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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY

CIRCUIT COURT

Judge William Keesley

Appellate Case No. 2024-000147

Common Pleas Case No. 2018-CP-02-2208

Richard Viviano and Johnette Gunter, Plaintiffs,

Of whom Richard Viviano is the Appellant,

v.

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, Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This action was commenced by the filing of a Summons and Complaint on September 21, 2018. In due course, the Complaint was Answered, and the Defendants (hereinafter Respondents) Counterclaimed. On February 28, 2020, the Plaintiffs (hereinafter Appellants) amended the complaint and the Respondents (Defendants) answered and counterclaimed.

In the Complaint, the Appellants, residents of Braeloch Subdivision in Aiken County, South Carolina, alleged that a lot (Lot #51) had been added to the Subdivision. Pursuant to the Subdivision Plat and the Covenants governing the subdivision, there is to be a riding trail that should lie on the outer perimeter of the subdivision. In the Amended Complaint, Appellants alleged that, upon the addition of Lot 51, the perimeter of the subdivision had changed. The Appellants further alleged that, despite the change in the perimeter of the subdivision, the riding trail had not been moved as required by the covenants.

The Appellants sought a declaratory judgment to determine whether the riding trail should have been moved. The Appellants also sought damages for the HOA's failure to move the riding trail and for the continued use of Appellants' property which was set aside for the riding trail before Lot 51 was added.

The parties negotiated and a Memorandum of Understanding was created on May 25, 2022 (Supplement to September 6, 2023 Motion, Attachment 15). Subsequent to the drafting and signing of the Memorandum of Understanding, the Appellants discovered that, in fact, Lot 51 had not been lawfully admitted to the subdivision because the required 34 signatures had not been affixed to the petition to approve admission of Lot 51 (Defense Exhibit 1). The Respondents knew that the petition was invalid, but allegedly concealed that from the Appellants. Because of this fraud, the Appellants refused to comply with the Memorandum of Understanding. The Respondents in their

counterclaim sought to compel the Appellants to accept the terms of the Memorandum of Understanding pursuant to Rule 43(k), SCRCP.

Following a non-jury hearing before Circuit Judge William Keesley on Respondent's Motion to Enforce Settlement Agreement (Tr. p. 1-28), an Order was issued granting the Respondents' motion (August 15, 2023 Order granting Motion to Enforce). The Appellants timely filed a Motion pursuant to Rule 59(e), SCRCP. The Court accepted the Rule 59(e) Motion with exhibits without objection, and the Respondents filed a response. Subsequently Counsel submitted briefs to support their positions on the Rule 59(e) motion and the Court ruled without oral argument (January 10, 2024 Order denying Motion to Alter or Amend). This Appeal followed.

STANDARD OF REVIEW

This case involves the enforceability of a Memorandum of Understanding entered into after a mediation, construed as a settlement agreement by the lower court. "In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 621 (Ct. App. 2012). Contract actions can sound in law or in equity depending on the nature of the underlying claim. The Order appealed does not grant money damages, but rather compels the Appellants to comply with the terms of the Memorandum of Understanding; this action therefore is one which sounds in equity. *See Lollis v. Dutton*, 421 S.C. 467, 479, 807 S.E.2d 723, 729 (Ct. App. 2017) ("[A]ppellate courts have traditionally viewed the main purpose of a cause of action seeking specific performance as the pursuit of equitable relief and thus have found such a claim to be equitable in nature."). "In an action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence." *Inlet Harbour v. S.C. Dep't of Parks, Rec. & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). "However, the appellant is not relieved of its burden of convincing the appellate court the circuit judge committed error in his findings." *Pinckney v. Warren*, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001).

ARGUMENT

I

THE COURT ERRED IN ORDERING THAT THE MEMORANDUM OF UNDERSTANDING WAS ENFORCEABLE, THE ERROR BEING THAT THE COURT FAILED TO RULE ON PLAINTIFF'S ARGUMENT THAT THE MEMORANDUM OF UNDERSTANDING WAS UNENFORCEABLE DUE TO FRAUD

The Plaintiffs (now Appellants) in their Reply to the Motion to Enforce Settlement argued that the Defendants (now Respondents) fraudulently concealed and withheld vital and material information about Lot 51 and its status prior to and during Mediation. Specifically, the owners of 34 lots had to sign the Petition for admission. The Petition had signatures from owners of 33 lots (Defendant's Exhibit 1). The Respondents knew that they did not have enough signatures. Respondents concealed those facts from the Appellants.

