IN THE

Supreme Court of Virginia

RECORD NO. 160999

JAMES T. DENTON,

Appellant,

v.

BROWNTOWN VALLEY ASSOCIATES, INC.,

Appellee.

REPLY BRIEF OF APPELLANT

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Pursuant to Rule 5:29 of the Rules of the Supreme Court of Virginia**,** this reply brief responds only 1) to those facts, issues and cited case law presented in Appellee's (Browntown) brief requiring further explanation, clarification or distinction and 2) any defenses first raised in Appellee's reply brief that can be addressed within the page and word limitations of the Rule. Appellant (Denton) relies on his previously filed briefs and pleadings, documents and exhibits contained in the record in further response to Browntown's Brief. Browntown cites new cases, most all of which cannot be distinguished in this short reply brief. Denton reserves the right to make such distinctions at the hearing on this matter.

CLARIFICATION OF BROWNTOWN'S STATEMENT OF THE CASE

It is undisputed that Browntown breached the 2005 non-contingent contract (the "Contract") to purchase Denton's land in Front Royal, Virginia (the "Property") because it could not reach an agreement with Cogil, an adjacent land owner, regarding improvement to the right-of-way servicing the Property, a reason unrelated to the contract terms. App. at pp. 1083, line 8 -1084, line 5 and 1360. It is undisputed that Browntown presented Denton with a Release. App. at p. 1362. It is further undisputed that Denton did not sign the release. Denton sued for Specific Performance of the Contract in 2010 after attempting to sell the Property to mitigate his damages. App. at p. 884, lines 13 - 19. Browntown defended the suit claiming Denton did not have good title to a 4.191 acre portion of the Contract

Property. Browntown also counterclaimed for its attorney's fees *and filed a third-party claim against its realtor and real estate agent ("Weichert/Boies") for* Negligence, Fraud by Concealment and Claim for Attorney's Fees for Fraud by Concealment. App. at pp. 83-89. While Browntown repeatedly points out that Denton did not pursue his claim for 2 ½ years, Browntown, likewise, did not pursue its own claims for 2 ½ years, where Weichert/Boies was not compelled by Browntown to answer the third-party claim until July, 2014. App. at pp. 114 - 122 Weichert/Boies prevailed on their Demurrer (App. at pp. 157 - 158), and their attorney's fee claim was settled prior to hearing. App. at pp. 589-594.

At the close of a two day trial, the trial court took the matter under advisement, and on March 10, 2015, in a letter opinion, the court granted Browntown's motion to strike based on "a substantial issue as to the ownership of the 4.191 acre tract" of the 122.281 acre Contract Property. App. at p. 226. Denton filed a Motion for Reconsideration (App. at pp. 464 - 523) and the motion was denied. App. at pp. 557-558.

In a separate hearing on Browntown's counterclaim for attorney's fees, Browntown was awarded $54,964.00 of its attorney's fees, including $11,000.00 of fees for pursuing its attorney's fee claim. App. at pp. 781, 781A, 781B.

CLARIFICATION OF BROWNTOWN'S STATEMENT OF FACTS & MATERIAL PROCEEDINGS

It is undisputed that the Denton/Wayside Inn Limited Partnership

("Wayside") Deed of Boundary Settlement and Dedication of Plat ("Boundary Settlement and Plat") confirming Denton's ownership of the 4.191 acre tract was recorded on December 13, 1994, after the Wayside property was sold in foreclosure on February 28, 1994. However, the fact remains that Wayside *was the owner at the time the agreement was entered into* and, as such, it had the right to enter into such an agreement. Further, while Browntown points out that the lienholder of the Wayside property was not a party to the agreement between Wayside and Denton and, arguably, had no *record* notice of the Boundary Settlement and Plat, Denton's title insurer did not require the lienholder be a party to the agreement (App. at pp. 1287 – 1296), and Browntown produced no evidence at trial that the lienholder or any subsequent owner objected to the agreement after its recordation. Browntown produced no evidence of any such objections, *because there are none. All subsequent conveyances of the Wayside property hold the line between the Wayside and Denton properties as called in the boundary settlement plat, with the 4.191 acre tract being part of the Denton Property.* App. at pp. 497-522.

