[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 24-10287

AMERICAN SOUTHERN HOMES HOLDINGS, LLC,
ASH-GRAYHAWK, LLC,

Plaintiffs-Counter Defendants-Appellants-Cross Appellees,

versus

DAVID B. ERICKSON,
GH LOT HOLDINGS, INC,
GH LOT HOLDINGS OF ATLANTA, CORPORATION,
f.k.a. Grayhawk Homes of Atlanta Inc,
GH LOT HOLDINGS OF SOUTH CAROLINA, INC,
f.k.a. Grayhawk Homes of South Carolina Inc,
TIGER CREEK DEVELOPMENT, INC,
et al.,

Defendants-Counter Claimants-Appellees-Cross Appellants,

CARROLLTON DEVELOPMENT, LLC,

Counter Claimant-Defendant.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 4:21-cv-00095-CDL

Before JILL PRYOR, BRANCH, and HULL, Circuit Judges.

PER CURIAM:

This appeal involves a Land Purchase Agreement ("LPA") between (1) plaintiffs American Southern Homes Holdings, LLC and ASH-Grayhawk, LLC (collectively, "ASH") and (2) defendants David Erickson and several entities he controlled (collectively, "the LPA Sellers"). The parties asserted multiple claims and counterclaims against each other. After extensive discovery and motions, the district court granted in part and denied in part cross-motions for summary judgment as to various claims.

Several claims proceeded to trial, including: (1) plaintiff ASH's claim that the defendants LPA Sellers breached a separate Consulting Agreement between the parties; (2) the defendants LPA

Sellers' counterclaim against plaintiff ASH for breach of the Consulting Agreement; and (3) plaintiff ASH's claim that defendants LPA Sellers breached the LPA. After a six day trial, the jury returned a verdict finding that (1) the defendants LPA Sellers breached the Consulting Agreement, but plaintiff ASH was entitled only to nominal damages of $1.00; (2) the LPA Sellers' counterclaim for breach of the Consulting Agreement failed; and (3) the defendants LPA Sellers breached the LPA, but plaintiff ASH's conduct prevented the LPA Sellers from performing their obligations under the LPA.

Plaintiff ASH appeals the district court's denial at trial of ASH's Rule 50 motion for judgment as a matter of law on its LPA breach claim. Plaintiff ASH argues that (1) the LPA is an enforceable contract, (2) the district court should have granted its Rule 50 motion and held that the defendants LPA Sellers breached the LPA as a matter of law, and (3) the district court should not have submitted the LPA Sellers' prevention defense to the jury for multiple reasons. ASH asks that this Court reverse the jury's verdict and the denial of its Rule 50 motion and enter judgment for ASH on its LPA breach claim as a matter of law.

In response, the LPA Sellers make alternative arguments for affirming. Among other things, they argue their prevention defense as to the claimed LPA breach was properly submitted to the jury under the evidence and relevant law and this Court should affirm the jury's verdict and the denial of ASH's Rule 50 motion. Alternatively, if this Court does not affirm the jury's verdict as to

the prevention defense, the LPA Sellers argue, among other things, that the LPA is not enforceable by ASH for various reasons and this Court should still affirm the jury's verdict and judgment for the LPA Sellers on ASH's LPA breach claim.

In addition, the defendants LPA Sellers cross-appeal the district court's post-judgment order denying their motion for attorney's fees incurred in defending against ASH's Copyright and Lanham Act claims. The Copyright claims were disposed of in the partial summary judgment ruling. The Lanham Act claims went to trial but were eventually disposed of at trial on the LPA Sellers' Rule 50 motion and were not submitted to the jury.

After careful review, and with the benefit of thorough briefs and oral argument, we affirm the jury's verdict, the district court's denial of ASH's Rule 50 motion for judgment as a matter of law on its LPA breach claim, and the district court's denial of the LPA Sellers' motion for attorney's fees as to the Copyright and Lanham Act claims. Because we affirm the denial of ASH's Rule 50 motion on its LPA breach claim and do not set aside the jury's verdict on the LPA claim, we need not reach the LPA Sellers' alternative argument as to the enforceability of the LPA.

I. BACKGROUND

Given that we write for the parties, who are already familiar with the extensive record, we set out only the facts necessary to explain our decision.

On November 15, 2019, plaintiff ASH acquired defendant Erickson's homebuilding business based in Columbus, Georgia.

The transaction was effected through multiple contracts, including: the (1) LPA; (2) Consulting Agreement; (3) Asset Purchase Agreement ("APA"); (4) Copyright Assignment Agreement; (5) Trademark Assignment Agreement; and (6) Transition Services Agreement. However, the main contract at issue on appeal is the LPA.

