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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Robert J. Bonds, Circuit Court Judge

Case No. 2023-CP-10-01790
Appellate Case No.: 2024-000293

Jerome B. Crites Jr., Trustee of the
BAC Trust U/A Dated April 9, 2021,

Respondent,

v.

Lawrence E. Miller,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS BECAUSE THE PLEADINGS AND THE EXHIBITS INTEGRAL TO THE COMPLAINT PRESENTED NO ISSUE OF FACT OR MATERIAL ISSUE OF FACT AND THE PLEADINGS DISCLOSED THAT RESPONDENT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.
 - A. **There Is No Genuine Issue of Material Fact or Law as to Whether the Parties Entered into a Valid and Binding Settlement Agreement.**
 - B. **Miller Failed to Present Any Material Issue of Fact or Identify Any Error Properly Preserved for Appeal.**
- II. THE TRIAL COURT DID NOT CONVERT RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS INTO A MOTION FOR SUMMARY JUDGMENT.

STATEMENT OF THE CASE

Respondent Jerome B. Crites Jr., Trustee of the BAC Trust U/A Dated April 9, 2021 ("Respondent" or "Crites") commenced the underlying action on April 12, 2023, by filing his Complaint against Appellant Lawrence E. Miller ("Appellant" or "Miller"). (*See generally* R. pp. 7-22; Complaint ("Compl.")). Crites' Complaint alleged causes of action for: (i) breach of contract/specific performance (settlement agreement); (ii) violation of S.C. Code Ann. §§ 27-50-10, *et seq.*; and (iii) fraudulent misrepresentation. (*see generally* R. pp. 7-22). Crites' causes of action arise out of the Appellant's knowing disclosure of false and misleading information in connection with his sale of the real property located at 1642 Clyde Street,

Charleston, South Carolina bearing Tax Map No. 352-14-00-166 (the “Property”) to Crites and the breach of a subsequent settlement agreement to resolve those claims. (*see generally* R. pp. 7-22).

Specifically, Crites alleged that Miller made material misrepresentations on the South Carolina Residential Property Condition Disclosure Statement with respect to the chimney, fireplace, and the surrounding foundation of the Property (the “Chimney”) by checking “[N]o” in Section II asserting that he had no actual knowledge of any problems defects, malfunctions, conditions, etc. with respect to the Chimney. (R. pp. 8-11; Compl. ¶¶ 7-9 & 12-20). However, after buying the Property, Crites later became aware that Miller did in fact have actual knowledge of certain defects or problems with respect to the Chimney when signing the Disclosure Statement. (R. pp. 8-11; Compl. ¶¶ 7-9 & 12-20). After Crites made Miller aware of his material misrepresentations, Miller sent Crites a settlement offer dated October 24, 2021, wherein he offered \$8,000.00 in exchange for final resolution of the dispute (the “Settlement Offer”). (R. pp. 11, 23-25; Compl. ¶¶ 23-25 & Ex. 4 Settlement Offer). Crites accepted the Settlement Offer on November 12, 2021, and prior to any withdrawal of the offer by Mr. Miller (the “Acceptance Letter”). (R. pp. 12, 26-28; Compl. ¶¶ 26-27 & Ex. 5, Acceptance Letter). Despite the ratification of the settlement agreement, Miller refused to pay the settlement

amount of \$8,000.00 in exchange for the settlement and resolution of the matter. (R. p. 12; Compl. ¶¶ 26-29).

On May 19, 2023, Miller filed his Answer to the Complaint (“Answer”), wherein Miller admitted to sending the Settlement Offer and receiving Crites’ Acceptance Letter (R. p. 31; Answer ¶¶ 15, 17; *see also* R. pp. 55-57; Memo in Support, Ex. 1, Nov. 13, 2021, Email from Mr. Miller¹). Furthermore, Miller does not contend that the Settlement Offer was withdrawn prior to receiving the Acceptance Letter or that there was a lack of valuable consideration for the settlement agreement.

On June 2, 2023, Crites filed a Notice of Motion and Motion for Judgment on the Pleadings (the “Motion”). In the Motion, Crites contended that the allegations contained in the Complaint (including its exhibits and incorporations therein) together with Miller’s admissions in his Answer establish that there was no genuine issue of material fact or law that Crites was entitled to judgment as a matter of law that a settlement agreement was formed and Miller breached that agreement by failing and refusing to perform on the same. On January 25, 2024, Crites filed Memorandum in Support of his Motion for Judgment on the Pleadings (“Memo in Support”). (*See generally* R. pp. 42-54). On the same day,

¹ Miller’s November 13, 2021, email was directly incorporated by reference in Paragraph 27 of Crites’ Complaint and in Miller’s Answer to the Complaint. (R. pp. 12, 31; Compl. ¶ 27; Answer ¶ 17).

Miller filed his responsive Memorandum in Opposition to Plaintiff's Motion for Judgment on the Pleadings (the "Memo in Opposition"), wherein Miller contended that the settlement agreement was not binding. (*See generally* R. pp. 58-66). Miller asserted there was not a meeting of the minds and that Miller did not have knowledge of the Chimney defects. (*See generally* R. pp. 58-66).

