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Aug 22 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM PICKENS COUNTY
Court of General Sessions
Charles B. Simmons, Master in Equity

Appellate Court Case No.: 2020-000396

Terrance "Terry" Carroll, Appellant,

v.

Debra Mowery, TD Realty, Upstate RE Group,
Hawk Shadow Business Services, LLC, and Debra Mower Realtor, Respondents.

PETITION FOR REHEARING

J. Falkner Wilkes (SC Bar #12893)
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Counsel for Appellant

August 22, 2023.

PETITION

Pursuant to Rule 221, SCACR, the Appellant hereby moves this Court to reconsider its opinion and grant a rehearing based on the points overlooked or misapprehended by the court as set forth below.

I. CONSTRUCTIVE FRAUD, BUSINESS FIDUCIARY AND FALSE REPRESENTATION

The Court's decision is based on a finding that the Appellant failed to present evidence that a business transaction took place between he and the Respondent. This finding is in error as the record shows that the Respondent was in the business of providing all aspects of business administration to businesses and individuals. Regardless of whether the Respondent had obtained her realtor's license prior to or after the purchases of the properties at issue, the purchases of the properties at issue were clearly done as part of Mowery's "real estate business." The record is clear that Carroll and Mowery engaged in a plan of investing time and money to purchase and renovate real properties and Carroll relied on Mowery's business experience to handle all of the administration of the venture while he provided for renovation of the properties.

The record shows that prior to the purchase of the first property the Respondent was operating Hawk Shadow Business Services, LLC, the stated purpose of which was "to engage in services and support of accounting, bookkeeping, taxes, instruction and all aspects of business administration and development for all individuals, small to medium size businesses fro profit and non-profit." R. 533. The record has ample evidence that Carroll relied on Mowery's business expertise to handle the administration of the real estate which included the purchase, titling, and transfer of the properties at issue: "That's what she does is paperwork. *I mean business services.*

When I met her that was her business that she had started and throughout the years I just gave her money and – to put into her business when she –.” R. 169, l. 19-22 (*Emphasis added*).

Carroll testified that when they moved to South Carolina Mowery continued to operate the business (Hawk Shadow) out of an office that Carroll made for her at their house. Carroll also testified that TD Realty, LLC, was set up to ultimately hold the titles to properties at issue.

Carroll testified that TD stood for Terry/Debra and that Mowery led him to believe that he would have an interest and position in TD Realty and thus the properties at issue. R. 169. Carroll’s testimony shows that he relied on Mowery’s expertise to do all of the business administration and acts necessary to effectuate a business plan for investing in real estate. Taken in light most favorable to Carroll the record is more than sufficient to establish that Carroll entered into a confidential or fiduciary relationship with Mowery and that he placed special confidence in her based on her ability to manage all aspects of the administration and development of the venture. Mowery was therefore in a position of trust and responsibility. As a result, Carroll was entitled to rely on Mowery’s representations and Mowery was bound to act in good faith and with due regard to the interests of Carroll. SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (S.C. 1990).

The Court’s opinion is further in error as its finding that Carroll did not present sufficient evidence showing Mowery made false representations about the administration and ownership of the properties and TD Realty. Carroll testified that “the whole reason why we put it and we started the TD Realty to put all of these – all of these business houses were supposed – it was Terry/Debra. I was supposed to be on there and I just found out that I’m not even listed as an owner on that business.” R. 169, l. 11-17. Carroll’s testimony, when taken in the light most

favorable to Carroll shows that the parties discussed and formed a plan to invest in properties and share the benefits from their efforts. Carroll's testimony shows that part of their plan was to transfer the properties to TD Realty and in which he would have an interest and a degree of control. The record shows that Mowery set up TD Realty without Carroll having any ownership or control. The record further shows that Mowery never transferred the properties in a way that provide Carroll with any interest in the properties. The record is therefore sufficient to create an inference that Carroll's expectations were made in reliance on representations made by Mowery.

II. BREACH OF TRUST

This Court's affirmance of Carroll's cause of action for breach of trust is based on a finding that Carroll failed to present evidence showing that he and Mowery had a fiduciary relationship. As more fully argued above, and incorporated herein, the Court's opinion overlooks evidence more than sufficient to establish a confidential or fiduciary relationship requirement between Carroll and Mowery. Because of that relationship a constructive trust was formed. "A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title." Lollis v. Lollis, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987). "A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." *Id.* Equity supports Carroll's claim for restitution. The Court's opinion is therefore in error.