Under the LPA, plaintiff ASH had an exclusive right to purchase 1,600 lots in the Columbus, Georgia area from the defendants LPA Sellers over an approximately 8-year period. The LPA categorized the lots as finished (Phase A), under development (Phase B), or raw land that the LPA Sellers were obligated to develop and deliver to ASH (Phase C).

The LPA specifically provided that the 1,600 lots would be sold to ASH according to the Takedown Schedule. Out of the 1,600 lots, approximately 600 were Phase A and B lots, and 964 were Phase C lots.

The Takedown Schedule defined the precise number of Phase A, B, and C lots to be sold each quarter through December 2027. The Takedown Schedule provided that the LPA Sellers were to sell 25 Phase A lots per quarter beginning in December 2019 as well as 25 to 30 Phase B lots per quarter beginning in September 2020. The Takedown Schedule further specified that 15 Phase C lots were to be sold each quarter beginning in September 2021, with that figure increasing to 45 Phase C lots each quarter beginning in March 2025 through December 2027.

The LPA also provided a formula for how the Phase C lots would be priced. The formula factored in development costs, property taxes, and a flat $3,000 management fee owed to the LPA Sellers.

The LPA thus expressly delineated how the Phase C lots were to be categorized, developed, and priced, as well as the exact number of lots to be sold each quarter. The LPA, however, did not designate which of the particular lots would be in that allotment of Phase C lots to be sold to ASH each quarter. Instead, the LPA required the parties to agree to a Phase C lot order within one year, i.e., by November 15, 2020.

Throughout 2020, the LPA Sellers continued developing Phase C lots that were already being developed at the time of the transaction. But the parties never reached a formal agreement on the Phase C lot order. Between March and June 2021, and after the one-year deadline had passed, ASH made multiple proposals for a Phase C lot order. The LPA Sellers did not respond substantively to ASH's proposals or propose a Phase C lot order of their own.

Notably, at least one of ASH's proposed term sheets changed the pricing formula for the Phase C lots, including waiving the flat $3,000 management fee owed to the LPA Sellers. ASH's proposed term sheets also included demands related to disputes between the parties regarding separate contracts on separate subjects—the APA and the Consulting Agreement. The proposed term sheets provided that "[n]othing is agreed until everything is agreed."

At trial, the parties disputed whether they agreed in principle to a proposed Phase C lot order at a June 2, 2021 in-person meeting. ASH's general counsel testified that the parties agreed in principle to ASH's March 2021 proposed Phase C lot order. But Erickson testified that the parties agreed only that they did not have an agreement. Erickson also testified that ASH continued to take the position that the parties would agree to "everything" or "nothing."

In any event, the parties never memorialized a particular Phase C lot order in a written agreement.

ASH eventually sued, asserting ten claims against the LPA Sellers, including: (1) breach of the Consulting Agreement; (2) breach of the LPA; (3) breach of a non-compete provision in the APA; (4) breach of the Copyright Assignment Agreement; (5) copyright infringement under the federal Copyright Act; (6) breach of the Trademark Assignment Agreement; and (7) trademark infringement claims under both the federal Lanham Act and various state laws. Regarding its LPA claim, ASH asserted that the LPA Sellers breached the LPA by (1) failing to agree on a Phase C lot order, and (2) failing to deliver Phase C lots that had been developed.

The LPA Sellers filed seven counterclaims against ASH for (1) declaratory judgment that the APA's non-compete provision was unenforceable; (2) breach of two other sections of the APA; (3) breach of the LPA; (4) breach of the Consulting Agreement; (5) breach of a Transition Services Agreement between the parties; and (6) quantum meruit.

The district court dismissed, granted summary judgment, or entered judgment as a matter of law on all claims except for the Consulting Agreement claims and ASH's LPA breach claim.

Those remaining claims proceeded to trial. At the close of the evidence, ASH orally moved for judgment as a matter of law as to its LPA breach claim against the LPA Sellers under Federal Rule of Civil Procedure 50. The district court reserved ruling on the motion until after the jury's verdict.

The jury ultimately found (1) that defendants LPA Sellers breached the LPA beginning on November 16, 2020,[1] but (2) that plaintiff ASH prevented the LPA Sellers from performing, so the jury did not award any damages.

After the jury's verdict, plaintiff ASH renewed its Rule 50 motion for judgment as a matter of law on its LPA breach claim. The district court denied that motion, finding that the jury's conclusions were not contrary to the evidence or the law.