On February 1, 2024, the Trial Court held a hearing on Crites' Motion (the "Hearing"). At the Hearing, Miller argued that Crites' Motion should be denied because: (1) Miller purports that he withdrew the settlement offer after it was accepted by Crites; and (2) Miller believed there was no settlement agreement because the exchange of offer and acceptance did not comply with South Carolina Rule of Civil Procedure 43(k). (R. pp. 86-87; Transcript pp. 9:18-10:14). Upon a review of only the pleadings in this matter, together with documents integral to the Complaint, the Trial Court held and ordered that there was no question of fact or law that: (1) Miller extended an offer to Crites to resolve all disputes between the parties for \$8,000.00 in the October 24, 2021 Settlement Offer letter; (2) Crites accepted Miller's offer by way of the November 12, 2021 Acceptance Letter; (3) only after Crites' acceptance of his Settlement Offer did Miller indicate that he was "now seriously considering withdrawal" of his Settlement Offer, (4) Miller's statement in post-acceptance correspondence that he was "considering withdrawal" of the Settlement Offer only after it had already been accepted

confirmed his knowledge that his offer was outstanding and not withdrawn prior to Crites' acceptance; and (5) a binding agreement was formed and Crites failed to comply with the terms of the enforceable settlement agreement. (R. pp. 94-95; Transcript pp.17:11-18:16; *see also* R. pp. 1-3; Feb. 2, 2024, Order granting Crites' Motion). The Trial Court held Rule 43(k) to be inapplicable because there was no litigation pending at the time the settlement agreement was formed. (R. pp. 87-88; Transcript pp. 10:7-11:19). Accordingly, the Trial Court granted Crites' Motion. (R. p. 94; Transcript pp. 17:11-13; *see also* R. pp. 1-3; Feb. 2, 2024, Order granting Crites' Motion).

Miller filed a Notice of Motion and Motion to Reconsider, Alter, or Amend the Order Granting Plaintiff's Motion for Judgment on the Pleadings dated February 12, 2024 (the "Motion to Reconsider") wherein Miller alleged the Trial Court failed to construe all inferences in a light most favorable to Miller and that the Trial Court erred to the extent that Crites' Motion was a motion for summary judgment rather than a motion for judgment on the pleadings. (*See generally* R. pp.70-77). On February 20, 2024, the Trial Court issued its Order denying Miller's Motion to Reconsider. (R. pp. 4-6).

Miller filed a Designation of Matter and Initial Brief of Appellant with this Court on April 5, 2024, whereby appealing the decision of the Trial Court to grant Crites' Motion (the "Appellant's Brief").

FACTS

On March 12, 2021, Miller and Crites entered into that certain Agreement to Buy and Sell Real Estate (“Purchase Contract”), wherein Crites agreed to purchase the Property for the purchase price of \$335,000.00. (R. p. 8; Compl. ¶ 6). On February 24, 2021, prior to entering into the Purchase Contract, Miller, as seller of the Property, filled out, signed, and delivered to Crites the State of South Carolina Residential Property Condition Disclosure Statement with respect to the condition of the Property (the “Disclosure Statement”), which was attached as Exhibit 1 to the Complaint. (R. p. 8; Compl. ¶¶ 6-7, Ex. 1, Disclosure Statement; *see also* R. p. 29; Answer ¶ 4). On the Disclosure Statement, Miller checked the “No” column in Section II relating to the Chimney, indicating that he had no knowledge of any problems, defects, malfunctions, damages, conditions, or characteristics in connection with the Chimney on the Property. (R. pp. 8-11; Compl., Ex. 1, Disclosure Statement, p.2; R. p. 30, lines 1-3; Answer ¶ 5).

Notwithstanding this, at the time Miller completed the Disclosure Statement, Miller did have actual knowledge of existing problems and/or defects regarding the Property’s Chimney and surrounding area as identified by an estimate from Ashbusters Chimney Services, Inc. (“Ashbusters”). (R. p. 10; Compl. ¶ 15, Ex. 3, Emails & Ashbusters Quote). Ashbusters conducted an inspection of the Property’s Chimney on or around January 25, 2021, and issued an invoice for

the estimated cost of repair (the “Invoice”). (R. p. 9; Compl. ¶¶ 12-13, Ex 2, Ashbusters Invoice). Contained in the Invoice was notations that there were missing mortar joints and broken flue tiles. (*Id.*). Ashbusters recommended discontinuing use of the Chimney until repairs were completed. (*Id.*; Compl. Ex. 3, Emails & Ashbusters Quote p. 2). Miller’s actual knowledge of the Invoice and Chimney problems prior to signing the Disclosure Statement and selling the Property is evidenced by an email he sent to his son Andrew Miller on January 26, 2021, stating, “Looks like pretty extensive repair work needed.” (*Id.*). This email was sent with respect to the Ashbusters Invoice. (*Id.*). Crites relied on the representations made by Miller in the Disclosure Statement and ultimately purchased the Property from Miller on May 7, 2021. (R. p. 10; Compl. ¶ 11).

