THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Richard L. Booth, Master-in-Equity

Common Pleas Case No. 2009-CP-43-2538
Appellate Case No. 2013-000255

First Citizens Bank and Trust Company, Inc.,.....Respondent,

v.

Charles T. Brooks, III and the South Carolina Department of Revenue, Defendants,

Of Whom Charles T. Brooks, III, is.....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Does the Respondent incorrectly argue that Appellant violated the parties' agreement by not withdrawing his answer when the forbearance agreement document states that Appellant "hereby withdraws its [sic] answer"?

II. In arguing lack of ambiguity, does the Respondent focus on some provisions of the documents at issue while ignoring contradictory provisions?

III. Are Appellant's arguments preserved for review?

IV. By binding itself to an interpretation of a finding in the master's order, has the Respondent effectively conceded a favorable interpretation of that finding to Appellant once this appeal is over?

ARGUMENT

I. The forbearance agreement document expressly states that Brooks "hereby withdraws its [sic] answer[,]" yet First Citizens still argues that Brooks violated the parties' agreement by not withdrawing his answer.

The forbearance agreement document at issue states that Appellant (hereinafter "Brooks") "hereby withdraws its [sic] answer and defenses with prejudice[.]" (R. pp. _____; Affidavit of Davies Exh. D p. 2.) This statement is contained in the forbearance agreement document attached to the affidavit that Respondent (hereinafter "First Citizens") served in support of its motion. (R. pp. _____; Affidavit of Davies Exh. D p. 2.) First Citizens still argues, though, that "the only admissible evidence presented to the lower court is that [Brooks] . . . agreed to withdraw the Answer, and the Answer has not been withdrawn which, in and of itself is a breach of the terms of the agreement." (Initial Brief of Respondent p. 12.)

It is no wonder that First Citizens contends – even in the face of the contradictory evidence in the material it served in support of its motion and in the face of a specific argument to the contrary in Brooks' brief – that "it is uncontested that the Appellant failed to withdraw his Answer as provided by the terms of the settlement agreement[.]" (Initial Brief of Respondent p. 4.) This is the only basis even arguably articulated for Brooks' purported default of the settlement agreement that is noted in the affidavit First Citizens served in support of its motion. (R. pp. _____; Affidavit of Davies.) First Citizens' contention, though, is not correct.

Brooks argued that "all ambiguities in the operative documents should be construed against [First Citizens]." (R. pp. ___; Order p. 2.) First Citizens now

argues that Brooks did not comply with a provision of the settlement agreement document that provides that "Brooks agrees to withdraw his Answers in the current litigation[.]" (R. pp. _____; Exh. C to Affidavit of Davies.) Where an agreement between parties is embodied in more than one document, the documents are considered as a whole and construed together. E.g., Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 232 S.E.2d 20 (1977). When the settlement agreement document and the forbearance agreement document are construed together, they show at least an ambiguity about whether Brooks withdrew his answer by signing the forbearance agreement document. (R. pp. _____; Exhs. C and D to Affidavit of Davies.) That is an issue of fact that is material to whether summary judgment on this point was proper. Given that the law is that "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law[,]" Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986), and that "[e]ven when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied[,]" Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004), there was at least a genuine issue of material fact here, and summary judgment on this point should have been denied.

II. In arguing lack of ambiguity, First Citizens focuses on some provisions of the documents at issue while ignoring contradictory provisions.

As quoted in First Citizens' brief, in construing a contract, "the parties' intention must be gathered from the contents of the *entire* agreement and not from any particular clause thereof." Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 497-98, 649 S.E.2d 494, 501-02 (Ct. App. 2007) (emphasis added). Admittedly, there provisions in the forbearance agreement document from which one might argue, as First Citizens does, that Brooks was required to make the $1,500.00 monthly payments *as well as* the regular payments coming due under the note and mortgage. (Initial Brief of Respondent pp. 7-9.) That, however, is only one interpretation of the ambiguous, inconsistent provisions of the document. For instance, the term "Payments" is not defined in the document. (R. pp. ___; Exh. D to Affidavit of Davies.) First Citizens ignores that paragraph 3 of the forbearance agreement states that "Borrower shall comply with this agreement *in the following manner*" (emphasis added) and then lists five sub-items, the only one of which that is actually applicable to this case being that Brooks pay the initial $5,000.00 payment and pay the $1,500.00 monthly payments through March 1, 2011. (R. pp. _____; Affidavit of Davies Exh. D.) That list does *not* state that the monthly payments due under the note and mortgage must also be paid. (R. pp. _____; Affidavit of Davies Exh. D.)

Also, First Citizens states in its brief that "[t]he Note and Mortgage had a maturity date of May 5, 2010 [which means that it came and went during the time the forbearance agreement document called for Brooks to make monthly payments] and, therefore, [Brooks] would have been in maturity default on the instruments by failing to pay the balance due on the debt by that date." (Initial Brief of Respondent pp. 2-3.)

