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Feb 07 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
PERRY H. GRAVELY, CIRCUIT COURT JUDGE
Appellate Case No. 2024-002035

Nelson & Galbreath, LLC,.....Respondent,

v.

Eric K. Ricardo, Americas Signature Homes, LLC and
Everardo A. Gutierrez, Defendants,

Of Whom Americas Signature Homes, LLC is the,Appellant.

**RETURN TO
MOTION TO DISMISS APPEAL**

Appellant Americas Signature Homes, LLC (hereafter “Appellant”) submits the following in return and opposition to the Motion to Dismiss.

FACTUAL BACKGROUND

America Ahumada (“America”) is a former South Carolina realtor who has had tremendous success in real estate as both a realtor and investor. One company through which she buys and sells real estate in the upstate is America’s Signature Homes, LLC, the Appellant in this matter. The instant appeal arose from a fraudulent real estate transaction on December 27, 2022, in which Appellant, by and through America, entered into a contract to sell one of its properties to purported buyer Eric K. Ricardo (“Ricardo”), who was eventually discovered to be a fraudster. Ricardo selected Respondent to serve as the closing attorney for the transaction.

By December 22, 2022, Respondent had received a cashier’s check from Ricardo for \$90,000.00 to pay the contract price of \$65,000.00, which ultimately turned out to be a fraudulent check. Despite receiving the cashier’s check at least five days before the closing, Respondent

deposited the check on December 27, 2022, the morning of the closing, and failed to verify the funds as collected before they were disbursed from Respondent's IOLTA account. The closing proceeded as scheduled, and Respondent disbursed a check to Appellant in the amount of \$17,349.27 representing seller's proceeds. America picked up the check on behalf of Appellant and deposited it in Appellant's business account the same day. Respondent also paid to have the deed recorded and paid the 2022 property taxes.

On or about December 30, 2022, Respondent discovered the fraudulent nature of the check and contacted America to inform her of the situation and to request that Appellant return the check for the seller's proceeds. Appellant was unable to return the funds as they had already been spent on business expenditures, however America informed Respondent that she was willing to help recover the funds and suggested reselling the property depending on the status of the deed. America attempted to obtain written confirmation of the status of the deed from Respondent without success. Even though the deed was recorded and titled to Ricardo the same day of the closing, that information was not disclosed to Appellant until January 11, 2023, after Appellant retained counsel to assist

In a completely unrelated transaction, America's spouse, Jhurani, had a closing scheduled with Respondent's office for the afternoon of January 6, 2023. In this transaction, America was representing Jhurani in the purchase of a home which was to be their primary residence. America attended the closing on behalf of Jhurani, who was out of the country at the time, and wired \$23,000.00 to Respondent representing the down payment. The morning of the closing, Respondent realized that America was the principal for Appellant which had not returned the seller's proceeds from the closing on December 27, 2022.

Rather than supplying America with the finalized closing documents, attorney Nathan Galbreath, a principal of Respondent, provided America a letter containing an enclosed check. A copy of this correspondence is attached as **Exhibit A**. In this letter, Galbreath advised that he took a portion of Jhurani's down payment for the January 6, 2023 closing, deducted the amount of the seller's proceeds from the separate real estate transaction on December 27, 2022, and enclosed a check payable to Appellant and America from the difference, \$5,534.51.

On January 24, 2023, Respondent filed the underlying action seeking to rescind the contract between Appellant and Ricardo, set aside the deed to restore title back to Appellant, and order a constructive trust for the seller's proceeds, property taxes, and recording fees associated with the fraudulent transaction. On August 16, 2023, Judge Simmons issued an Order rescinding the contract between Appellant and Ricardo and restoring the deed to Appellant. **Exhibit B**. Judge Simmons recused himself from hearing the contested issue of whether the seller's proceeds should be returned to Respondent. After the deed was restored, Appellant sold the property at a loss to a legitimate buyer on in March 2024.

