

RECEIVED

Sep 12 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURGH COUNTY
Court of Common Pleas

Hon. George M. Mc Faddin, Jr.,
Circuit Court Judge

Case No. 2016-CP-45-00590, Circuit Court
Appeals Court Docket No. 2021-00849

Cassandra Selph, Appellant,

v.

Barbara Boatwright, Margaret S. Daniels, Individually and as Personal
Representative of the Estate of Eli Selph, Eli Maurice Selph, and Dwayne Selph,
Defendants,

of whom Margaret S. Daniels, individually and as Personal Representative of the
Estate of Eli Selph, and Dwayne Selph are the Respondents.

FINAL BRIEF OF PLAINTIFF-APPELLANT

Bernard M. Alter, Esq.
ALTER & BARBARO, ESQS.
Attorneys for Plaintiff-appellant
26 Court Street, Suite 1812
Brooklyn, New York 11242-1118
Tel: (718) 237-0880

TABLE OF CONTENTS

TABLE OF CONTENTS i

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE..... 1

STANDARD OF REVIEW 2

ARGUMENT..... 3

THE LOWER COURT HAD NO BASIS IN THE RECORD TO CONCLUDE, IN LIGHT OF THE DISPUTED FACTUAL ALLEGATIONS, THAT THE APPELLANT WITHHELD COMPLIANCE WITH THE AGREEMENT AND IMPOSE COSTS AND LEGAL FEES AGAINST THE APPELLANT AND ORDER ENFORCEMENT OF THE STIPULATION. 3

CONCLUSION..... 6

CERTIFICATE OF COUNSEL 7

TABLE OF AUTHORITIES

Cases

Antiques and Persian Rugs, Inc. v. Noaha, LLC, 425 S.C. 413, 823 S.E.2d 179 (Ct. Apps., 2018).....5

Curry v. Carolina Insurance Group of SC, Inc., 428 S.C. 60, 832 S.E.2d 760 (Ct. Apps., 2019).....2

Dedes v. Strickland, 307 SC 152 (1992)4

Hobgood v. Pennington, 300 S.C. 309, 387 S.E.2d 690 (1989).....6

Kinghorn, as Trustee for the Mildred Ann Kinghorn Trust, 426 S.C. 147, 825 S.E.2d 748 (Ct. Apps., 2019);.....3

Nichols Holding, LLC v. Divine Capital Group, LLC, 416 S.C. 327, 785 S.E.2d 613 (Ct. App, 2016)3, 5

Vista Antiques and Persian Rugs, Inc. v. Noaha, LLC, 425 S.C. 413, 823 S.E.2d 179 (Ct. Apps., 2018).....3, 5

Statutes

SC Rules of Civil Procedure Rule 64

STATEMENT OF ISSUE ON APPEAL

The issue on appeal is whether the lower court, based upon the disputed factual allegations of the parties made on paper submissions and statements of counsel only, without appropriate demand letters, grant the motion and make factual findings to impose court costs, legal fees, and interest upon the appellant.

STATEMENT OF THE CASE

This action was initially commenced by plaintiff-appellant, Cassandra Selph, to determine the land she was entitled to possess with respect to family members.

After negotiation, the matter was settled by an undated stipulation in 2019 (R. p.41-44) between the parties and counsel.

Defendant-respondent, Daniels, (“hereinafter respondent”) claimed that plaintiff-appellant, Cassandra Selph, (“hereinafter appellant”) refused to comply with the stipulation.

On April 7, 2020, respondent moved to compel compliance with the stipulation and sought attorney’s fees, costs, and interest against appellant (R.-p.39-40) purportedly in accordance with paragraph 11 of the stipulation. (R. p. 41-44).

The appellant filed her response to the motion on November 25, 2020. (R.p.45-47)

The lower court, Hon. George M. Mc Faddin, Jr., Circuit Court Judge, set a hearing of the motion on for January 14, 2021.

On January 4, 2021, respondent's counsel filed an additional affirmation setting forth his legal fees and costs. (R. p. 51-59). On January 5, 2021, the respondent filed an affidavit with respect to the hearing. (R. p. 60-62)

Appellant filed her response on January 12, 2021. (R. p. 63-71)

The court heard argument of counsel on January 14, 2021 only, on the record (R. pp. 72-91 and reserved decision. ¹

On July 6, 2021, by written order, the lower court held in favor of respondent on the issue of legal fees, costs and interest and issued its order under appeal. The order held that the appellant was at fault for not closing on the agreement. (R. p. 3-10)

Notice of appeal was timely filed on August 2, 2021. (R. p.1-2).

This court has directed submission of papers on appeal by January 25, 2022.

STANDARD OF REVIEW

The standard of review is a full appellate review as a matter of law in the same manner as the lower court reviewed this matter.

It is appellate review of the manner of enforcement of a settlement agreement as a contract only. Curry v. Carolina Insurance Group of SC, Inc., 428 S.C. 60, 832 S.E.2d 760 (Ct. Apps., 2019)

¹ The Court should note that the separate case set forth on the hearing transcript, ending in 0088, calendared together for the hearing with the instant case, is in process of being resolved and has no bearing on this appeal.