Additionally, the defendants LPA Sellers moved for attorney's fees in connection with plaintiff ASH's Copyright and Lanham Act claims, which the district court had previously disposed of on the LPA Sellers' motions for summary judgment and judgment as a matter of law. The district court denied the motion for attorney's fees, finding that the "losing claims" were not unreasonable, frivolous, or improper.

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[1] On appeal, the LPA Sellers do not challenge the jury's finding that they first breached the LPA on November 16, 2020.

II. DISCUSSION

A. The LPA

On appeal, plaintiff ASH contends that the LPA is enforceable, challenges the district court's denial of its Rule 50 motion as to the LPA breach claim, and claims the prevention defense should not have been submitted to the jury.[2] In response, the LPA Sellers ask this Court, among other things, to affirm the jury's verdict.

Under Georgia law, "[i]f the nonperformance of a party to a contract is caused by the conduct of the opposite party, such conduct shall excuse the other party from performance." Ga. Code Ann. § 13-4-23. A party's obligation to perform may be relieved "where the other party to the contract repudiates the obligation by act or word, or takes a position which renders performance of the obligation useless or impossible." *J & E Builders, Inc. v. R C Dev., Inc.*, 646 S.E.2d 299, 301 (Ga. Ct. App. 2007) (quoting *Taliafaro, Inc. v. Rose*, 469 S.E.2d 246, 247–48 (Ga. Ct. App. 1996)). At trial, the LPA Sellers contended, *inter alia*, that ASH took a position that rendered their performance useless or impossible. In the district court and on appeal, the parties called it the prevention defense, and we do too.

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[2] "We review *de novo* the district court's rulings on motions under Rule 50 of the Federal Rules of Civil Procedure, examining the trial evidence in the light most favorable to the non-moving party." *S.E.C. v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 813 (11th Cir. 2015) (quotation marks omitted).

After extensive review of the record, we conclude that the trial evidence, viewed in the light most favorable to the defendants LPA Sellers as the non-moving party, supported the jury's verdict as to the prevention defense.

A reasonable jury could find that the LPA Sellers did not agree to a Phase C lot order because of ASH's conduct, including its multiple and repeated demands. It is undisputed that ASH did not propose a Phase C lot order before the November 15, 2020 deadline. The term sheets that ASH eventually proposed either (1) altered the terms of the LPA by changing how the Phase C lots would be priced, or (2) were conditioned on the LPA Sellers' acquiescence to concessions related to other agreements, i.e., the APA and the Consulting Agreement. And plaintiff ASH continually maintained that no agreement would be made until "everything" was agreed upon.

The jury could also reasonably find that the defendants LPA Sellers could no longer continue to deliver Phase C lots without a lot order. As Erickson testified, developing and delivering lots without a Phase C lot order became unfeasible for the LPA Sellers because it would result in increased carrying costs in the form of development costs, interest, property taxes, and maintenance expenses.

For these reasons, a reasonable jury could find that ASH's conduct rendered the LPA Sellers' efforts to agree to a Phase C lot order "useless or impossible." *J & E Builders*, 646 S.E.2d at 301. Thus, we affirm the jury's verdict on the LPA breach claim and

affirm the district court's denial of ASH's Rule 50 motion. Because we affirm the jury's verdict, the parties' remaining arguments regarding the LPA do not require, or even merit, further discussion.[3]

B. Attorney's Fees

In their cross-appeal, the defendants LPA Sellers argue that the district court abused its discretion in denying their motions for attorney's fees on ASH's failed Copyright and Lanham Act claims.[4] While the LPA Sellers recognize that district courts have substantial discretion in this area, they argue, among other things, that the district court's citation of an abrogated case, *Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc.*, 253 F.3d 1332, 1335 (11th Cir. 2001), as part of a string cite setting out a standard for evaluating whether fees were appropriate, constitutes a legal error that taints the district court's whole attorney's fees decision.

Under the Copyright Act, a district court "in its discretion . . . may [] award a reasonable attorney's fee to the

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[3] The parties also dispute whether lis pendens notices placed on the Phase C lots by ASH when this lawsuit was filed prevented the LPA Sellers' performance. We need not reach this issue because even assuming the lis pendens notices did not prevent performance, ASH's multiple demands involving the various other agreements discussed above during the negotiation period provided enough evidence for the jury to find that ASH prevented the LPA Sellers from performing.