On March 22, 2023, Appellant filed a lawsuit against Respondent and Nathan Galbreath asserting causes of action for legal malpractice, defamation, and intentional infliction of emotional distress arising from Respondent's handling of both real estate closings and the conversion of Jhurani's down payment to recoup the loss from the fraudulent closing ("malpractice action"). On May 5, 2023, Respondent filed an Answer and asserted counterclaims against Appellant for conversion and unjust enrichment claiming that it was inequitable for Appellant to retain the seller's proceeds. Because the malpractice action and the underlying action both arose from the same transaction and involved common questions of law and fact, Respondent filed a Motion to

Consolidate both actions on August 14, 2024. On October 4, 2024, Respondent filed a Motion for Summary Judgment in the underlying action as to the remaining claim for constructive trust.

A hearing on Appellant's Motion to Consolidate and Respondent's Motion for Summary Judgment was held on October 16, 2024, before Judge Gravely. Following the hearing, Judge Gravely issued an Order granting Respondent's Motion for Summary Judgment, assessing a judgment against Appellant in the amount of \$20,497.69 representing the seller's proceeds, property taxes, recording fees, and prejudgment interest. **Exhibit C.**

Appellant, which continues to operate a reputable real estate business, had an imminent real estate closing in November 2024 which was at risk of falling through due to the active judgment against Appellant. As such, Appellant paid the judgment in full on November 12, 2024, so as not to disrupt the transaction. Respondent thereafter filed a Satisfaction of Judgment on November 13, 2024. On December 3, 2024, Appellant timely filed a Notice of Appeal from October 16, 2024 Order granting Summary Judgment in favor of Respondent and denying Appellant's Motion to Consolidate.

ARGUMENT

Respondent incorrectly asserts that the appeal of the underlying judgment is moot. A matter becomes moot "when judgment, if rendered, will have no practical legal effect upon the existing controversy." *Curtis v. State*, 345 S.C. 557, 567-68, 549, S.E.2d 591, 596 (2001) (quoting *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). It is well established that appellate courts will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Byrd v. Irom High Sc.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). However, that is simply not the case in the instant matter because there is still an existing controversy in the related malpractice action which is substantially the

same as the controversy in the underlying trial court action. As set forth above, the only contested issue in the underlying action is whether Respondent was entitled to have the seller's proceeds returned, and that issue has also been raised by Respondent via counterclaim in the malpractice action, thus there still exists a controversy between the parties. While Appellant has paid the judgment to Respondent, a judgment from this Court reversing or altering the trial court's judgment will directly affect the malpractice action and is still capable of having a practical legal effect in underlying action.

Assuming that the appeal is moot (which Appellant maintains is not), there are three exceptions to the mootness doctrine:

(1) an appellate court can retain jurisdiction if the issue is capable of repetition yet evading review, (2) an appellate court can decide cases of urgency to establish a rule for future conduct in matters of important public interest, and (3) if the decision by the trial court can affect future events or have collateral consequences to the parties, the appellate court can take jurisdiction.”

Curtis at 568, 549 S.E.2d at 596.

Appellant asserts that this Court can retain jurisdiction of this matter under the first and third exceptions to the mootness doctrine. First, the issues in this matter are capable of repetition evading judicial resolution in the future. A party raising this exception “need only show the issue raised is capable of repetition and is not required to prove there is a ‘reasonable expectation’ the issue will arise again.” *Sloan v. Greenville County*, (citing *Byrd*, 321 S.C. at 431-32, 468 S.E.2d at 864). The issues raised in this matter involve the collateral effects of a fraudulent real estate transaction compounded by the ethical missteps of the Respondent closing attorneys. Real estate

fraud is a well-known concern among South Carolina realtors and real estate lawyers. Most competent real estate law firms are aware of the different schemes and tactics employed by fraudulent buyers and sellers in order to prevent falling victim to fraud, but it still occurs all too often. In this case, Ricardo provided a fraudulent cashier's check to Respondent which deposited the check into its IOLTA account and disbursed the funds to Appellant without first verifying that the funds were collected. The South Carolina Rules of Professional Conduct require an attorney to only disburse collected funds with limited exceptions and expressly states that "a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the lawyer making the disbursement. See Comment 7 to Rule 1.15, SCRPC. This risk includes "deposited instruments that are forged, stolen, or counterfeit." *Id.* Whether an attorney is equitably entitled to the return of funds in which the attorney disbursed at his sole risk due to the attorney's failure to verify those funds as collected is an issue capable of repetition and will continue to occur without review and intervention by this Court.