In or around August of 2021, Crites first discovered that Miller had the Chimney inspected by Ashbusters prior to entering into the Purchase Contract, signing the Disclosure Statement, and selling the Property to Crites. (R. p. 10; Compl. ¶ 12). Upon learning of the Invoice, email to Andrew Miller, and related documentation, Crites, through undersigned counsel, provided written notice to Miller of the misrepresentations including by a letter dated September 13, 2021. (R. p. 10; Compl. ¶ 13).

After some back and forth, Miller sent Crites a written settlement offer by letter dated October 24, 2021 (the “Settlement Offer”). (R. pp. 11, 23-25; Compl. ¶

24, Ex. 4, Settlement Offer; *see also* R. p. 31; Answer ¶ 15). Crites received the Settlement Offer on or around October 27, 2021. (R. p. 11; Compl. ¶ 24). In the Settlement Offer, Miller offered to pay Crites Eight Thousand and 00/100 Dollars (\$8,000.00) in one last effort to fairly resolve this situation short of expensive litigation. (R. pp. 11, 24-25; Compl. ¶ 24, Ex. 4, Settlement Offer, p.2). In a letter dated November 12, 2021, and before Miller’s Settlement Offer had expired or been withdrawn, Crites accepted the terms of the Settlement Offer and the parties had agreed on settlement terms regarding Crites’ claims. (R. pp. 12, 27; Compl. ¶ 26, Ex. 5, Acceptance Letter). The Acceptance Letter states, in pertinent part, that “Mr. Crites has elected to accept your offer to resolve and release all claims between the parties regarding this chimney dispute matter completely and entirely for a settlement payment in the amount of \$8,000.00.” (*Id.*).

Crites’ counsel informed Miller of Crites’ acceptance of the Settlement Offer resulting in a final Settlement Agreement via email on November 12, 2021. (R. pp. 55-57; Memo in Support, Ex. 1, Nov. 12-13, 2021, emails between Crites’ counsel and Miller²). In reply to Crites’ unequivocal acceptance of the Settlement Offer on November 13, 2021, Miller stated that “[t]he tone and content of your letter is

² Miller’s November 13, 2021 email was directly incorporated by reference in Paragraph 27 of Crites’ Complaint and in Miller’s Answer to the Complaint. (R. pp. 12, 31; Compl. ¶ 27; Answer ¶ 17).

unprofessional and unacceptable. I am now seriously considering withdrawal of my offer and meeting you in court.” (R. p. 56).

Despite Miller’s Settlement Offer being fully accepted by Crites, Miller refused to perform his obligations under the Settlement Agreement, namely tendering the \$8,000.00 settlement payment amount to Crites in exchange for Crites’ release of claims. Crites suffered actual damage by way of paying a contractor for work related to the Chimney and surrounding area, attorney’s fees and costs in bringing the action, and other loss. As referenced above, the Court granted Crites’ Motion, holding that a final, binding, and enforceable settlement agreement was reached by parties, and that Crites was entitled to final judgement for the same. (R. pp. 1-3, 4-6; Order granting Crites’ Motion & Order denying Miller’s Motion for Reconsideration).

STANDARD OF REVIEW

When considering a motion for judgment on the pleadings, the court must regard all properly pleaded factual allegations as admitted and may not consider matters outside the pleadings. *Falk v. Sadler*, 341 S.C. 281, 286 (Ct. App. 2000). However, “in resolving a motion for judgment on the pleadings, the court may consider the pleadings and exhibits attached thereto, relevant facts obtained from the public record, and exhibits to the motion that are ‘integral to the complaint and authentic.’” *United States v. Mashni*, 547 F.Supp.3d 496, 503 (D.S.C. 2021)

(interpreting FED. R. CIV. P. 12(c), which is nearly identical to the first sentence of S.C. R. CIV. P. 12(c)); see also *Carolina First Corp. v. Whittle*, 343 S.C. 176, 190n.7 (Ct. App. 2000) (citing *Stoner v. Walsh*, 772 F. Supp. 790, 797-798 (S.D.N.Y. 1991) (“Generally, a court may consider documents outside of the complaint if the complaint incorporates the documents by reference.”) “A motion for judgment on the pleadings is proper where pleadings entitle a party to judgment without proof, by disclosure of all facts, where the pleadings present no issue of fact or present merely an immaterial issue.” *Rosenthal v. Unarco Industries, Inc.*, 278 S.C. 420, 422 (1982). A motion for judgment on the pleadings will be granted “when, under the admitted facts, the moving party would be entitled to judgment on the merits, without regard to what the findings might be on the facts on which issue is joined.” *Brown v. United Ins. Co. of America*, 268 S.C. 254, 257 (1977) (quoting *Wooten v. Standard Life & Casualty Ins. Co.*, 239 S.C. 243, 248 (1961)).