Despite Browntown's lengthy recitation of facts regarding its failed agreement with Cogil, the Contract with Denton was not contingent on reaching an agreement with Cogil. The contract provided for no study period to determine "whether the Purchaser's plan for development of the Property is practical." App.

at p. 1324 (Study Period). Further, the Contract was non-contingent as to financing. App. at p. 1323 (Price and Financing). Browntown clearly breached its Contract with Denton by failing to proceed to settlement because of its failure to reach an agreement with Cogil.

Browntown further breached its Contract with Denton by failing to instruct its settlement agent to conduct a title examination of the Denton Property. Contrary to Browntown's assertion that Mr. Pond represented both parties, the Contract clearly states that Mr. Denton chose "to use Nikki Marshall of Fallon, Myers, Marshall & Groux, LLP to act as his settlement attorney." App. at p. 1327 (Other Terms). The Jurisdictional Addendum to the Contract reflects that the "purchaser wishes to employ Daniel Pond, Attorney ("Settlement Agent") to represent the Contract." Daniel Pond was Browntown's Settlement Agent, and he was required to order the title examination. App. at p. 1330, (Paragraph 7). The Contract specifies that "the title report and survey *shall* be ordered *promptly."* [Emphasis added.] App. at p. 1325 (Title). Browntown admits it told Mr. Pond to "hold off" until the situation with Cogil could be resolved (App. at p. 1082), in direct contradiction to the contract terms. Browntown further admits a title examination was never conducted. App. at p.93 (Answer, Paragraph 29).

While Browntown strongly objects to Denton's failure to advise Browntown of its default, tellingly, Browntown references no provision in the Contract that

requires such notice. In fact, there is no such provision. Denton did not sign Browntown's Release and that was sufficient notice to Browntown that Denton had no intention of releasing it from the Contract.

Browntown attempts to attach some negative significance to the fact that Denton withdrew his expert witness designation on February 4, 2015, just two weeks prior to trial. As communicated to the trial court and Browntown's counsel, Joy Herndon, Denton's expert title examiner, was diagnosed with thyroid cancer and had radiation treatment scheduled at the time her designation was withdrawn. At the time of the withdrawal, Mr. Denton was of the opinion that his title was good and marketable and no title report or title binder had been submitted by Browntown to the contrary. Cherry picking a 1994 deed from an adjacent owner's chain of title hardly qualifies as evidence of a "current" title defect where the property has been transferred four times since 1994 and the alleged defect is of no consequence because the line between the Wayside/Denton properties is adopted in *all of the transfers.* App. at pp. 476 line 3 – 477 line 8.

The Substitute Trustee's Deed was submitted by Browntown to prove the truth of its content. As submitted, the Deed was admitted as an *exception to the rule against hearsay*, pursuant to § 8.01-839(C), 1950, Code of Virginia, as amended, revised, and Rule 2:803 (14)(15), Rules of the Supreme Court of Virginia. Denton is not required to make a specific "hearsay" objection for the

Deed to be subject to Rule 2:803(15). "Va. Sup. Ct. R. 5:25 does not require a party to precisely reference the exact statute or rule upon which they rely in making any argument. Rather, a party need only give a trial court sufficient notice of the substance of the objection." *Va. Elec. & Power Co. v. Hylton,* 292 Va. 92, 103, 787 S.E.2d 106 (2016)

While the trial court granted Browntown's Motion to Strike and denied Denton's Motion for Reconsideration based on the court's finding that Denton had "a title problem with the 4.191 acre tract," the court does not adequately consider Browntown's material contractual obligation to conduct a proper title examination, where such an examination would preclude Browntown from considering one deed in a chain of title to the exclusion of all subsequent deeds in the chain.

REBUTTAL TO APPELLEE'S ARGUMENT

A. The Trial Court Erred in Granting Browntown's Motion to Strike Because the Court Abused its Discretion, as a Matter of Law, by Failing to Require Browntown to Conduct a Title Examination, pursuant to the Contract Terms; and Improperly Weighing the Evidence Related to Marketable and Insurable Title to the 4.191 Acre Tract.

