

STATE OF SOUTH CAROLINA)

IN THE CIRCUIT COURT)

COUNTY OF ANDERSON)

TENTH JUDICIAL CIRCUIT)

Harold P. Threlkeld d/b/a Harold P. Threlkeld, Attorney at Law)

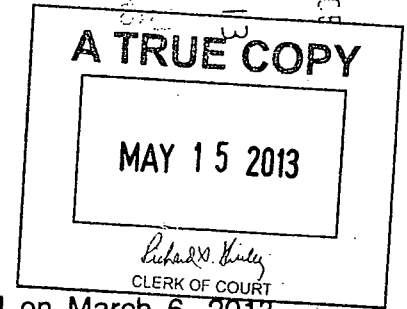
C/A No. 2012-CP-04-00041)

Plaintiff,)

vs.)

ORDER

Lyman Warehouse, LLC, Lyman Pacific, LLC, Mills Demolition, LLC, Susan C. Stanley, Peter M. Stanley and Donald J. McWhirter.)
_____)



This interpleader action came before me for non-jury trial on March 6, 2013. Present at the trial were the Plaintiff Harold Thelkeld, Defendant Lyman Warehouse, LLC and Defendant Donald J. McWhirter. Defendants Mills Demolition, LLC, Lyman Pacific, LLC, Susan C. Stanley, and Peter M. Stanley were not present and did not answer the call of the case for trial. After considering the evidence, arguments of Counsel, and the parties' submissions, I find that Donald J. McWhirter is the rightful party to receive the interpleaded monies.

PROCEDURAL HISTORY

On January 4, 2012, Plaintiff brought this interpleader action to determine the parties' respective rights to One Hundred Thousand (\$100,000.00) Dollars. Defendant Lyman Warehouse, LLC answered the complaint asserting it was entitled to the monies. Defendant, Donald McWhirter ("McWhirter") through his Amended Answer and Cross Claim asserted he was entitled to the monies and further asserted causes of action for breach of contract against Lyman Warehouse, LLC ("Lyman Warehouse"), unjust

enrichment against Lyman Warehouse, Declaratory Judgment against all parties, civil conspiracy against Susan C. Stanley and Peter M. Stanley ("Stanley), Warehouse, Mills Demolition, LLC ("Mills) and Lyman Pacific, LLC ("Pacific"), and breach of fiduciary duty against Stanley and Pacific. Lyman Warehouse asserted in its filings that it is entitled to the money pursuant to an April 7, 2011 contract with Pacific.

FINDINGS OF FACT

1. This controversy involves the proposed purchase of 22 +/- acres of land in Lyman, South Carolina ("the Property"). Defendant Lyman Warehouse **Exhibit 1**.
2. Initially, Peter Stanley (and his company Lyman Pacific LLC), Don McWhirter, and Elliott Edwards sought to purchase the Property from Lyman Warehouse for demolition and reclamation of steel.
3. On April 7, 2011, Pacific and Lyman Warehouse entered into a contract. Defendant Lyman Warehouse **Exhibit 1**.
4. The contract was signed at a meeting at Stax's Restaurant in Greenville, SC. Present at the meeting were Peter Stanley, Richard Bennett, Elliott Edwards and Don McWhirter.
5. The closing date on the contract was May 7, 2011.
6. The contract set forth a purchase price of \$1.3 million with \$100,000 placed in trust.
7. McWhirter individually wrote a check for \$100,000 to satisfy the earnest money provision of the contract. Defendant Lyman Warehouse **Exhibit 2**.
8. Paragraph 15 of the contract states in pertinent part:

REMEDIES FOR BREACH: In the event of default or breach of this Agreement on behalf of Purchaser, Seller's remedy against Purchaser shall be limited to receipt of all monies paid by Purchaser. In other words, if Purchaser does not pay any or all of subsequent payments mentioned in paragraph four (4) then seller's sole remedy for breach against Purchaser shall be limited to all monies paid by the Purchaser thru the date of default.

9. The contract did not close on May 7, 2011.
10. On May 27, 2011, an Agreement for Rescission of Contract and Full and Final Release ("Release") was reached between Lyman Warehouse, Mills Demolition, Lyman Pacific, Bennett, and Stanley. Defendant Lyman Warehouse **Exhibit 5**.
11. The Release was drafted by the Plaintiff on behalf of his client, Lyman Warehouse.
12. The Release states in pertinent part that Lyman Warehouse:

[F]orever discharge Lyman Pacific, Mills, Peter and Susan from all of the Claims, both past and present, including but limited to all claims, demands, actions, and causes of action including without restricting the foregoing generality, any and all claims for damages, liquidated damages, exemplary damages, punitive damages, incidental, special, indirect or consequential damages, damages and all losses of money and economic opportunity and for mental anguish or emotional distress, damages for loss of reputation damages for fraud, civil conspiracy, interference with contractual relations . . .

It being the specific intent of the releasing Parties to fully release the Parties herein released of and from any Claims or right of the releasing Party to claim or to make any of the Claims against the Parties herein released for any losses or damages the releasing Party may have sustained or may hereafter sustain, known or unknown, **arising out of the Circumstances or arising out of any other transaction** or relationship between or among the releasing Party and the Parties herein released and all incidents and consequences thereof.