Additionally, the decision by the trial court has and will have collateral consequences to the parties as it relates the parallel malpractice action. On November 26, 2024, Respondent filed a Motion for Summary Judgment in the malpractice action in which it gathers the majority of support from the trial court's Order granting summary judgment in the underlying action. **Exhibit D.** Respondent's use of the trial court's Order as support for its Motion for Summary Judgment in the related malpractice action is a clear indication that the trial court's order will have a direct impact on the parties and their positions in the malpractice action. As such, this Court has authority to take jurisdiction over this matter pursuant to the third exception to the mootness doctrine.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that the Court deny Respondent's Motion to Dismiss and allow this matter to proceed on appeal.

Respectfully submitted,

s/ Haley Hubbard
Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON
226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com

ATTORNEYS FOR APPELLANT

February 7, 2025

Exhibit A

January 6, 2023, 4:00 PM

VIA HAND DELIVERY

America Ahumada
d/b/a America's Signature Homes, LLC
d/b/a America's Properties, LLC
213 East Butler Road
Suite B1
Mauldin, South Carolina 29662

Dear Ms. Ahumada:

On or about December 7, 2022, you entered into a contract with Eric Kez Ricardo ("Buyer") to sell 119A Woodland Drive, Fountain Inn, South Carolina 29644 for \$65,000 ("Contract"). Nelson & Galbreath, LLC ("N&G") was the closing attorney. Shortly after closing, N&G learned that Buyer was engaged in fraud and that Buyer's cashier's check presented at closing was intentionally fraudulent and was presented with the hope of receiving an overage check back from N&G. N&G was able to freeze the disbursement of all funds at closing, except that N&G had already given you a check for the seller proceeds of \$17,349.27, and had paid your property taxes in the amount of \$360.42 (\$17,709.69 total).

N&G requested that you immediately return the amounts paid to you and on your behalf upon learning of the fraud. Initially, you agreed to return the funds. Later, you changed your mind and said that you refused to return the funds. At one point you claimed that you could not return the funds because you had "sent them overseas."

Then today, you appeared again in our offices: this time as a buyer of a DR Horton home. You wired \$23,000.00 to us in connection with the closing. We did not make the connection about your identity until you were here in our conference room.

Now that I realize your identity, I obviously do not feel comfortable with N&G representing you in this transaction. N&G cannot be your closing attorney on this or any future transaction. Please consider any and all representations hereby terminated.

Accordingly, enclosed please find a check for \$5,534.51, which represents the difference between the \$23,000.00 that you wired to N&G, and the \$17,709.69 that you retained in connection with the fraudulent transaction.

You will need to retain substitute closing counsel to assist you with the closing of your DR Horton property and any other properties that you wish to close. We will gladly provide title

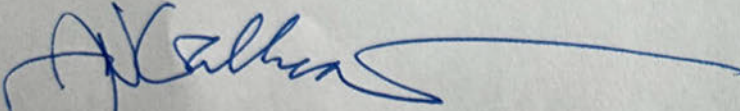
N&G | NELSON & GALBREATH

ATTORNEYS AT LAW

work and any other assistance, at no charge, to your substitute counsel. We will also continue the work of unwinding your fraudulent transaction at our own cost.

We regret that you became involved with a fraudster; and we wish you all the best in your future endeavors.