Browntown's entire argument, in its purest form, supposes that because Denton is requesting specific performance, Browntown is relieved of *all* its obligations under the Contract, the law of the case, including those obligations related to conveyance of good and marketable title, the very issue to which Browntown claims relieves it of specifically performing the Contract. The trial

court incorrectly adopted Browntown's argument.

Browntown was obligated by the Contract to have a title examination performed on the Denton Property. It failed to do so. Its objection to the title to the 4.191 acre tract is based on a snapshot in time in 1994, eleven (11) plus years prior to the Contract between the parties, sixteen (16) plus years prior to Denton filing his suit for specific performance, and days short of twenty (20) years prior to trial of the matter. As the trial court stated in its opinion letter sustaining Browntown's Motion to Strike, Denton is asking for specific performance "now" and his title must be good and marketable now. A title examination would have revealed that Browntown's claimed "title defect" is of absolutely no consequence. Certainly, it would not have prevented Browntown from securing title insurance on the 4.191 acre tract.

Further, apart from Browntown's contractual obligation to conduct a proper title examination, it is only reasonable that the trial court would require Browntown to show that the notice defect complained of is relevant now and casts a *current* cloud on Mr. Denton's title to the 4.191 acre tract, rising above Mr. Denton's deed of record and his quiet enjoyment of the Contract Property, including the 4.191 acre tract, for twenty-two (22) years at the time of trial, combined with that of his predecessor in title, exceeding seventy-five (75) years. Browntown proffers no alternative ownership of the 4.191 acre tract, because there

is none. At the time of trial, the lienholder and all subsequent owners to the Wayside property would have been estopped from making any claim to the 4.191 acre tract, because they all adopted the Wayside/Denton boundary line reflected in the Boundary Settlement and all relevant statutes of limitation would have passed.

In the case of *Carter v. Robinett,* 74 Va. 429, 1880, Va. LEXIS 52, defendant squatters in an ejectment action sought to defeat the record title owner's right in the property, but the court found that in all the proceedings, and despite an improperly admitted power of attorney, defendants had produced not one person to 1) dispute the title of the record owner, 2) claim title or 3) demonstrate interference with the control of the property by the record owner. The plaintiff record title owner prevailed. Even though the case before this Court is for specific performance and not ejectment, in both cases the record owner plaintiff must prove good title. The Court in *Carter* specifically recognized and ruled that the defendant challenging title had a burden to show some title superior to the plaintiff. In the instant case, the trial court should have required Browntown, as the Contract requires of Browntown, to conduct a title examination of the Contract Property, to show a defect in title that rises above Denton's "good and marketable" title, which could be shown by Browntown through an inability of Browntown to obtain title insurance or a mortgage on the Contract Property due to the defect. The trial court erred by not attributing that burden to Browntown, as the Contract between the

parties requires. It is absurd that Browntown defends by stating it need not order its own title examination, at the time of Contract, as required by the Contract, because Denton had already applied for title insurance in 1992.

In stark contrast to the case at bar, in *Madbeth, Inc. v. Weade,* 204 Va. 199, 201, 129 S.E.2d 667, 669 (1963), the Supreme Court reversed the trial court's judgment for the sellers because the Court found that "it was impossible, as a matter of record, to determine the location of the boundaries" of the two acre sales parcel and "there existed a potential if not actual overlap or encumbrance on the parcel." *Madbeth* sets a bar for "doubtful" title, and the alleged notice issue concerning Wayside's lienholder does not come close to meeting that bar. Additionally and importantly, the *purchaser* in *Madbeth* employed "a qualified title examiner, who examined the title to the land which was the subject of the contract. He conducted his *examination of the land records* and reported to the defendant [purchaser] that, the title to the land was not marketable." Further, he reported that he submitted the title to Lawyers Title Insurance Corporation, and the company refused to issue a title policy because of the "*present condition of title as reported."* [Emphasis added.] *Id* at 201, 202. The record in the instant case clearly reflects that Browntown *did not* order a title examination, in direct breach of the Contract terms, and Browntown admits it was never denied title insurance on the Contract Property.