Whether reviewing a grant of summary judgment or a judgment on the pleadings, [appellate courts] apply the same legal standards as the trial court.” See *Ballard v. Admiral Insurance Company*, 442 S.C. 22, 34 (Ct. App. 2023) (quoting *Ziegler v. Dorchester Cnty.*, 426 S.C. 615, 619 (2019)). Additionally, the appellate court must “review questions of law *de novo*.” (*Id.*).

ARGUMENT

- I. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS BECAUSE THE PLEADINGS AND THE EXHIBITS INTEGRAL TO THE COMPLAINT PRESENTED NO ISSUE OF FACT OR MATERIAL ISSUE OF FACT AND THE PLEADINGS DISCLOSED THAT RESPONDENT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The Trial Court did not err in granting Crites' Motion for Judgment on the Pleadings because the pleadings (including the exhibits and materials incorporated therein), demonstrated that there was no genuine issue of material fact that Crites and Miller entered into a valid and binding agreement causing the Trial Court to enter judgment as a matter of law. Miller failed to point to any facts or portion of the pleadings that might in any way present an issue of material fact opposite to the clear showing that the parties entered into a settlement agreement.

The applicable test for judgment on the pleadings is "whether or not, when viewed in the light most favorable to the party against whom the motion is made, genuine issues of material fact remain or whether the case can be decided as a matter of law." *RLI Insurance Company v. Innovative Employer Solutions, LLC*, No. 6:20-CV-1289-JD, 2021 WL 7501826, at *1 (D.S.C. April 20, 2021). Judgment on Pleadings is appropriate where the pleadings entitled a party to judgment without proof, by disclosure of all facts, where the pleadings present no issue of fact or present merely an immaterial issue. *Rosenthal*, 278 S.C. at 422 (citing *Wooten*, 293

S.C. 243.) Here, the pleadings present no material issue of fact that the Settlement Agreement was entered into and Crites is entitled to Judgment on the Pleadings.

A. There Is No Genuine Issue of Material Fact or Law as to Whether the Parties Entered into a Valid and Binding Settlement Agreement.

Based upon a review of the pleadings in this matter (including exhibits incorporated therein by reference), there is no genuine issue of material fact that Crites and Miller entered into a valid and binding agreement prior to Appellant's attempted revocation of the Settlement Agreement. Crites is and was entitled to judgement on the pleadings and as a matter of law.

A settlement agreement is considered to be a contract. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238, 95 S. Ct. 926 (1975). Under South Carolina contract law, "[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 (Ct. App. 1997). Therefore, "[i]n deciding whether a settlement agreement has been reached, the Court looks to objectively manifested intentions of the parties." *Sadighi v. Daghighfekr*, 66 F.Supp.2d 752, 759 (D.S.C. 1999) (citing *Moore v. Beaufort County, North Carolina*, 936 F.2d 159, 162 (4th Cir. 1991)). To establish that the exchange of letters constituted a contract, plaintiffs must prove that there was an offer, an acceptance, and valuable consideration. (*Id.*) (citing *Roberts*, 486 S.E.2d at 773; *Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993)). Lastly, a plaintiff

must prove there was a meeting of the minds, a mutual assent to be bound to the essential and material terms of the contract. *See Vessell v. DPS Assocs. of Charleston, Inc.*, 148 F.3d 407, 410 (4th Cir.1998) (applying South Carolina law); *Player v. Chandler*, 299 S.C. 101, 105 (1989).

Here, the pleadings and integral exhibits reveal that all elements of contract formation are met. First, Miller extended a valid offer to Crites when he sent the Settlement Offer to Plaintiff's counsel in a letter dated October 24, 2021. (R. pp. 11, 24-25, 31; Compl. ¶¶ 24-25, Ex. 4, Settlement Offer; Answer ¶¶ 15, 17 (wherein Miller admitted he sent the October 24, 2021 letter)). "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Carolina Amusement Co.*, 313 S.C. at 220 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981)). Here, Miller's Settlement Offer stated in pertinent part that: "in one last effort to fairly resolve this situation short of expensive litigation, I'm offering \$8,000 to cover the Ashbusters estimate and half of the lawyer fee." (R. pp. 23-25; Compl., Ex. 4, Settlement Offer; *see also* R. p. 31; Answer ¶¶ 15, 17 (wherein Miller admitted sending the Settlement Offer letter dated October 24, 2021 and receiving Crites' Acceptance Letter)). Indeed, Miller made an offer inviting Crites' acceptance of the terms set forth in the Settlement Offer. (*See* R. p. 94, lines 15-17; Transcript p. 17:15-17).

