

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Richard Viviano and Johnette Gunter,

Plaintiffs,

vs.

Fulton Jeffers and Braeloch I Association, Inc.
d/b/a Braeloch Homeowner's Association,
Sandy Carroll individually and in her capacity
as a member of the Board of the Braeloch
Homeowner's Association, and Derrick
Boddy individually and in his capacity as a
member of the Board of the Braeloch
Homeowner's Association,

Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No. 2018CP0202208

ORDER

RECEIVED

Jan 31 2024

SC Court of Appeals

The following matter is before the Court on joint motion by the Defendants Fulton Jeffers and Braeloch I Association, Inc. d/b/a Braeloch Homeowner's Association, Sandy Carroll individually and in her capacity as a member of the Board of the Braeloch Homeowner's Association, and Derrick Boddy individually and in his capacity as a member of the Board of the Braeloch Homeowner's Association, by and through their undersigned counsel, to enforce settlement. A hearing the motion was held on July 17, 2023. In attendance at the hearing was John Harte, counsel for the Plaintiffs Richard Viviano and Johnette Gunter; Paul Simons, as counsel for Fulton Jeffers; Mary D. LaFave, as counsel for Derrick Boddy and Sandy Carroll; and Clarke McCants, III, as counsel for the Braeloch Homeowner's Association. For the reasons set forth below, the Court grants the Defendants' motion to enforce settlement.

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BACKGROUND

This matter, originally filed in the Aiken County Court of Common Pleas on September 21, 2018, arises out of an equestrian/pedestrian easement dispute in the Braeloch Neighborhood (hereinafter “the neighborhood”) which is governed by the Braeloch Homeowner’s Association (hereinafter “HOA”). Richard Viviano (hereinafter “Viviano”), Johnette Gunter (hereinafter “Gunter”), Fulton Jeffers (hereinafter “Jeffers”), Derrick Boddy (hereinafter “Boddy”), and Sandy Carroll (hereinafter “Carroll”) are and were, at all times relevant, owners of property in the neighborhood. Boddy and Carroll are former officers of the HOA who are being sued in their official and individual capacities. The easement in question runs along the shared boundary line between lots owned by Plaintiffs Viviano/Gunter and Defendant Jeffers. Plaintiffs allege that the easement and/or the covenants related thereto are invalid and/or waived by the actions or inactions of the HOA and its officers. Further, and by way of Amended Complaint filed on February 28, 2020, Plaintiffs filed a civil conspiracy claim alleging that the individual Defendants (Jeffers, Boddy, and Carroll) conspired to thwart attempts at resolution of the easement issues during the initial stages of the dispute.

After extensive written discovery, but before all named Defendants were deposed, the parties agreed to engage the services of Ret. Judge Thomas W. Cooper, Jr. as a mediator to try to facilitate resolution. The parties mediated this matter over the course of two (2) days on March 30, 2022, and May 25, 2022, and all parties and their respective counsel signed a Memorandum of Understanding (hereinafter “MOU”) setting forth the terms of settlement on May 25, 2022, that has been filed into the record in this matter. Following execution of the MOU, Judge Cooper filed the Mediation Results Report on June 6, 2022, and set forth two important conclusions or observations from the mediation. First, the Report stated that the parties “Fully Settled SUBJECT

TO approval by the HOA in accord with the terms of the MOU signed by the parties on May 25, 2022”. Second, Judge Cooper added “Further comments of the mediator” at the end of the Report as follows:

This case was complicated by legal and factual issues and by personality conflicts which either had developed during the litigation, or were, in part, the cause of the litigation. The lawyers had the difficult tasks of zealously advocating their clients’ causes while fashioning a resolution that was acceptable to the other side(s). (There were more than two sides to this conundrum.) This settlement is a testament to the determination and imagination of the lawyers and the recognition of their clients that emotion has to give way to reason to resolve difficult disputes.

Subsequently, the terms of the settlement espoused in the MOU were presented to the HOA for a vote and the final vote was cast in favor approving the MOU on or about July 18, 2022. The HOA approved the Memorandum of Understanding by vote and the HOA vote tally was entered during the hearing of this matter into the record as Exhibit 1. The Court notes that on June 30, 2022, Plaintiff Viviano signed on behalf of himself and Plaintiff Gunter in approval of the MOU.