B. Denton's Objections to the Trial Court Ruling on Browntown's Motion to Strike Have Merit.

1. Error No. 2 – The Trial Court Abused its Discretion in not Giving Significant Weight to Browntown's Failure to Instruct its Closing Agent to Conduct a Title Examination of the Contract Property at the Time of Contract or Through the Trial of This Matter to Identify Legitimate Issues of Ownership.

As previously stated herein, Daniel Pond was Browntown's Settlement Agent. Pursuant to Paragraph 29 of the Contract, Denton chose "Nikki Marshall . . . to act as his settlement attorney." App. at p. 1327. The Jurisdictional Addendum at Paragraph 7 instructed the *purchaser,* Browntown, to contact the Settlement Agent and schedule settlement. App. at p. 1330. Browntown admits it directed Daniel Pond to "hold off" on the title examination and further admits that one was never conducted. As Browntown points out, the Contract "may" be terminated, "at the option of the seller" if settlement is delayed *to receive the title report* and it is not available 15 business days after the scheduled settlement. By its plain language, the Contract does not *require* Denton to terminate the Contract. The Contract does, however, provide that "if the Purchaser is in default, the Seller *shall* have all legal and equitable remedies." [Emphasis added.] App. at p. 1325. Paragraph 21 (Default).

The trial court was obligated to view this case through the lense of the Contract terms. Mr. Denton sued for specific performance of the Contract. The suit requested that the court compel Browntown "to perform *and comply with the*

provisions of the contract." [Emphasis added.] App. at p. 3. Browntown cannot complain of Denton's title when it failed to direct that a title examination of the Property be conducted to identify *legitimate* title issues that would affect "good and marketable title," and the trial court cannot hold Denton to a standard higher than the Contract terms. The Contract is the law of the case.

2. **Denton Was Not Required to Specifically Cite to Va. Sup. Ct. R. 2:803 (14) and (15) in His Objections to the Substitute Trustee's Deed Because "Preservation Under Va. Sup. Ct. R. 5:25 Does Not Require a Party to Precisely Reference the Exact Statute or Rule Upon Which They Rely in Making an Argument. Rather, a Party Need Only Give a Trial Court Sufficient Notice of the Substance of the Objection."** ***Va. Elec. & Power Co. v. Hylton*****, 292 Va. 92, 103, 787 S.E.2d 106 (2016)**
3. **The Trial Court Did Abuse Its Discretion in Admitting The Substitute Trustee's Deed Into Evidence and Weighing It In Support Of a Title Defect Against the Denton Property in Violation of Rule 2:803(15).**

Browntown acknowledges that Denton objected to the Trustee's Deed's admission on grounds of relevancy, lack of testimonial sponsor, *incomplete chain of title*, failure to name an expert witness to opine on the deed's significance and failure to produce the document prior to the discovery cutoff. In Denton's response to Browntown's Motion to Strike, Denton clearly articulates that "although Browntown has not pled any alternative theory of ownership, they assert somehow that there is a cloud on this title, although no one has ever come forward and made such a claim in the 20 plus years since Mr. Denton's deed has gone to record. . . . and over 20 years since the recordation of the plat removing the hatch

marking on the 4.191 acres in December of 1994" and " . . . there have been no claims against the 4.191 acres in all that time. That is the evidence before the court today. The owner of the Wayside property, the evidence has shown today, has actually had contact with Mr. Denton, but has never made a claim to that property." App. at p. 1046. Denton also testified that he leased the Contract Property to John Shank and he ran cattle on the Property. (App. at p. 859, lines 4 and 5 and 1345).

In consideration of Denton's evidence at trial and the lack of evidence presented by Browntown, *a complete chain of title of the Wayside Property would have established that the Trustee's Deed cast no cloud on Denton's title at the time specific performance was demanded.* Plaintiff's Motion for Reconsideration, IV, App. at pp. 474 – 477. Rule 2:803(15) guards against just such an omission. Even though the trial court can take judicial notice of the Substitute Trustee's Deed, the Deed should have been given no weight in regard to the question of Denton's title to the 4.191 acre tract without further evidence of the Wayside title to the time of trial, especially in light of Mr. Denton's clear testimony of no challenges to his ownership by the Wayside successors. While Denton did not cite specifically to Rule 2:803(15) in his "incomplete chain of title" objection to the Substitute Trustee's Deed, the objection, in conjunction with his testimony, adequately put the trial court on notice that Denton was objecting because dealings with the

[Wayside] property since the [Substitute Trustee's Deed] was made have been inconsistent with [Browntown's] purport of the document and that, as such, the document could not be weighed in support of Browntown's title defect argument.