If the loan matured on May 5, 2010, then Brooks would have been required to pay the entire balance of the loan on or before that date; thus, there would be no need to make *any* further payments beyond that, but monthly payments beyond that date, at least arguably in lieu of the payments per the note and mortgage provisions, were exactly what the forbearance agreement called for. (R. pp. _____; Affidavit of Davies Exh. D.)

The presence of these provisions in the same document presents an ambiguity. "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then *a question of fact*." S.C. Dept. of Natural Resources v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001) (internal citations omitted, emphasis added).

That only the specific payments called for under the forbearance agreement, and not the monthly payments under the note and mortgage, were what was required is borne out by the parties' performance under the agreement. (R. pp. _____; Affidavit of Brooks.) Perhaps most telling as to the parties' shared understanding of their agreement's terms is that when First Citizens moved for summary judgment, the supporting affidavit it used did not state that Brooks was in default of the forbearance agreement for failure to make required payments. (R. pp. _____; Affidavit of Davies.)

There was a genuine issue of material fact on this point. It was, accordingly, error for the master to grant summary judgment on it.

III. Brooks' arguments are preserved for review.

No magic words are required to be said below in order that an issue be preserved for review on appeal. See e.g. Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973); State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (issue was preserved even though defendant did not use the exact words "corpus delecti" in his request for directed verdict); In re: Robert D., 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000) *overruled on other grounds by* State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012) (although party did not specifically mention any constitutional provisions to the trial court, the record reflected that he complained the testimony would violate his right of confrontation). Our Supreme Court has noted that "civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party" in the context of issue preservation. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772, 780 (2004). Not long ago, the Supreme Court remarked upon "the need to approach issue preservation rules with a practical eye and not in a rigid, hypertechnical manner." Herron v. Century BMW, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011).

Despite this, First Citizens argues that some issues raised by Brooks in this appeal are not preserved for review. (Notably, First Citizens does not argue that the issue of whether the master erred in finding Brooks failed to withdraw his answer is unpreserved. While this issue certainly is preserved, as the master noted Brooks' argument that "all ambiguities in the operative documents should be construed against [First Citizens,]" (R. pp. ___; Order p. 2), even if it were not preserved, the Court could still consider it due to First Citizens' failure to argue that it is

unpreserved. See McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997).) All of Brooks' arguments on appeal center around ambiguity in the contractual documents and the parties' understanding of or modification of their agreement as reflected in their behavior, and Brooks' arguments on both of these points were raised to the master, who necessarily ruled against those arguments on the points at issue when he made the challenged findings. (R. pp. ___; Order pp. 2-3, 5.)

Furthermore, in light of the procedural posture of the case at the time of this appeal, Brooks had little choice but to bring the appeal without first making a Rule 59(e) motion on these points. The master's order sets the case for trial on February 7, 2013, and Brooks received written notice of the entry of the order on February 4, 2013. (R. p. ___; Notice of Appeal.) There was not time to make a motion to reconsider and have it heard and ruled upon before a trial would be had with the findings the master made in his order established for that trial's purposes. The pendency of a motion to reconsider would not have stayed the trial. See Rule 62, SCRCP. Under the circumstances, which include the failure of the lower court or First Citizens (the moving party) to provide a court reporter, the master's recognition of Brooks' arguments is sufficient for their preservation for review by this Court.

IV. By binding itself to an interpretation of a finding in the master's order, First Citizens has effectively conceded a favorable interpretation of that finding to Brooks once this appeal is over.

Brooks has argued in this appeal that the master's finding that the forbearance agreement contained a term stating that "acceptance of monies hereunder shall not be deemed an estoppel, prejudice or waiver of Lender's right to proceed with the foreclosure action[,]" without any findings about its ambiguity and inconsistency, was

at best incomplete. (R. pp. _____; Order p. 5.). In response, First Citizens has stated in its brief that "the relevance and effect of the term was left open as an issue to be proven at trial. Accordingly, judgment was not rendered on the term to affect [Brooks'] rights." (Initial Brief of Respondent p. 10.)

First Citizens has made a concession here that makes the Court's work light on this issue. As First Citizens' position is that "judgment was not rendered on the term to affect [Brooks'] rights[,]" First Citizens cannot argue at trial that this finding in the master's order precludes Brooks from arguing anything or even that it precludes the master from finding anything.

CONCLUSION

First Citizens has grasped at straws in an effort to maintain findings the master made that were favorable to First Citizens but improper, particularly at the summary judgment stage. Further, Brooks' arguments are indeed preserved for review. Accordingly, reversal on the issues subject of this appeal is warranted.

Respectfully submitted,

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July 25, 2013

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PROOF OF SERVICE

I certify that I served the foregoing initial reply brief of Appellant on the Respondent by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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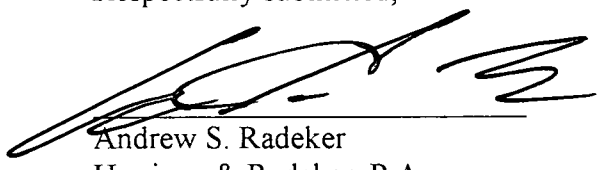
July 25, 2013

Respectfully submitted,



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