The defect in the Petition is not in doubt and, indeed, there are communications among the Respondents acknowledging the insufficiency of signatures. The emails between Defendants were introduced without objection as part of the Appellants' Rule 59(e) Motion (Supplement to September 6, 2023 Motion, Attachment 5).

During the negotiations and prior to the drafting of the MOU, the Appellants believed that the admission of Lot 51 had been properly handled. The validity of the Petition admitting Lot 51 and the admission of Lot 51 were critical facts to the controversy and the validity of the admission of Lot 51 was a material representation. The Respondents made that representation, and the Appellants had no reason to doubt the truth of the representation. Clearly the Respondents intended for the Appellants to rely on the representation. The record reflects that the Appellants did rely on the representation. But for the belief that the petition to admit Lot 51 was valid, the Appellants

would never have signed the Memorandum Of Understanding- nor would they have even considered the terms set forth in the MOU.

The best evidence that the Respondents knew there was an insufficient number of signatures to admit Lot 51 can be found in the email from Derrick Boddy to Fulton Jeffers dated February 11, 2019 (Derrick Boddy was the HOA President at that time; Fulton Jeffers is one of the Defendants) (Supplement to September 6, 2023, Motion, Attachment 5). This email is part of the record, having been submitted without objection as an exhibit to the Rule 59E Motion. The February 11, 2019, email contains the following language:

> "There are 35 signatures on the petition representing 33 lots – the threshold for validating the covenant change is 2/3 of the lot owners. There were 50 eligible to vote/sign – 2/3rds is 33.33, close but no cigar!!"
>
> The covenants clearly state that it's one vote per lot in anything that requires a vote by the homeowners."

The Defendants knew at least as early as February 11, 2019, that the petition to include Lot 51 was invalid. Yet, they continued to conceal that from the Appellants, and they used that false narrative to trick the Appellants into signing the Memorandum Of Understanding. The Trial Court erred in failing to recognize or acknowledge that fact.

The record establishes by clear and convincing evidence that: 1) there was a representation that Lot 51 had been lawfully admitted to the subdivision; 2) the representation was false; 3) the representation was critical to the issue under negotiation; 4) The Respondents knew that Lot 51 had not been lawfully admitted and they confirmed that to each other. In addition, they displayed a reckless disregard for the truth throughout their dealings with the Appellants; 5) The Respondents intended for the Appellants to act on the representation. 6) the Appellants had no reason to question the representation at the time of the petition and the Appellants were ignorant of its falsity; 7) the Appellants' conduct and their execution of the Memorandum Of Understanding prove that they

relied on its truth; 8) the Respondents had a duty as members of the HOA to be honest in their dealings with the Appellants and the Appellants had a right to rely on the Respondents and on the representations which they were making; and 9) the Appellants have been injured by the fraud and fraudulent concealment because the title to their property and to the area burdened by the easement are cloudy, as is their right to use property which continues to be burdened by the riding trail easement. To the extent that the riding trail easement's existence is determined by whether Lot 51 is a part of the Subdivision, there is a cloud on the Appellants' title.

Thus, all of the elements of fraud and fraudulent concealment have been established:

> In order to prove fraud, the following elements must be shown: 1) a representation; 2) its falsity; 3) its materiality; 4) knowledge of its falsity or a reckless disregard of its truth or falsity; 5) intent that the representation be acted upon; 6) the hearer's ignorance of its falsity; 7) the hearer's reliance on its truth; 8) the hearer's right to rely thereon; and 9) the hearer's consequent and proximate injury.

Florentine Corp. v. Peda I, Inc., 287 S.C. 382, 385-86, 339 S.E.2d 112, 113-14 (1989).