4. **The Trial Court Improperly Applied the Law on Specific Performance by not properly weighing the Contractual Obligations of the Parties.**

The Court in both *Madbeth* and *Cogito v. Dart*, 183 Va. 882, 33 S.E.2d 759 (1945) were able to rely on the fact that the alleged title issue, identified through a title examination, was submitted to a title insurance company by the *purchaser's agent at the time of contract,* even if the complete abstract of title was not submitted into evidence in *Cogito.*

While the trial court in the instant case correctly identifies the contractual requirement of "good and marketable title", "insurable by a licensed title company with not [sic] additional risk premium," it fails to balance that obligation against the requirement of the *purchaser's title examination*, a contractual obligation crucial to identification of valid title defects and one that *precedes* the requirement of good title *at closing*. There is no evidence in the record that title insurance was denied Browntown at the time of contract through the trial of this matter. It is absurd that Browntown contends that it need not have applied for title insurance because Denton had already applied for title insurance in 1992, at his time of purchase.

C. Denton's Request For An Extension of the Law of *Peers v. Barnett,* 53 Va. 410, 1855 Va. LEXIS 30, Is Properly Made and Has Merit.

Unquestionably, Denton asked the trial court to find that he had "good and marketable" title to his property because 1) he had been in uninterrupted possession and in quiet enjoyment of his Property in excess of the twenty-two (22) years since the recordation of his deed and twenty (20) years since the recordation of the plat removing the hatch marking on the 4.191 acres in December of 1994, well beyond the fifteen (15) year statute of limitations for adverse possession claims; and 2) his ownership remained unchallenged, with no suggestion of disturbance, or the assertion of any adverse claim, including any claim by subsequent owners in the Wayside property, up to the time of hearing. App. at p.78. Denton *was* asking the trial court for an extension of the law, if the current law, as interpreted by the trial court, required Denton to pursue a quiet title action to overcome an arguable notice defect that, under no circumstances, could have been pursued by Wayside's lienholder or any subsequent owner of the Wayside property, all of whom acknowledged and agreed to the boundary line between Wayside and Denton through subsequent deeds and plats in Wayside's chain of title. Contrary to Browntown's contention that an extension of the law of *Peers* "would lead to significant chaos, increased litigation, and expense in Virginia real estate transactions," *the trial court's current decision* in this matter will lead to chaos, increased litigation and expense because purchasers will no longer be bound

by their contractual obligations to properly investigate title, according to accepted protocol and standards in the industry. Instead they will be permitted to identify any perceived title defect, legitimate or not, real or imaginary, and breach their contract on a whim, for cause or not. This sets a very dangerous precedent.

Denton does not respond specifically to Browntown's Brief arguments, numbered D, D1, D2, and D3, regarding award of attorney's fees due to the page limitation of this brief, and relies on his previously filed briefs and pleadings, documents and exhibits contained in the record, and oral hearing on this matter.

CONCLUSION

Browntown argues over and over again, that Browntown, contrary to the Contract terms, had no obligation to order a title examination to identify legitimate issues of title. Tellingly, there are no cases proffered by Browntown excusing its default under the Contract for a reason unrelated to the Contract terms and further excusing Browntown's continued promises to Denton of closing on the Property only to defend this suit on lack of marketable title. Proper title examination was and is the responsibility of the Browntown under its Contract with Denton. It is a *material term of the Contract* and is paramount to the *principle purpose* and object of the Contract, transfer of good and marketable title. The requirement cannot be ignored or taken into account only in a penalty reducing an attorney fees award. The decision of the trial court should be reversed and remanded for specific performance of the contract by Browntown.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In compliance with Rule 5:26, I hereby certify that on April 18, 2017, the correct number of true and accurate copies of this Reply Brief were hand-filed with the Supreme Court of Virginia and an electronic copy filed via VACES in PDF format, and an electronic copy via email in PDF format was served upon counsel for the appellee:

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