Second, Crites accepted Miller's Settlement Offer. On November 12, 2021, Crites' counsel sent Miller the Acceptance Letter via email prior to the Settlement Agreement being withdrawn or expired. (R. pp. 12, 27-; Compl. ¶ 26 & Ex. 5, Acceptance Letter). The Acceptance Letter stated in pertinent part, that "Mr. Crites has elected to accept your offer to resolve and release all claims between the parties regarding this chimney dispute matter completely and entirely for a settlement payment in the amount of \$8,000." (*Id.*). Miller acknowledged receipt of Crites' Acceptance Letter prior to withdrawing the Offer. (*See* R. pp. 12, 56-57³; Compl. ¶ 26; Memo in Support, Ex. 1, November 13, 2021, Email from Miller; *see also* R. p. 31; Answer ¶¶ 15, 17). Indeed, in his Answer, Miller agreed that he only sent a purported withdrawal of his Settlement Offer *after* it was already accepted. (*See* R. p. 31; Answer ¶ 17 ("[Crites'] *pro se* communications to [Miller's] counsel, made within 24-hours *after* [Crites'] purported acceptance letter, made unequivocally clear that [Miller] did not agree to [Crites'] proposed settlement terms.")). The Trial Court properly held that based on the allegations in the Complaint and Crites'

³ Miller's November 13, 2021 email was directly incorporated by reference in Paragraph 27 of Crites' Complaint and in Miller's Answer to the Complaint. (R. pp. 12, 31; Compl. ¶27; Answer ¶15). Further, even without consideration of Miller's November 13, 2021 email and considering only Miller's Answer, Miller admitted he sent a Settlement Offer and received the Acceptance Letter before the Settlement Offer was revoked. (R. pp. 12 & 31; Compl. ¶27; Answer ¶¶ 15, 17).

Answer, Crites' November 12, 2021, Acceptance Letter was an acceptance of the Offer. (R. p. 94, lines 15-24; Transcript p. 17:15-24).

Third, there was valuable consideration for the Settlement Agreement. Miller agreed to pay \$8,000.00 to Crites in exchange for Crites providing full and final resolution of the matter and resolving all claims related to Miller's misrepresentations regarding the Property and the Chimney. (R. pp. 11, 24-25, 27, 31; Compl. ¶¶ 24-26 & Ex. 4, Settlement Offer; Ex. 5, Acceptance Letter; Answer ¶¶ 15, 17).

Finally, there was a meeting of the minds. "A meeting of minds is based upon the intent and purposes as shown by all the circumstances." *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 303 (1996). Here, the written correspondence between the parties demonstrates by objective manifestation their mutual agreement to the terms offered in the Settlement Offer. Miller admitted to sending the Settlement Offer, which was accepted by Crites. (R. pp. 11, 23-25, 27, 31; Compl. ¶¶ 24-25 & Ex. 4, Settlement Offer, Ex. 5, Acceptance Letter; Answer ¶¶ 15, 17 (wherein Miller admitted he sent the October 24, 2021 letter)). Accordingly, the Settlement Agreement is enforceable under South Carolina law.

Only after Crites had accepted the Settlement Offer, forming a final, enforceable, and binding contract, did Miller attempt to revoke his acceptance of the Settlement Offer and refuse to comply with the obligations of the Settlement

Agreement. (See R. p. 94, lines 17-24; Transcript p. 17:17-24). To date, Defendant has refused to perform his obligation under the Settlement Agreement: to pay the \$8,000.00. (R. pp. 12, 31; Compl. ¶ 28; Answer ¶ 17). However, an offer may not be withdrawn after acceptance.

“An offer may be withdrawn at any time before its acceptance, by notice given to that effect to the other party.” *Masonic Temple v. Ebert*, 199 S.C. 5, 12 (1942). Miller did not inform Crites of his purported revocation of the Settlement Agreement until after his receipt and acknowledgement of the Acceptance Letter. (R. p. 58; Memo in Support, Ex. 14, November 13, 2021 Email from Miller). As Miller was properly notified of Crites’ acceptance prior to Miller’s purported revocation, the Settlement Agreement is a binding and enforceable agreement between the parties. Further, as the Trial Court noted at the hearing Mr. Miller had not even attempted to reject the offer for days after its acceptance by Crites. (R. pp. 94-95; Transcript pp.17:18-18:16).

As the Trial Court found, it is clear there is no genuine issue of material fact as admitted in the pleadings and shown in the clear documents incorporated therein, that the Settlement Agreement is enforceable and Defendant is in breach

⁴ Miller’s November 13, 2021 email was directly incorporated by reference in Paragraph 27 of Crites’ Complaint and in Miller’s Answer to the Complaint. (R. pp. 12, 31; Compl. ¶ 27; Answer ¶ 17).

of his obligations therein. (*Id.*; *see also* R. pp. 1-3, 4-6; Order granting Crites' Motion; *see also* Order denying Miller's Motion for Reconsideration).

B. Miller Failed to Present Any Material Issue of Fact or Identify Any Error Properly Preserved for Appeal.

The arguments in Appellant's Brief fail to identify or present any material factual issue or error that would support overturning the Trial Court's decision. Additionally, Miller attempts to introduce arguments not properly preserved for appeal to this Court, which should be disregarded entirely.

As an initial point, Miller goes to great lengths to identify all the affirmative defenses that were listed in his Answer to the Complaint, without identifying specific factual or legal issues these defenses could possibly raise that would supplant his own Answer or which might otherwise affect the Trial Court's ruling. (Appellant's Brief pp.8-10). Because of this, Respondent will address only Miller's arguments that are actually identified and put forth.