Over the next few months, the parties exchanged several versions of a draft Release finalizing the parties’ agreement. It was also brought to the Court’s attention that during the time that the Release was being edited, former counsel for the Plaintiffs was indisposed due to medical issues resulting in some delay. Nevertheless, as of March 20, 2023, written communications reflect that the parties had all edited and approved the language of the Release through their respective counsel. At that time, the attorneys agreed in writing that they would all reach out to their clients and obtain their respective signatures to fulfill the terms of the MOU.

On March 31, 2023, counsel of record for the Plaintiff, Charley Krawczyk, filed a Motion to Be Relieved as Counsel and he was formally relieved by Order of the Court on April 2, 2023. Subsequently, Plaintiffs retained John W. Harte (hereinafter “Harte”) as their new counsel. On

April 18, 2023, counsel for Defendants Boddy and Carroll, Mary D. LaFave (hereinafter “LaFave”), sent a letter to Harte with the previously agreed upon Release and the MOU asking that it be executed and stating that failure to do so would result in a Motion to Enforce Settlement. The letter from LaFave set forth that the letter represented her satisfaction of SCRCP Rule 11 to consult with counsel prior to filing a motion.

On April 24, 2023, Harte formally entered an appearance on behalf of the Plaintiffs. On April 24, 2023, and May 2, 2023, Harte responded in writing to LaFave’s April 18, 2023, letter, rejecting the Release based on various theories, including but not limited to: 1) the Release is not consistent with the Memorandum of Understanding; 2) the passage of time renders the settlement a “nullity”; 3) the settlement is invalid because discovery was not complete at the time of mediation; 4) the settlement is invalid due to a lack of good faith; and 5) the merits of the Plaintiffs’ allegations did not warrant settlement with the Defendants. In response to LaFave’s request for the Release to be signed, Harte invited additional settlement discussions but made it clear that his clients would not sign the Release.

On May 2, 2023, Defendants jointly filed a Motion to Enforce Settlement filing the fully executed MOU, Release, and communications between counsel in support arguing the MOU is an enforceable agreement under SCRCP, Rule 43(k). Defendants rely on SC Human Affairs Com’n v. Chen, et al., 430 S.C. 509 (Ct. App. 2020) as instructive on the enforceability of Rule 43(k) agreements and that such agreements cannot be defeated by principles of equity. On June 26, 2023, Defendants filed an Amended Motion to Enforce Settlement which replaced the original Release exhibit with one signed by all of the Defendants. No new arguments were raised in the Amended Motion.

Plaintiffs filed an initial Reply on May 15, 2023, setting forth their arguments that the MOU is not an enforceable agreement and relying on two main grounds. First, Plaintiffs rely on Lampo v. Amedisys Holding, LLC, 437 S.C. 236 (Ct. App. 2004) for the proposition that the necessary elements of a contract are “offer, acceptance, and valuable consideration”. Plaintiffs argue that the elements are not present in the MOU. However, Plaintiffs do not provide any specific reference to missing material elements nor does the evidence support this contention. Second, Plaintiffs rely on Nutt Corp. v. Howell Rd., LLC, 396 S.C. 323 (Ct. App. 2011) for the premise that there must be a “meeting of the minds” for the Court to enforce the contract. Plaintiffs also do not provide any explanation as to any aspect of the MOU where the Release conflicts with the MOU or that Plaintiffs understanding of the settlement differed in some way from the Release. Plaintiffs also provide no support for the argument that the passage of time nullifies the MOU as there is no time limitation in the MOU.

Plaintiffs Reply acknowledges that performance of the contingency that the HOA approve the agreement in the Memorandum of Understanding would have rendered the agreement “binding” if the agreement were enforceable. Although other contingencies are referenced generally by Plaintiffs, none are provided with specificity nor does the record reflect other contingencies to be found. *See* Pls’ Reply, ¶ 12.