III. BREACH OF CONTRACT AND INTEREST IN AND FOR REAL ESTATE.

Breach of Contract

This Court's affirmance is based on a finding that Carroll failed to present evidence

proving a contract between him and Mowery. In its analysis the Court's relies on Mowery's testimony that she never agreed to compensate Carroll in exchange for his work on the properties. This is error as this indicates a preponderance analysis rather than viewing the evidence in light most favorable to Carroll. The Court's opinion further overlooks relevant evidence that, when viewed in light most favorable to Carroll, is sufficient show that a contract existed between Carroll and Mowery.

A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). Testimony of Carroll's sister and brother-in-law is sufficient to show that the parties agreed to run the business together. As argued more fully above, under this agreement Carroll was to supply money and labor while Mowery supplied the business administration and management. Carroll was to have an ownership interest and a degree of control in the investment properties, this being the compensation for his investment of time and money into the venture. When viewed in the light most favorable to Carroll, and taking all favorable inferences from the evidence, the record is sufficient to show an agreement between the parties that included an ownership interest as compensation for Carroll.

Interest in Real Estate

The Court's opinion on the Interest in Real Estate claim turns on the finding that Carroll failed to present evidence showing that he and Mowery had a confidential or fiduciary relationship. As more fully argued above the Court's opinion overlooks relevant evidence establishing the confidential relationship between the parties. Knowing Mowery put the deeds initially in her name only is irrelevant to the analysis where there is evidence showing that deeds

were to be subsequently transferred to TD Realty in which Carroll was supposed to have an ownership interest and a degree of control. Given the confidential or fiduciary relationship Mowery owed a duty to Carroll to disclose that she did not transfer the titles to the properties to TD Realty. She further had a duty to disclose that she did not assign an ownership or control interest in TD to Carroll. There Court therefore erred finding that there was no evidence supporting a constructive trust.

IV. QUANTUM MERUIT, UNJUST ENRICHMENT, AND RESTITUTION

This Court's opinion on the issue of quantum meruit, unjust enrichment and restitution rests on a finding that there was no evidence showing Mowery received a benefit from Carroll's renovation work. The Court overlooks evidence, when taken in light most favorable to Carroll, shows that the value of the properties were increased by the renovations done by Carroll. The record shows that the 109 Linda Lane property was purchased for \$61,000. Carroll testified that he completely renovated the house:

... I totally rehabbed it. Everything. New plumbing, all new plumbing. I added all new – a whole new bathroom. I added a whole full closet in the – master bedroom. I added another closet. I redid the basement because the basement was unfinished. I mean it was bad. I completely refinished the basement. I added a new exterior door so that she had a separate, because it had line an in-laws – the basement was set up – it used to be a garage, but it was set up like a living quarters on one side with a separate bathroom, but it didn't have an outside entrance. You could only get in one way. And none of that was finished anyway. It was just set up for it. So I completely redid all that.

R. 155, l. 19 - R. 156, l. 9.

Carroll testified that the profit would then come from the increase in value caused by his work:

It was like 61,000 for a four-bedroom. So that's how we made our money was –

was we would pay cash for the house and then I would do all the work to fix them up. And the equity in the house would jump 100 -- you know, over 100 percent. So that was my side of what we were doing. And the money came from that loan that we got.

R. 156, l. 13-19.

As a result of Carroll's work the house sold for \$169,000: "...we bought it for 61,000 and we sold it for 169, so that tells you how much worked I did on it." So the record shows that the value of the properties at issue were increased substantially by Carroll's work. Because Mowery never transferred any interest in the properties to Carroll, she received all of the benefit from Carroll's work by way of the increase in value of the properties. The Court's finding that Carroll failed to present evidence showing Mowery received a benefit from his renovation work is in error. The Court's finding that Carroll did not present evidence detailing how his personal and financial contributions to the renovation of the properties raised the value of the properties is also in error as Carroll's testimony clearly equated the increase in value to his work: "we bought if for \$61,000 and we sold it for 169, so that tells you how much work I did on it." The lack of evidence allowing a determination of Mowery's contribution to the increase in value only supports Carroll's assertion that all of the increase in value is the direct result of his renovations. The decision of the Court affirming the special referee's dismissal of these claims is therefore in error.

CONCLUSION

Based on the foregoing, as well as the arguments set forth in the Appellant's Brief, this Court should reconsider its opinion, grant a rehearing, and reverse the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 22, 2022, I filed and served electronically served and filed
the Appellant's Petition for Rehearing by AIS email to counsel of record and to the
Court as follows:

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Respectfully submitted,

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