With kind regards,



J. Nathan Galbreath

Check enclosed for \$5,534.51

NELSON & GALBREATH, LLC
Escrow Account
131 Falls Street, Ste 101
Greenville, SC 29601
(864) 232-3766

File : 3244983

United Community Bank
1400 Augusta Street
Greenville, SC 29605

13157965

1/6/2023

Pay Five Thousand Five Hundred Thirty Four Dollars and Fifty One Cents

\$5,534.51

Void after 90 days

To America Ahumada, d/b/a America's Signature Homes, LLC, d/b/a America's Properties, LLC

The
Order
Of

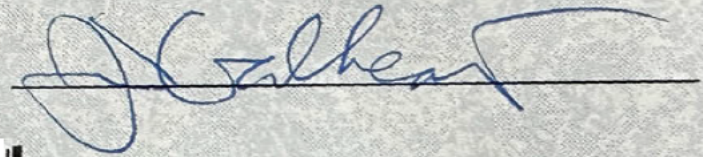


Exhibit B

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
Nelson & Galbreath, LLC,)
)
Plaintiff,)
)
v.)
)
Eric K. Ricardo, Americas Signature)
Homes, LLC and Everardo A. Gutierrez,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE 13TH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2023-CP-23-00347

ORDER SETTING ASIDE DEED

Pursuant to Rule 53(b), the above-entitled matter was referred to the Master in Equity by Order of Reference filed on June 15, 2023 to make appropriate findings of fact and conclusions of law with authority to enter a final judgment, and to hear and determine any post-judgment proceedings. Any appeal from this Order is to the South Carolina Supreme Court or to the Court of Appeals, as provided by the South Carolina Appellate Court Rules.

Following the filing of that Order of Reference, this court recused itself from hearing the contested issue between Plaintiff and Defendant Americas Signature Homes, LLC (“ASH”) regarding whether funds disbursed from Plaintiff’s office to ASH, in conjunction with the delivery and recording of a deed from ASH to Defendant Erik K. Ricardo, should be returned to Plaintiff concurrently with the setting aside of the deed. The parties agreed that the issue concerning entitlement to and custody of those funds could be heard separately from the matter regarding setting aside the deed. Therefore, whether and/or when funds received by ASH from Plaintiff should be returned to Plaintiff is not being determined at this time. This order deals strictly with whether the deed at issue in this case should be set aside.

Pursuant to the Order of Reference, a hearing was held on Wednesday, August 9, 2023, which was attended by counsel for the Plaintiff and by counsel for the Defendant ASH.

The Plaintiff herein, Nelson & Galbreath, LLC (“NG”), filed and served its Summons and Complaint on January 24, 2023, seeking, in pertinent part, an Order from the Court to set aside and declare null and void a deed that was recorded as the result of a fraudulent conveyance to the Defendant Eric K. Ricardo (“Ricardo”). The subject deed was recorded on December 27, 2022 in the office of the Register of Deeds for Greenville County in Deed Book 2676 at Page 5775 (the “Deed”).

The Defendant Ricardo was served by Publication, and has failed to answer or file any responsive pleadings and therefore was held in default, as evidenced by the Certificate of Default and of Non-Military Service filed on June 9, 2023. The Defendant Everardo A. Gutierrez (“Gutierrez”) filed an Answer to the Plaintiff’s Complaint on April 28, 2023.

The real property described in the Deed is an unimproved lot located at 119A Woodland Drive, Fountain Inn, South Carolina, Lot D, containing 0.42 acres, more or less on a Plat entitled “Lots A, B, C, D, & E, Woodland Heights Subdivision”, prepared by Rykard Land Surveying, LLC, dated 9/30/21 and recorded in the Office of the Register of Deeds for Greenville County in Plat Book 1416 at Page 50 (the “Lot”). The mortgage held by Gutierrez on the Lot was recorded on May 31, 2022 in the Greenville County Register of Deeds in Mortgage Book 5693, at Page 3451. The Plaintiff agrees that Gutierrez holds a first priority mortgage lien on the Lot and does not contest the validity of the Mortgage; therefore, Gutierrez was dismissed from the case with prejudice, by virtue of a Consent Order filed on June 14, 2023. ASH filed an Answer to the Complaint on May 25, 2023, which sought among other things, that the court set aside the Deed that was fraudulently conveyed to Ricardo.