First, Miller argues that the Trial Court failed to properly accept the allegations in Miller's Answer as true and construe all references in the light most favorable to him. (Appellant's Brief pp. 8-9). However, the Court did accept Miller's Answer as true and in the light most favorable to him. Miller admitted in his Answer that he sent the Settlement Offer letter. (R. pp. 11, 24-25, 31; Compl. ¶¶ 24-25, Ex. 4, Settlement Offer; Answer ¶¶ 15, 17). Miller also admitted that he received the Acceptance Letter prior to attempting to revoke his Settlement Offer.

(R. pp. 11-12, 27, 31; Compl. ¶¶ 25-26, Ex. 5, Acceptance Letter; Answer ¶ 17). The Trial Court based its findings on the Settlement Offer and the Acceptance Letter and Miller's own Answer, which clearly show an offer of \$8,000 to resolve the parties dispute, and an acceptance of that offer by Crites. (*Id.*). In his Answer, Miller admitted his settlement Offer was made and the Acceptance Letter was received prior to his attempted revocation. The Trial Court was required to accept Miller's admissions to Crites' allegations as true, which it did. "The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the acts [that] are admitted by the pleadings are taken as true against the pleader of the purpose of the action." *Town of Kingstree v. Chapman*, 405 S.C. 282, 311 (Ct. App. 2013) (quoting *Postal v. Mann*, 308 S.C. 385, 387 (Ct. App. 1992)).

Next, Miller argues that there was ambiguity regarding the terms of the Settlement Agreement. (Appellant's Brief pp. 8-10). This argument is without merit. Further, the issue was not raised in the Trial Court below, and thus, is not preserved on appeal. As an initial matter, the word ambiguity or ambiguities is found nowhere in the hearing Transcript or in Miller's Answer.⁵ Additionally, the

⁵ The word ambiguity was located in a case citation in Miller's Memo in Opposition; however, no argument of ambiguity was made in the brief or at the hearing. (R. p. 60, Memo in Opposition p.3.)

Trial Court found that the Settlement Agreement comprised of the Settlement Offer and Acceptance Letter could not be susceptible to more than one interpretation. (R. pp. 94-95; Transcript pp. 17:15-24, 18:6-15). Only on appeal does Miller now argue that Paragraph 17 of his Answer, standing alone, causes mutual assent to be materially at issue (Appellant's Brief p.10). Paragraph 17 of Miller's Answer states:

[W]ithin 24-hours after Plaintiff's purported acceptance letter, made unequivocally clear that Defendant did not agree to Plaintiff's proposed settlement terms. Further answering, Defendant's *pro se* communications to Plaintiff's counsel, made within 24-hours after Plaintiff's purported acceptance letter, confirmed that any alleged offer that was made by the Defendant had been unequivocally withdrawn.

Rather than support his position, Miller's Answer here expressly admits that he did not attempt to withdraw his offer until after Crites' acceptance of the offer. (*Id.*). Miller's argument attempts to reconstitute Crites' acceptance as, instead, the initial offer and that Crites, rather than Miller, proposed settlement terms. Such reconfiguration would require the Court to ignore Crites' Settlement Offer, which was admitted, and Crites' own Answer, which states he received the Acceptance Letter before he attempted to revoke his Settlement Offer. Crites' Acceptance Letter is clear: "Mr. Crites has elected to accept your offer to resolve and release all claims between the parties regarding this chimney dispute matter completely and entirely for a settlement payment of \$8,000.00." (R. p. 27; Compl. Ex. 5,

Acceptance Letter). There was no counter-offer or new proposed terms. Miller's Settlement Offer letter says specifically, "in one last effort to failure resolve this situation short of expensive litigation, I'm offering \$8,000 to cover the Ashbusters Estimate and half of the lawyer fee." (R. pp. 23-25; Compl. Ex. 4, Offer Letter). The settlement agreement was clear, and Miller admitted all elements of formation of that contract in his Answer.

Miller asserts, for the first time on appeal, that the Acceptance Letter was a counter-offer and that ambiguity exists as to whether the Settlement Offer was intended to resolve any and all claims or disputes that arise from the purchase and sale of the Property or just the Chimney dispute. (Appellant's Brief, pp.10-11). This argument is improper as Miller did not preserve this argument by raising it in front of the Trial Court. *See Wilder Corp v. Wilke*, 330 S.C. 71, 76 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector. *Id.* at 733. At no time did Miller or his counsel argue that there was a counter-offer or any misunderstanding about what was being released between the parties prior to Appellant's Brief. (*See generally* R. pp. 78-96; Transcript; *see also* R. pp. 58-66; Miller's Memo in Opp.).