[4] We review the district court's denial of a motion for attorney's fees for abuse of discretion. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 678 F.3d 1199, 1201 (11th Cir. 2012).

prevailing party." 17 U.S.C. § 505. In turn, the Supreme Court has adopted a standard for evaluating attorney's fees motions under the Copyright Act. The Supreme Court has explained that courts should consider "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) (quotation marks omitted).

For Lanham Act claims, a district court "in exceptional cases may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117(a). The Supreme Court has emphasized that district courts should exercise discretion on a case-by-case basis and has favorably cited *Fogerty*'s identification of "frivolousness, motivation, [and] objective unreasonableness" as relevant considerations in determining whether a case is "exceptional." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 & n.6 (2014) (construing the identical "exceptional cases" standard in the Patent Act, 35 U.S.C. § 285).

Before *Octane Fitness*, this Court in *Tire Kingdom* identified "'evidence of fraud or bad faith'" as justifying an attorney's fees award under the Lanham Act. *Tire Kingdom*, 253 F.3d at 1335 (quoting *Safeway Stores, Inc. v. Safeway Discount Drugs, Inc.*, 675 F.2d 1160, 1169 (11th Cir. 1982)). Subsequently, in *Tobinick v. Novella*, 884 F.3d 1110 (11th Cir. 2018), this Court first noted that the Lanham Act's exceptional case standard had traditionally

allowed for the award of attorney's fees "'only in exceptional circumstances and on evidence of fraud or bad faith.'" *Id.* at 1117 (quoting *Safeway Stores*, 675 F.2d at 1169). The *Tobinick* Court then held that *Octane Fitness* abrogated this traditional interpretation because the language in the Patent Act and Lanham Act is "identical" and "courts generally have looked to the interpretation of the patent statute for guidance in interpreting the attorney's fees provision in the Lanham Act." *Id.* at 1118 (quotation marks omitted). In sum, this Court recognized its "past precedent" regarding attorney's fees under the Lanham Act "as having been abrogated" by *Octane Fitness*. *Id.* We thus agree with the LPA Sellers that the district court made an errant citation to *Tire Kingdom* given it relied on *Safeway Stores*.

Nonetheless, reasonably read as a whole, the text of the district court's order set forth and adopted the correct legal standard as to both the Copyright and Lanham Act claims jointly. Here's why.

The relevant section of the district court's order has two long paragraphs. Its order begins by recognizing that the defendants LPA Sellers must do more than establish that they simply prevailed "to recover attorneys' fees and litigation expenses under the Copyright Act and the Lanham Act." The district court then lays out the correct legal standard—whether the "claims were objectively unreasonable, improperly motivated, or frivolous, and whether an award is necessary to advance the goals of the statutes." The district court's statement of the legal standard overlaps cleanly

with the considerations that district courts must consider under the Supreme Court's standard for both statutes. *See Fogerty*, 510 U.S. at 534 n.19; *Octane Fitness*, 572 U.S. at 554.

Directly after the district court pronounces this standard, there is only one long "*see*" cite. The court's "*see*" cite properly cites and quotes from *both* relevant statutes, including § 1117(a)'s reference to "exceptional cases." *See* 15 U.S.C. § 1117(a). So the correct quoted standard is recognized as applying to both the Copyright and Lanham Act claims.

Further, in the first sentence of its second paragraph, the district court jointly refers to the "losing claims" as not objectively unreasonable, frivolous, or improperly motivated. The district court twice refers to plaintiff ASH's "*claims*" and whether attorney's fees are necessary to advance the goals of the "*statutes*" and finds that the "circumstances likewise do not support a finding that an award is necessary to achieve the goals of the trademark and copyright statutes." The district court concludes that although the evidence presented in support of both sets of claims was lacking, this is not an "exceptional case" where an award of attorney's fees is warranted.

The district court also jointly refers to both the "copyright and trademark claims" when finding that plaintiff ASH had a good faith basis for asserting them. Any consideration of "bad faith" in the analysis overlaps with *Fogerty*'s consideration of "motivation." *See Fogerty*, 510 U.S. at 534 n.19.

Accordingly, despite the errant citation in a string cite, the district court adequately set forth the substance of the proper legal standard, properly assessed the totality of the circumstances, and concluded in its discretion that ASH's claims did not warrant an attorney's fees award to the LPA Sellers. While the district court was not *required* to find bad faith as a condition of awarding attorney's fees, it was free to consider lack of bad faith under the totality of the circumstances as part of its assessment of ASH's motivation.

For these reasons, we discern no abuse of discretion in the district court's denial of the LPA Sellers' motion for attorney's fees.

AFFIRMED.