FINDINGS OF FACT

Having failed to respond to the Complaint and having been held in default, pursuant to SCRCP 55(a), Defendant Ricardo is deemed to have admitted all facts alleged in the Complaint.

Those relevant facts are:

1. Ricardo is the individual who acted as the buyer in the Sale and is the current owner of record of the Lot by virtue of the recording of the Deed in the Greenville County Register of Deeds on December 27, 2022 at Book No. 2676 at Pages 5775-5776.

2. On December 7, 2022 Ricardo and ASH entered into a sales contract in which ASH agreed to sell and Ricardo agreed to buy the Lot (the "Contract").

3. Pursuant to the Contract, Ricardo was required to pay to ASH an agreed upon purchase price for the Lot

4. On or about December 13, 2022 Ricardo delivered to NG a cashier's check purportedly issued by Fifth Third Bank in the amount of \$90,000.

5. At the time that the cashier's check was delivered, the NG was not aware that the check was fraudulent and that no funds were available to pay the purchase price owed to the Seller.

6. On December 27, 2022, after the Sale was closed, the Deed was recorded in the Greenville County Register of Deeds on December 27, 2022 at Book No. 2676 at Pages 5775-5776. All fees associated with the recordation of the Deed were paid by NG.

7. On or about December 27, 2022, NG also paid the property taxes due on the Lot in the amount of \$360.42.

8. On or about December 27, 2022, the NG also paid to ASH, the net proceeds that would have been payable to had the Sale been properly supported by consideration.

9. Shortly after NG had recorded the Deed, NG paid the taxes on the Lot and paid to Seller the net sales proceeds, NG learned that the cashier's check presented by Ricardo was fraudulent and that there were no funds to support the Sale or to pay the purchase price for the Lot.

ASH agreed in its Answer, filed May 25, 2023, that the check used to pay the purchase price for the Lot was fraudulent, and in her prayer for relief, asked that the sales contract between ASH and Ricardo be rescinded and that the Deed be set aside.

CONCLUSIONS OF LAW

Based upon the undisputed facts, this Court finds that the sale contract should be rescinded, and that the Deed should be set aside. As noted above, the remaining issue as to whether and/or when ASH should repay or be otherwise accountable for what would have been its portion of the proceeds of sale should be determined by another judge. Therefore, that issue shall be returned to the court of common pleas for determination.

THEREFORE, it is hereby ORDERED that:

1. The sales contract between ASH and Ricardo for the sale of the Lot is rescinded;
2. The Deed from ASH to Ricardo is hereby set aside and declared null and void;
3. The Defendant Ricardo and all persons claiming under him are forever barred from making any claims to or interests in the Lot;
4. The Mortgage held by Gutierrez is a first lien on the Lot.
5. A copy of this Order shall be filed with the Office of the Register of Deeds for Greenville County, South Carolina and shall be indexed properly in the chain of title for the property.

AND IT IS SO ORDERED.

JUDGE'S SIGNATURE PAGE TO FOLLOW



Greenville Common Pleas

Case Caption: Nelson & Galbreath LLC vs. Eric K Ricardo , defendant, et al

Case Number: 2023CP2300347

Type: Master/Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)

Exhibit C

Plaintiff replenished the funds in its trust account that it had disbursed to Americas Signature Homes, LLC. Plaintiff also asked Americas Signature Homes, LLC to return the disbursed funds in the amount of \$17,349.27.

On January 24, 2023, Plaintiff filed this action to set aside the deed to restore ownership to Americas Signature Homes, LLC and requested to impose a constructive trust on the funds disbursed to Americas Signature Homes, LLC because Americas Signature Homes, LLC refused to return them.

The deed was set aside. The only issue remaining was determining whether the funds in Americas Signature Homes, LLC's possession should be paid to Plaintiff along with reimbursement for the taxes that Plaintiff paid on the property before the deed was set aside.