Even if the issue was properly preserved for appeal, it nonetheless fails to create any material issue of fact or ambiguity regarding the Settlement Agreement. There was only one dispute between the parties. In Appellant's Brief, Miller points to no other existing dispute between the parties that could be the subject of any other claim or dispute⁶. And indeed, he cannot. Both parties understood that the payment would resolve their single existing dispute, and the parties would go along their respective ways. Indeed, Miller referred to the payment as resolving "this situation" and Crites said it would resolve "this chimney dispute matter completely and entirely for a settlement payment in the amount of \$8,000.00." (R. pp. 23-25, 27; Compl. Ex. 4, Offer Letter and Ex. 5, Acceptance Letter). Moreover, Crites' response was clear, "Mr. Crites has elected to accept your offer" referring specifically to Miller's Settlement Offer letter. Crites' Acceptance Letter did not add terms to the offer. It was, quite simply, an acceptance of the terms offered. As the Trial Court succinctly held: Miller "knew exactly what he was doing. He knew exactly what was going on." (R. p. 95, lines 5-16; Transcript p.18:5-16).

"In deciding whether a settlement agreement has been reached, the Court looks to objectively manifested intentions of the parties." *Sadighi*, 66 F.Supp.2d at 759. The manifest intent of the parties is clear from the Offer letter and the

⁶ To the extent Appellant purports to assert ambiguity was created between release of the chimney matters as opposed foundation matters, both of those matters were identified together in the dispute and referenced specifically in Mr. Miller's Settlement Offer as the same dispute. (See R. pp. 23-25; Compl. Ex. 4, Settlement Offer).

Acceptance Letter. Miller would pay Crites \$8,000.00 in exchange for a full resolution of the dispute between the parties. Crites accepted that Offer in the Acceptance Letter and conveyed such acceptance to Miller before the Offer expired or was otherwise withdrawn or rescinded.

Lastly, Miller argues that the Trial Court's Order was premature as discovery had not yet been produced and no depositions had been taken. However, "the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is 'not merely engaged in fishing expedition.'" *Dawkins v. Fields*, 354 S.C. 58, 69 (2003) (quoting *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991)). Here, Miller failed to state even a single fact that discovery might show that would change his Answer or the Court's determination. (See generally Appellant's Brief). Nor did he raise any such points with the Trial Court. See *Wilder Corp v. Wilke*, 330 S.C. 71, 76 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

If Miller believed facts to exist in discovery that might change his Answer, the proper resolution (before hearing) was to move to amend his Answer. Miller did not, and indeed, cannot. No amount of discovery is going to change the plain

and simple fact that Mr. Crites accepted Mr. Miller's Offer to resolve the dispute for \$8,000.

II. THE TRIAL COURT DID NOT CONVERT RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS INTO A MOTION FOR SUMMARY JUDGMENT⁷.

The Trial Court did not err in failing to give Miller proper notice and a reasonable opportunity to present or develop evidence because Crites' Respondent's Motion for Judgment on the Pleadings was not converted into a Motion for Summary Judgment.

"In resolving a motion for judgment on the pleadings, the court may consider the pleadings and exhibits attached thereto, relevant facts obtained from the public record, and exhibits to the motion that are 'integral to the complaint and authentic.'" *United States v. Mashni*, 547 F.Supp.3d at 503 (interpreting FED. R. CIV. P. 12(c), which is nearly identical to the first sentence of S.C. R. CIV. P. 12(c)); see also *Carolina First Corp.*, 343 S.C. at 190 n.7 (citing *Stoner*, 772 F.Supp at 797-798 ("Generally, a court may consider documents outside of the complaint if the complaint incorporates the documents by reference.")). The Trial Court entered its order based on the pleadings, the exhibits attached thereto, documents

⁷ Respondent addresses both of Appellants arguments "II" and "III" in this Section for efficiency, as they both pertain to whether or not Crites' Motion was converted to that of one for Summary Judgement.

expressly referenced therein. (*See generally* R. pp. 1-3, 78-96; Order granting Crites' Motion; Transcript).

First, as noted by Miller in his brief, Crites did not move for, nor did he request, that his Motion be converted to a Rule 56 Summary Judgment motion. (Appellant's Brief p.13). At the hearing, the Trial Court judge did not identify that he was converting the Motion to one that was for summary judgment or that he considered documents outside of the pleadings or those expressly referenced and incorporated therein, such that the Motion need be converted. (*See generally* R. pp. 78-96; Transcript). Further, at no point in time at the hearing did counsel for Miller argue that the Motion was being or had been converted to that of summary judgment, and that he therefore needed more time to prepare for such occurrence. (*Id.*). Miller did not object to the consideration of any documents referenced in the pleadings, nor did he request the opportunity to introduce documents of his own that would contradict his client's own admissions in the Answer. Miller did not argue that the Motion should be denied because documents or materials outside of the pleading were being introduced and that he did not have an opportunity to prepare for what he now considered a summary judgement motion or hearing. (*Id.*).