See Defendant Lyman Warehouse Exhibit 5 at p. 5-6 emphasis added.
13. Lyman Warehouse received Twenty Seven Thousand Five Hundred Dollars (\$27,500) in exchange for the release.

CONCLUSIONS OF LAW

McWhirter asserts five causes of action to recover the \$100,000: (1) McWhirter is a third party beneficiary to the contract, (2) civil conspiracy, (3) breach of fiduciary duty (4) unjust enrichment against Lyman Warehouse, and (5) Declaratory Judgment against all parties. Lyman Warehouse asserts it is entitled to the money as a result of the default provision fo the April 7, 2011 contract. The Court addresses each in turn.

1. McWhirter's Third Party Beneficiary Claim Fails.

I find that Defendant McWhirter failed to prove he was a third party beneficiary to the April 7, 2011 contract. Under South Carolina law, a contract between two persons for the benefit of a third person can be enforced by the third person, even if he or she is not named in the contract. Svenningsen v. Knight, 286 S.C. 299, 304; 333 S.E.2d 78, 81 (Ct. App. 1985). The third person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to the third person. Bob Hammond Const. Co., Inc. v. Banks Const. Co., 312 S.C. 422, 424; 440 S.E.2d 890, 891 (Ct. App. 1994). Sloan Const. Co., Inc. v. Southco Grassing, Inc. 377 S.C. 108, 120, 659 S.E.2d 158, 165 (S.C. 2008). McWhirter asserts that he is a third party beneficiary by virtue of the language in the April 7, 2011 contract referring to demolition, testimony that he was intended to do the demolition, and his check for \$100,000.

Here, the contract is clearly between two parties, Lyman Pacific, LLC and Lyman Warehouse LLC. There is no reference to McWhirter anywhere in the contract. The reference to demolition of the building in the contract is not sufficient to give rise to a third party beneficiary claim. Furthermore, I find the check itself was to bind the actual

parties to the contract, not to make McWhirter a party to the contract. McWhirter's interest in the contract was incidental and consequential rather than direct. As a result, he cannot recover under this theory.

2. McWhirter's Civil Conspiracy Claim Fails.

McWhirter has failed to prove a conspiracy was entered against him. Civil Conspiracy is a combination of two more persons for the purposes of injuring a third person which causes special damages. The difference between civil and criminal conspiracy is in criminal conspiracy, the gravamen of the offense is the agreement itself, whereas in civil conspiracy, the gravamen of the tort is the damage resulting to plaintiff from an overt act done pursuant to a common design. Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct.App. 2009). McWhirter argued that a conspiracy existed between Lyman Warehouse, Lyman Pacific and Stanley because the parties entered into a back-up contract for the sale of the property on May 4, 2011. **See Defendant Lyman Warehouse Exhibit 9.** By its very terms, the May 4, 2011 contract is conditioned upon the April 7, 2011 contract failing. As a result, rather than evidence of a conspiracy, it is merely a back-up contract.

3. McWhirter's Breach of Fiduciary Duty Claim Fails

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. Ellis v. Davidson, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct.App.2004); Regions Bank v. Schmauch, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct.App.2003); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 476, 581 S.E.2d 496, 505 (Ct.App.2003). To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust

in another has some foundation for believing the one so entrusted will act not in his own behalf but in the interest of the party so reposing. The evidence must show the entrusted party actually accepted or induced the confidence placed in him. Here no competent evidence was introduced that would create a fiduciary relationship between the parties and, therefore, McWhirter cannot recover on this theory.

4. Unjust Enrichment.

McWhirter asserts that Lyman Warehouse would be unjustly enriched if it obtains the \$100,000. Unjust enrichment (quantum meruit) requires a showing that a benefit was conferred upon the defendant by the plaintiff, realization of the benefit by the defendant, and retention by the defendant of the benefit under circumstances that make it unjust for the defendant to retain the benefit. JASDIP Properties SC, LLC v. Estate of Richardson, 395 S.C. 633, 640, 720 S.E.2d 485, 488 (Ct. App. 2011).

On April 7, 2011, Don McWhirter tendered \$100,000 to be placed into the escrow account of Mr. Threlkeld. By law, the \$100,000 in Mr. Threlkeld's escrow account does not belong to Mr. Threlkeld. See Rule 1.15, RPC, SCACR Rule 407 and Moore v. Weinberg, 373 S.C. 209, 225, 644 S.E.2d 740, 748 (Ct. App. 2007). At no time did the money leave Mr. Threlkeld's escrow account.