DISCUSSION

“[A] constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or had been acquired through a breach of trust, or the violation of a fiduciary duty, and the like.” *Wolfe v. Wolfe*, 215 S.C. 530, 533, 56 S.E.2d 343, 345-46 (1949).

Americas Signature Homes, LLC obtained money that does not equitably belong to it, and, therefore, it is not entitled to withhold it from Plaintiff, who is beneficially entitled to it. In its answer to the Complaint, Americas Signature Homes, LLC admitted that the check from which its disbursement was paid was fraudulent. (Americas Signature Homes, LLC's Answer, ¶ 14). The fraudulent deed was set aside; therefore, is no basis for Americas Signature Homes, LLC to keep this money.

Americas Signature Homes, LLC argues that Rule 1.15 of the South Carolina Rules of Professional Conduct required Plaintiff, and not Americas Signature Homes, LLC, to reimburse

Plaintiff's trust account for the funds that Plaintiff had disbursed based upon an uncollected check. That is true, and Plaintiff did so, but that does not entitle Americas Signature Homes, LLC to keep the funds it received as a windfall at Plaintiff's expense, or to benefit from Plaintiff's having paid the taxes on Americas Signature Homes, LLC's property.

In its complaint, Plaintiff prayed for a constructive trust to be imposed on the funds that had been disbursed to Plaintiff and for the funds to be returned to Plaintiff once the fraudulent deed had been set aside. Plaintiff also sought reimbursement for the property taxes it had paid on the property ultimately for Americas Signature Homes, LLC's benefit in the amount of \$360.42. In addition, Plaintiff moved to amend its complaint to seek statutory pre-judgment interest on the amounts sought pursuant to S.C. Code Ann. § 34-31-20. Because the amounts sought are ascertainable and have been since this action was filed, that motion is granted.

WHEREFORE, Defendant Americas Signature Homes, LLC is ordered to pay to Plaintiff Nelson & Galbreath, LLC or its successor or assigns, the principal amount of \$17,709.69, which is the amount of the disbursement to Americas Signature Homes, LLC of \$17,349.27 plus the property taxes paid in the amount of \$360.42, plus pre-judgment interest from December 30, 2022 in the amount of \$2,788.00, for a total judgment amount of \$20,497.69.

IT IS SO ORDERED.

[E-signature of Judge Gravely to follow]

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS**

JUDGMENT IN A CIVIL CASE

CASE NO. 2023-CP-23-00347

Nelson & Galbreath, LLC

Eric K. Ricardo, Americas Signature Homes,
LLC and Everardo A. Gutierrez,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: s/Bernie W. Ellis	Attorney for : <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
--	--

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: **ORDER ON DEFENDANT AMERICAS SIGNATURE HOMES, LLC'S MOTION TO CONSOLIDATE AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Nelson & Galbreath, LLC	Americas Signature Homes, LLC	\$20,497.69
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

Master in Equity

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of October, 2024 and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of October, 2024 to attorneys of record or to parties (when appearing pro se) as follows:

Weyman C. Carter
P.O. Box 447
Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Greenville Common Pleas

Case Caption: Nelson & Galbreath LLC vs. Eric K Ricardo , defendant, et al

Case Number: 2023CP2300347

Type: Order/Other

So Ordered

s/ Honorable Perry H. Gravely, #2755

Exhibit D

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

America Ahumada, America’s Signature
Homes LLC, and Jhurani Aguilar Mizrahi,

Case No. 2023-CP-23-01435

Plaintiffs,

vs.

**DEFENDANTS J. NATHAN
GALBREATH AND NELSON &
GALBREATH LLC’S
MOTION FOR
SUMMARY JUDGMENT**

J. Nathan Galbreath and Nelson & Galbreath
LLC,

Defendants.

and

J. Nathan Galbreath and Nelson & Galbreath
LLC,

Counterclaimants,

vs.