On July 14, 2023, Plaintiffs filed a Reply to the Amended Motion, raising the argument that counsel for the Defendants did not comply with SCRPC, Rule 11 by consulting with Plaintiffs’ counsel prior to filing the instant motion. Further, Plaintiffs argue that the MOU is not an enforceable agreement for the reasons previously stated and adding that the principles of equity bar enforcement under the doctrines, *inter alia*, of unclean hands, waiver, and laches. Plaintiff also argues that the title “Memorandum of Understanding” and the words “proposed agreement” in the

opening paragraph reflect that the MOU was not an agreement but a proposed agreement that was never finalized because the various contingencies, though not explained other than HOA approval, were not met.

STANDARD OF REVIEW

At issue in this case is the interpretation of Rule 43(k), SCRPC. “It has long been the policy of the court to encourage settlement in lieu of litigation, and courts have usually enforced settlement agreements. There can be no doubt but that the trial court retains inherent jurisdiction and power to enforce agreements entered into in settlement of litigation before that court.” Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992).

SCRPC RULE 11

Plaintiffs argue that the instant motion is not ripe for consideration and should be stricken due to failure by counsel for the Defendants to satisfy and provide affirmation of satisfaction of the South Carolina Rules of Civil Procedure, and specifically, Rule 11. The Rule provides:

All motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held. There is no duty of consultation on motions to dismiss, for summary judgment, for new trial, or judgment NOV, or on motions in Family Court for temporary relief pursuant to Family Court Rule 21, or in real estate foreclosure cases, or with pro se litigants.

Rule 11, SCRPC.

The record in this case reflects that LaFave sent a letter on April 18, 2023, providing a copy of the Release and the MOU and asking that the Release be executed to satisfy the MOU. The letter further provided that LaFave considered the request for the Release to be signed as

satisfaction of her obligations under Rule 11. Harte responded in two separate letters refusing to provide a signed Release and taking the unequivocal position that there was no settlement via the MOU. Presumably, had LaFave engaged in discussions related to negotiations as Harte requested, it would have been contradictory to the legal position of her clients that the case was already settled. Therefore, the Court finds there was no useful purpose in continuing to consult prior to the filing of the instant motion. Upon filing the Defendants Motion to Enforce, Paragraph 7 of the Motion sets forth the communication by LaFave and provides the consultation correspondence in the April 18, 2023, letter as an exhibit in “compliance with Rule 11”.

The Court finds, based on the record, that the correspondence from the movant and the affirmation in the Motion to Enforce, satisfy counsel’s obligations under Rule 11. Furthermore, based on the filings and arguments of counsel, it is clear to the Court that consultation between counsel would not have served any useful purpose, though it was conducted in good faith and for good measure. Accordingly, the instant motion is properly before the Court and ripe for decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time this settlement agreement was signed, Rule 43(k) provided in relevant part:

(k) Agreements of Counsel. No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel...

Rule 43(k), SCRCP (amended effective May 2, 2022).

"To be enforceable, settlement agreements must either be entered into the court's record or acknowledged in open court and placed upon the record." Motley v. Williams, 374 S.C. 107, 110, 647 S.E.2d 244, 246 (Ct. App. 2007). A party can comply with this version of Rule 43(k) in three

ways: (1) a written stipulation signed and entered into the court record; (2) a consent order signed and entered into the court record; or (3) a settlement agreement announced in open court and noted upon the record. Lisa J. Hinchey, Court Strictly Construes Rule 43(k) to Settlement Agreements, 48 S.C. L. Rev. 15, 19 (1996). Defendants argue that the MOU is an enforceable agreement entered into the record under the rule as an agreement reduced to writing and signed by the parties and their counsel.

Plaintiffs challenge the contents of the MOU and that its structure or verbiage render it unenforceable. First, they argue that the MOU does not contain the material elements of a contract which are offer, acceptance and valuable consideration. See Lampo v. Amedisys Holding, LLC, 437 S.C. 236 (Ct. App. 2004) However, Plaintiffs do not specify which one of these elements is missing in the MOU and, upon review, the Court finds the MOU contains all the material elements of a contract. At mediation spanning two (2) days, offers and the acceptance of said offers were exchanged as reflected in the ADR report filed by Judge Cooper, and valuable consideration of money in exchange for the relocation of the easement can be gleaned from the plain language of the MOU.