Lyman Warehouse's claim to the \$100,000 is contingent on Lyman Warehouse's contractual rights under the April 7, 2011 agreement. The April 7, 2011 agreement called for a May 7, 2011 closing date³ and no closing occurred. On May 27, 2011, Lyman Warehouse, Lyman Pacific, Mills Demolition, Richard Bennett, Peter Stanley, and Susan Stanley (the Parties) entered into full and final Release. See Lyman Warehouse **Exhibit 5**. The release states in pertinent part:

[F]orever discharge Lyman Pacific, Mills, Peter and Susan from all of the Claims, both past and present, including but limited to all claims, demands, actions, and causes of action including without restricting the foregoing generality, any and all claims for damages, **liquidated damages**, exemplary damages, punitive damages, incidental, special, indirect or consequential damages, damages and all losses of money and economic opportunity and for mental anguish or emotional distress, damages for loss of reputation damages for fraud, civil conspiracy, interference with contractual relations . . .

It being the specific intent of the releasing Parties to fully release the Parties herein released of and from any Claims or right of the releasing Party to claim or to make any of the Claims against the Parties herein released for any losses or damages the releasing Party may have sustained or may hereafter sustain, known or unknown, **arising out of the Circumstances or arising out of any other transaction** or relationship between or among the releasing Party and the Parties herein released and all incidents and consequences thereof.

See Lyman Warehouse **exhibit 5** at p. 5-6 **emphasis** added. In addition to addressing the May 4, 2011 contract, the release affects any claim for damages arising out of any other transaction or relationship between or among the parties. This language is inclusive of the April 7, 2011 contract.

In South Carolina, when the terms of a Release are clear and unambiguous, they are enforced by their terms. Bowers v. Dept. of Transp., 360 S.C. 149, 156, 600 S.E.2d 543, 546 (Ct. App. 2004) ("In construing [a] release, the court must seek to ascertain and give effect to the intention of the parties."). Gardner v. City of Columbia Police Dep't, 216 S.C. 219, 223, 57 S.E.2d 308, 309 (1950); The Wilson Group, Inc. v. Quorum Health Resources, Inc., 880 F.Supp. 416, 425 (D.S.C.1995). S. Glass & Plastics Co. v. Duke, 367 S.C. 421, 428, 626 S.E.2d 19, 22-23 (Ct. App. 2005) (A release is a contract, and the scope of a release is gathered by its terms). Here, the release itself reveals the parties' intent: "It being the specific intent of the releasing Parties ..."

Lyman Warehouse released all claims to the earnest money in exchange for \$27,500. See Exhibit 5 pp. 4-6. As a result of the release, Lyman Warehouse would be unjustly enriched if were to obtain the \$100,000.

5. Lyman Warehouse's claim to the Interpleaded Money

Even if the Release did not end this matter, McWhirter would still be entitled to the interpleaded funds as Lyman Warehouse has failed to prove any damages from the default of the April 7, 2011 contract.¹

Generally, the construction of a contract is a question of law for the court. Soil Remediation Co. v. Nu-Way Env'tl., Inc., 325 S.C. 231, 234, 482 S.E.2d 554, 555 (1997). If the language employed by the agreement is plain and unambiguous, the contract should be enforced by its terms. First-Citizens Bank Trust Co. v. Conway Nat'l Bank, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct.App.1984).

The April 7, 2011 contract provides the following remedy for Lyman Warehouse if Pacific does not close:

Remedies For Breach: In the event of default or breach of this Agreement on behalf of Purchaser, Seller's remedy against Purchaser shall be limited to receipt of all monies paid by Purchaser. In other words, if Purchaser does not pay any or all of subsequent payments mentions in paragraph four (4) then Seller's sole remedy for breach against Purchaser shall be limited to all monies paid by the Purchaser thru the date of default.

By its plain terms, the April 7, 2011 contract requires Lyman Warehouse to prove its damages from the Seller's default for up to the amount of monies paid prior to the default. The monies paid prior to default are the \$100,000 dollars.

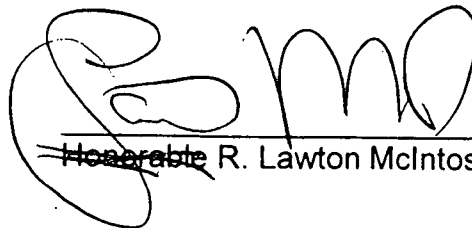
¹ This section addresses Lyman Warehouse's claim to the money held in escrow through the interpleader action and also addresses McWhirter's declaratory judgment action.

At trial, Lyman Warehouse failed to present competent evidence of any damages from Lyman Pacific's default. Rather, evidence was presented that Lyman Warehouse entered into two other contracts, a May 4, 2011 contract and a June 6, 2011 contract. The June 6, 2011 contract closed for more money than the April 7, 2011 contract. See Defendant McWhirter **Exhibits 2, 3, and 4**. As a result, Lyman Warehouse has failed to prove any damages from the default.

CONCLUSION

Based on the foregoing, I find that Lyman Warehouse released any claim it had to the One Hundred Thousand Dollars (\$100,000.00) that is the subject of this action. I further find that even if Lyman Warehouse had not released its claim, Lyman Warehouse failed to prove any damage resulting from Lyman Pacific's default under the April 7, 2011 contract. Accordingly, I find and conclude that McWhirter is entitled to the One Hundred Thousand Dollars (\$100,000.00) held in escrow.

AND IT IS SO ORDERED.



~~Honorable~~ R. Lawton McIntosh, Presiding Judge

5-17, 2013.
Anderson, South Carolina

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