Second, the email attached to Crites' Memo in Support is expressly identified and incorporated in paragraph 27 of the Complaint. Specifically,

Paragraph 27 states: “Defendant acknowledged receipt of the Settlement Agreement acceptance by email prior to withdrawing it’s offer or the [Settlement] Offer expiring.” (R. p. 12; Compl. ¶ 27). The email attached to Crites’ Memo in Support is an email chain that shows Crites’ counsel Nicholas Tierney emailing the November 12, 2021, Acceptance Letter to Miller, and Miller responding on November 13, 2021 making comments regarding the professionalism of the letter and stating that he is now considering withdrawing his Settlement Offer (R. pp. 55-57; Memo in Support, Ex. 1, Emails). Crites specifically identified this email in the Memo in Support, and Crites cited to paragraph 27 of the Complaint wherein the email was incorporated by reference. (*Id.*, p.4). In response, Miller did not make any assertion that the attachment of the email converted the Motion to a summary judgment motion. Moreover, the email was identified solely for the purpose of reflecting that Mr. Crites received the Acceptance Letter and had not withdrawn the Settlement Offer after his receipt of it.⁸ (*Id.* pp. 3-4). This fact was already admitted by Miller in his Answer, and therefore, the Trial Court need not (and likely did not) consider the email to grant Crites’ Motion for Judgment on the Pleadings. (R. p. 31; Answer ¶ 17).

⁸ This was used to provide clarity to ¶¶16-17 in Miller’s Answers which identify that Miller did receive the Acceptance Letter before any purported withdrawal of the Settlement Offer.

Courts in South Carolina permit documents that are specifically incorporated by reference in the Complaint (even those not attached) to be considered in 12(b)(6) motions to dismiss and motions for judgment on the pleadings, and that consideration of those documents does not convert them to summary judgment motions. *E.g., Brazell v. Windsor*, 384 S.C. 512, 516 (2009). Moreover, Miller's reliance on *Brown v. Leverette* and *Baird v. Charleston County* is misguided and provides no support. (Appellant's Brief p.13). Crites did not submit or attempt to provide any affidavits or testimonial evidence in support of his Motion for Judgment on the Pleadings. Accordingly, any consideration of the email contained in Crites' Memo in Support was not material to the Trial Court's findings and would not have converted the Motion to a motion for summary judgment.

To the extent Miller asserts that the documents he attached to his Memo in Opposition were considered by the Trial Court and somehow converted the Motion to a summary judgment motion, such argument is self-defeating. Miller cannot complain that he was provided no notice that the Trial Court would consider documents outside the pleadings and then object to its consideration of the documents he himself submitted. The purpose of providing notice that a court will convert a motion for judgment on the pleadings to a motion for summary judgment is to provide the party opportunity to submit competing exhibits and

affidavits. Rule 12(c), S.C. R. CIV. P. Here, even if the Trial Court had converted the Motion to a summary judgment motion, Miller's argument simply shows that he had an equal opportunity to submit evidence in support of his position. Notably, the document about which Miller complains is the exact email chain offered by Crites and acknowledged in Miller's Answer as his response in receipt of the Acceptance Letter. (R. pp. 12, 31, 56-57, 67-69; Compl. ¶ 27; Answer ¶ 17; *see* Memo in Support Ex. 1, Emails, Memo in Opposition, Ex. 1, Emails). Again, this email was incorporated by reference in Paragraph 27 of the Complaint, and there is clearly no additional or other evidence that Miller could present to change the fact that he sent it. (*Id.*).

Lastly, Appellant's arguments regarding outstanding discovery are both inaccurate and misleading. Miller asserts that Crites did not respond to Miller's discovery requests prior to the February Hearing. (Appellant's Initial Brief p.17). This is inaccurate. Crites served responses to Miller's discovery requests, including requests for production and interrogatories on January 12, 2024. These discovery responses were sent within the time agreed to by counsel pursuant to a 10-day extension on the deadline to deliver responses on Friday, January 12, 2024⁹. Moreover, the failure to receive any discovery responses was not argued or

⁹ This consent extension is evidenced by emails between Nicholas Tierney on behalf of Crites and Mr. John Guerry on behalf of Mr. Miller dated January 2, 2024.

presented to the Trial Court at Hearing or in Miller's Memo in opposition to be considered before final Order was entered. (*See generally* R. pp. 58-66, 78-96; Miller Memo in Opposition; Transcript). Notwithstanding these misstatements, and as outlined in Respondent's arguments hereinabove, no additional discovery would have had any effect on the fact that a settlement agreement was formed as a matter of law.

The remaining arguments contained in Section III of Appellant's Initial brief are repackaged arguments that have been substantively addressed hereinabove (i.e. the non-preserved counter-offer argument, ambiguity, and generic listing of affirmative defenses). Because the arguments have already been addressed in substance above and the Motion was not converted to one of summary judgement, Respondent does not need to address them further.

Accordingly, the Trial Court did not err in failing to give Miller proper notice and a reasonable opportunity to present or develop evidence because Respondent's Motion for Judgment on the Pleadings was not converted into a Motion for Summary Judgment. Moreover, there is no genuine issue of material fact that a binding and enforceable Settlement Agreement was formed.

CONCLUSION

For the foregoing reasons, the trial court properly granted Respondent's Motion for Judgment on the Pleadings, and Respondent respectfully requests this Court to affirm and uphold the same.

Respectfully submitted,

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