The Trial Judge did not mention the insufficiency of signatures on the Petition, nor did he mention or acknowledge the fact that the Respondents fraudulently concealed that material fact in order to obtain the Appellants' consent to the MOU (Tr. p. 1-27).

Because the Trial Judge did not rule on a critical issue in the case, at the very least the Order should be reversed and vacated, and the case should be returned to the lower court for a new trial. However, while not abandoning the right to have this Court return the case to the lower court, the Appellants believe that the facts warrant a complete reversal of the Order and a dismissal of the Motion to Enforce the Memorandum of Understanding.

The reason that this Court should include a dismissal of the Motion to Enforce the Memorandum of Understanding is that, if Lot 51 is not a part of Braeloch, which it is not, there is

nothing to be done and the boundary lines and trails will remain as they were prior to the attempt to bring Lot 51 into the subdivision.

The Record on Appeal includes the document by which the Defendants attempted to add Lot 51 to the Braeloch Subdivision. (Defense Hearing Exhibit 1). There were 50 lots in Braeloch. The covenants required 34 lots (33.33 rounded to 34) to sign before lot 51 could be included in Braeloch. Only 33 lots are represented in Exhibit 1.

II

THE COURT ERRED IN ORDERING THAT THE MEMORANDUM OF UNDERSTANDING WAS ENFORCEABLE, THE ERROR BEING THAT BECAUSE LOT 51 WAS NOT LAWFULLY ADDED TO THE SUBDIVISION, THE ENFOREABILITY OF THE MEMORANDUM OF UNDERSTANDING IS MOOT.

The Lower Court ignored the fraudulent concealment entirely; that error is dealt with in Argument I above. However, the Lower Court granted the Respondents Motion to Enforce the Memorandum of Understanding. That is a separate error even though it occurs because the Lower Court ignored the deficiency in the Petition by which Lot 51 was admitted.

Even if the Appellants failed to prove fraudulent concealment, the invalidity of the Petition to Admit Lot 51 must be addressed. As noted above, the subdivision covenants require 33.33 (rounded to 34 per the covenant) lots to vote in favor of admitting a lot. There were not 34 signatures on the Petition in favor of admitting Lot 51, and therefore any agreement allegedly reached by the parties on the issue are moot.

Appellate courts will "not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Fabian's Uptown Charleston v. South Carolina Tax Com.*, 247 S.C. 164, 166, 146 S.E.2d 608, 608 (1966). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy." *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 345, 195 S.E.2d 713, 715 (1973).

Lot 51 was not lawfully admitted to Braeloch. Even if there was no fraud, that statement is still true. Since Lot 51 is not a part of Braeloch, the Memorandum of Understanding is meaningless, unenforceable, and moot. The Respondents cannot correct the deficiency in the Lot 51 Petition through the use of a Memorandum of Understanding, nor is that deficiency addressed in the Memorandum. There must be a valid petition with sufficient signatures before Lot 51 can be admitted to the Subdivision pursuant to the Covenants in place in Braeloch.

It is not necessary for this case to return to the Lower Court for further proceedings as to the Memorandum of Understanding because Lot 51 is not a part of Braeloch. That fact cannot be changed by any action other than a vote by the owners of 34 lots in Braeloch. This Court should hold that, because Lot 51 is not lawfully a part of Braeloch, the Memorandum of Understanding is invalid, meaningless and moot, and therefore any ruling on the enforceability of the Memorandum would be unenforceable.

III
THE LOWER COURT ERRED, THE ERROR BEING THAT THE MEMORANDUM OF UNDERSTANDING IS NOT ENFORCEABLE BECAUSE IT IS NOT A VALID CONTRACT

To be enforceable, a Memorandum of Understanding must contain all of the necessary elements of a contract. That legal principle was explained by the South Carolina Supreme Court in *Stevens & Wilkinson of S.C., Inc. v. City of Columbia,* 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014):

> Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law. *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C. 352, 362, 101 S.E. 838, 841 (1920). A valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement. *Patricia Grand Hotel, LLC v. MacGuire Enters*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007). Thus, for a contract to be binding, material terms cannot be left for future agreement. *Aperm of S.C. v. Roof*, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986).

