CPM respectfully requests this Court reverse the Circuit Court's Order and rule in favor of CPM.

Respectfully Submitted CPM Virginia

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RULE 5:26 CERTIFICATE

I hereby certify that, on this, the 27th day of August, 2015:

1) I caused a true and exact electronic copy of the foregoing Reply Brief of Appellant, to be filed with the Clerk of the Court, via VACES, and served upon opposing counsel, via electronic mail, addressed as follows:

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2) The required paper copies of the foregoing have been dispatched for hand-filing with the Clerk of the Court within the prescribed one business day of said electronic filing.

3) Excluding the portions exempted under Rule 5:26, this Reply Brief contains 2,588 words.

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