The error of law results from the fact that the lower court adjudicated the case based on a paper record with clearly disputed facts set forth by the parties on the record with submission of conflicting affidavits and statements by counsel at a hearing before the lower court and had no basis to order enforcement. It should be noted that the lower court reserved decision after the hearing date and thereafter issued its final order on July 6, 2021, which is the subject of the appeal.

ARGUMENT

THE LOWER COURT HAD NO BASIS IN THE RECORD TO CONCLUDE, IN LIGHT OF THE DISPUTED FACTUAL ALLEGATIONS, THAT THE APPELLANT WITHHELD COMPLIANCE WITH THE AGREEMENT AND IMPOSE COSTS AND LEGAL FEES AGAINST THE APPELLANT AND ORDER ENFORCEMENT OF THE STIPULATION.

Paragraph eleven of the settlement agreement (R. p. 41-44) makes the agreement enforceable with costs and legal fees by the court based upon a breach by either party. (R. p. 41-44).

A settlement agreement is enforceable by the Court under the terms of the agreement. Nichols Holding, LLC v. Divine Capital Group, LLC, 416 S.C. 327, 785 S.E.2d 613 (Ct. App, 2016). Kinghorn, as Trustee for the Mildred Ann Kinghorn Trust, 426 S.C. 147, 825 S.E.2d 748 (Ct. Apps., 2019); Vista Antiques and Persian Rugs, Inc. v. Noaha, LLC, 425 S.C. 413, 823 S.E.2d 179 (Ct. Apps., 2018).

Yet, on April 7, 2020, in the motion, the respondent set forth no facts that appellant was in breach. (R. p. 39-40)

The appellant countered on November 25, 2020 (R. p. 45-47) that she was not in breach and the delays were caused by the improper preparation of the deeds by respondent's counsel.

The matter was set for a hearing on January 14, 2021.

It was not until January 4, 2021, a mere ten (10) days before the hearing that Mr. Askins submitted an affidavit of default (R. pp. 51-59) to show a default. This was followed by the filing on January 5, 2021 (R. p. 60-62) of an affidavit from respondent to show default by appellant.

The appellant countered with a detailed affidavit to show she was not in default, attached an e-mail chain to establish it, and further stated that the respondent's affidavit was filed too late considering Civil Rule 6. (R. pp. 63-71)

Accordingly, appellant argued that since respondent's affidavit was not filed until January 5, 2021, nine days before the hearing, it could not be considered under SC Rules of Civil Procedure Rule 6. Dedes v. Strickland, 307 SC 152 (1992).

The hearing (R. pp. 72-91) was very brief and consisted of argument by counsel and nothing more.

The trial court chose in its order of July 6, 2021 (R. p. 3-10) to enforce the stipulation and impose legal fees and court costs against appellant based upon

respondent's written statements, including the affidavit submitted in violation of Rule 6 of respondents on January 5, 2021, and arguments by counsel over appellant's disputed facts and arguments of appellant's counsel, detailed in their submissions to the court below.

There was clearly an insufficient basis in the record to do so considering the clear factual dispute set forth by the parties to the within proceeding.

Although the trial court has the right to enforce a stipulation, it cannot do so based upon the record before it, which, to reiterate shows a factual dispute between the parties, the improper consideration of respondent's affidavit in violation of Civil Rule 6 and the failure to take proper steps to order enforcement.

The detailed findings by the Court below of fault by the appellant for failure to close are clearly unsupported by the record considering the clear factual dispute set forth by the parties in their submissions of affidavits and arguments by counsel to the lower court as to which party was at fault.

Cases decided by this Court make that point abundantly clear. See Nichols Holding, LLC v. Divine Capital Group, LLC, 416 S.C. 327, 785 S.E.2d 613 (Ct. Apps., 2016); Kinghorn, as Trustee for the Mildred Ann Kinghorn Trust, 426 S.C. 147, 825 S.E.2d 748 (Ct. Apps., 2019); Vista Antiques and Persian Rugs, Inc. v. Noaha, LLC, 425 S.C. 413, 823 S.E.2d 179 (Ct. Apps., 2018).

Finally, because respondent set forth no written demand for enforcement within a particular time, the motion had to be denied. See Affidavit of Cassandra of January 12, 2021 (R. p. 63-71) at paragraph numbers 13-17 at R. p. 65. Hobgood v. Pennington, 300 S.C. 309, 387 S.E.2d 690 (1989); Ingram v. Kasey's Associates, 340 S.C. 98, 531 S.E.2d 287 (2000)

CONCLUSION

The order dated July 6, 2021, should be reversed and the motion denied.

Dated: September 12, 2022

/s/ Bernard M. Alter

ALTER & BARBARO, ESQS.
Attorneys for Plaintiff-appellant
26 Court Street, Suite 1812
Brooklyn, New York 11242-1118
Tel: (718) 237-0880
SC Bar No. 78125

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b),
SCACR.

Dated: September 12, 2022

/s/ Bernard M. Alter

ALTER & BARBARO, ESQS.
Attorneys for Plaintiff-appellant
26 Court Street, Suite 1812
Brooklyn, New York 11242-1118
Tel: (718) 237-0880
SC Bar No. 78125

RECEIVED
Sep 12 2022
SC Court of Appeals