For a contract to exist, both parties must be bound. See for example the case of *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc.* 357 S.C. 363, 593 S.E.2d 170 (Ct. App. 2004):

> A typical contract contains mutual promises and is created by an acceptance constituting a return promise by the offeree. *See* RESTATEMENT (SECOND) OF CONTRACTS § 50 cmt. c (1981); *Sauner v. Pub. Serv. Auth.*, 354 S.C. 397, 405, 581 S.E.2d 161, 166 (2003) ("A bilateral contract . . . exists when both parties exchange mutual promises."). Moreover, a contract only arises when there is an actual agreement by the parties in which the parties demonstrate a mutual intent to be bound. *Timmons v. McCutcheon*, 284 S.C. 4, 9-10, 324 S.E.2d 319, 322 (Ct. App. 1984).

The Memorandum of Understanding in the instant case (Supplement to September 6, 2023 Motion, Attachment 15)does not contain all essential and material elements of a contract because the Respondents are not bound by the Memorandum. The Memorandum of Understanding is a not the final document. Even a final document would not constitute a contract until it is approved by the HOA. The final document does not exist and, because it has not been created, there is nothing

for the HOA to approve. The Respondents are not bound and therefore there is no mutuality of obligation.

The Memorandum of Understanding was not a finished product. Other action was required to form a contract. First, under the terms of the document upon which the Defendants rely, the parties had to reach an agreement on the terms of what was intended to be the actual and complete contract / agreement. As the actual series of events shows, the parties were never able to agree on that final document. Further, the Plaintiffs are not bound unless the HOA approves the final agreement. It is important to note that if the Memorandum of Understanding had been a complete contract, that document would have been for submission to the HOA. The Memorandum of Understanding was not the document which was to be approved by the HOA. A subsequent document containing the final and complete terms was to be submitted.

To further support the fact that the Memorandum of Understanding is not a contract, reference should be made to paragraph 8 of the document which provides that the "Understanding" is contingent and requires that the final contract (which was never signed) must be approved by the mechanism required by the subdivision bylaws and covenants (Supplement to September 6, 2023 Motion, Attachment 15).

There is no time limit for the creation of the final agreement, and, in fact, that drafts of the final agreement have never been agreed to. Paragraph 7 of the Memorandum of Understanding indicates that there will be a mutual anti disparagement agreement, but the terms of that agreement are not set out in the Memorandum of Understanding thus rendering the Memorandum of Understanding incomplete and unenforceable. The terms of the Memorandum of Understanding at paragraph 4 provide for an undefined and nonspecific right on the part of the Defendants to designate "whatever portion of the equestrian/pedestrian easement now moved and located on lot

51 that is now moved and located on Lot 51 that is deemed by the HOA necessary for its proper use as an equestrian easement." (*Id*)

Paragraph 7 of the Memorandum of Understanding lacks any specificity and, until an actual contract document with specificity is drafted and accepted by the Plaintiffs, there is no contract. The Memorandum was nothing more than an acknowledgement that, if all contingencies were met and if the parties reached agreement on the terms of the actual contract, the parties might enter into a contract. The Memorandum of Understanding is simply not enforceable under South Carolina Law.

CONCLUSION

The Lower Court's Order granting the Respondents' request to enforce the Memorandum of Understanding should be reversed. The reversal should include an order finding and holding that the Motion to Enforce is not meritorious and is dismissed. The fatal defect in the Petition to admit Lot 51 should have been addressed by the Lower Court. Failure to address that issue requires at the least a remand for further proceedings; however, in the view of the Appellants, that is unnecessary, and this Court should hold that the Motion to Enforce is dismissed.

Even if the failure to address the issue regarding the flaws in the petition to admit Lot 51 is not reversable error, then the Motion to Enforce the Memorandum of Understanding should still be dismissed because the Memorandum does not bind both parties and is, at best, a mere nonbinding understanding to attempt to create a contract. That understanding is not enforceable.

RESPECTFULLY SUBMITTED

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