Plaintiffs also argue before the Court that the title of the MOU and the use of the word “proposed” in the first paragraph render it unenforceable. Plaintiffs also argue that the Release does not comport with the terms of the MOU but provide no specific reference to any clause in the Release that does not follow the MOU. Similarly, Plaintiffs argue a lack of a meeting of the minds but provide no explanation whatsoever as to any identifiable misunderstanding in the MOU. Upon review of the documents submitted by the parties, the Court finds the Release is consistent with the MOU and cannot identify any evidence of a lack of a meeting of the minds. The Court finds these arguments by Plaintiffs unavailing.

Next, Plaintiffs argue that the MOU contains contingencies that have not been met, therefore, the agreement is not binding. The only contingency identified in the MOU and argued by counsel is the approval of the MOU by the HOA through vote of the homeowners. As evidenced by Exhibit 1, such a vote for approval was held and completed on or about July 18, 2022, at least nine (9) months before Harte's April 28, 2023, and May 2, 2023, letters rejecting the MOU in writing for the first time.

In Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 634, 636-38, 627 S.E.2d 724, 725-26 (2006), the Supreme Court addressed Rule 43(k) in an action in which one of the parties rescinded her agreement prior to satisfaction of a contingency. Farnsworth, through a letter by her attorney, offered to release Davis from all liability in a breach of contract and negligence cause of action. Id. at 636, 627 S.E.2d at 725. Farnsworth rescinded the agreement before it was signed. Id. Davis moved to compel Farnsworth to comply with the agreement. Id. In reversing the trial court's order granting the motion, the Supreme Court stated: "an agreement is non-binding until a condition is satisfied. Until a party is bound, she is entitled to withdraw her assent." Id. at 637, 627 S.E.2d at 725 (quoting Rule 43(k), SCRCP).

Here, if Plaintiffs had withdrawn their assent on or before July 18, 2022, when the contingency of the HOA approval was met, they would not be bound by the MOU. There is no evidence in the record that Plaintiffs withdrew their assent prior to the HOA approval. The Court finds it important to note that Plaintiff Viviano voted for HOA approval of the MOU, thus, removed any credible challenge to the satisfaction of this contingency. No other contingencies are argued by Plaintiffs nor does the record reflect any in support of Plaintiffs' argument.

Finally, Plaintiffs argue that the equitable doctrines of unclean hands, waiver, and laches render the MOU unenforceable. Defendants submit the case of SC Human Affairs Com'n v. Chen,

et al., 430 S.C. 509 (Ct. App. 2020) which held that a party is precluded from “turning to contract or equitable principles (or counter public policy arguments) to vitiate” an agreement enforceable under Rule 43(k). The Court finds this holding instructive in the instant case and rejects Plaintiffs equitable challenges to the MOU.

CONCLUSION

The record reflects that the parties voluntarily selected a mediator and agreed to attend mediation over the course of two days under guidance of Former Circuit Judge Thomas W. Cooper, Jr. The MOU was contemporaneously signed by all parties and their attorneys and filed with this Court as an exhibit to the Motion to Enforce, as amended. The contingency that the HOA had to approve the MOU by vote occurred on July 18, 2022, rendering the parties bound by the MOU. The mediator filed his ADR statement providing that the case was settled and opined that the resolution was a testament to the mediation process. Therefore, the Court finds that the MOU satisfies Rule 43(k) as “a written stipulation signed and entered into the court record” and/or has been “reduced to writing and signed by the parties and their counsel” and is, accordingly, enforceable.

WHEREFORE, it is hereby ORDERED that Plaintiffs fully execute the Release agreed upon by counsel on March 20, 2023, executed by all the Defendants, and filed as an Exhibit to the Amended Motion to Enforce on June 26, 2023, within thirty (30) days of the date of this Order. Counsel for Plaintiffs is directed to deliver the executed Release to all counsel of record before the expiration of the deadline.

WHEREFORE, it is also hereby ORDERED that the parties are responsible for their own attorney’s fees and costs associated with this motion.

IT IS SO ORDERED.



Aiken Common Pleas

Case Caption: Richard Viviano , plaintiff, et al VS Fulton Jeffers , defendant, et al

Case Number: 2018CP0202208

Type: Order/Other

Circuit Judge (Code #2050)

s/ William P. Keesley

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