America Ahumada and America’s Signature
Homes LLC,

Counterclaim-Defendants.

J. Nathan Galbreath (“Galbreath”) and Nelson & Galbreath LLC (collectively, “N&G”), move the Court pursuant to SCRCP 56 for an Order granting them Summary Judgment against Plaintiffs.

SUMMARY OF GROUNDS

Defendants N&G make this motion for summary judgment on the grounds that:

1. There is no genuine issue of material fact as to N&G’s funds that were wrongfully retained by Plaintiffs from December 30, 2022, when Plaintiffs refused to return the funds, until November 13, 2024, after Plaintiffs were ordered by the Court to return the funds with prejudgment interest;

2. There is no genuine issue of material fact that Plaintiffs' refusal to return the funds for over 460 business days is a wrongdoing that is at least equal to N&G retaining Plaintiffs' funds in its trust account for one (1) business day;

3. There is also no genuine issue of fact as to whether any of the subsequent events would have taken place (the retention of the funds in the IOLTA account for one (1) business day, the canceling of the 139 Boxbury closing, and even the filing of the companion case seeking a constructive trust) had Plaintiffs returned the \$17,709.49 in funds when asked.

These facts are not contested. Accordingly, N&G is entitled to summary judgment.

FACTS

Plaintiffs America Ahumada ("Ahumada"), America's Signature Homes, LLC ("ASHomes") and Jhurani Mizrahi ("Mizrahi") (collectively, "Plaintiffs") have made claims against N&G arising out of two (2) residential real estate closings that took place at Nelson & Galbreath LLC in Greenville, South Carolina. Plaintiffs' claims include legal malpractice, conversion, defamation and intentional infliction of emotional distress. N&G counterclaimed, asserting that Plaintiff Ahumada converted funds from N&G's trust account and that Plaintiffs were unjustly enriched.

A. 119A Woodland Drive Transaction

The first closing, scheduled for December 27, 2022, involved the sale of a lot located at 119A Woodland Drive, Fountain Inn, South Carolina ("119A Woodland"). (*See* Compl. ¶ 8). The owner of record was Plaintiff ASHomes. (*Id.*). At the time of the facts giving rise to this case, Plaintiffs Ahumada and Mizrahi were the sole owners of ASHomes. Per the Contract for Sale, the Buyer of 119A Woodland was Eric Ricardo ("Ricardo"). (*See* Compl. ¶ 8)

Ricardo explained that he lived in New York would not be able to attend the closing. N&G arranged for the closing documents to be electronically forwarded to Ricardo and for him to participate in the closing via telephone on December 27, 2022. On Thursday, December 22, 2022, N&G received a cashier's check via from Ricardo in the amount of \$90,000, even though the amount due from Ricardo at closing was \$66,604.94. Because of his overpayment, Ricardo would be due a \$23,395.06 overage. N&G emailed Ricardo on December 22, 2022 to confirm that Ricardo intended to send a \$90,000 check and to obtain instructions from Ricardo regarding the overpayment. Ricardo asked N&G to wire the overage to his account. He gave wiring instructions and electronically signed a wire authorization via DocuSign.

N&G was closed for the holidays on Friday, December 23rd and Monday, December 26th. On Tuesday, December 27th, N&G deposited the \$90,000 cashier's check from Ricardo into its IOLTA account with United Community Bank ("N&G's IOLTA account"). That same day, Ahumada appeared at N&G to sign the closing documents, and N&G spoke with Ricardo on the phone to conduct the virtual closing. Through the closing, N&G paid the 2022 property taxes for 119 Woodland in the amount of \$360.42 on behalf of ASHomes. Ahumada, on behalf of ASHomes, received a check in the amount of \$17,349.27 as seller proceeds. Prior to close of business on December 27, 2022, Ahumada deposited the \$17,349.27 into a bank account for ASHomes. Both the \$360.42 for 2022 property taxes and the \$17,349.27 for ASHomes seller proceeds were drawn from N&G's IOLTA account.

Two days later, at 9:06 am on December 29, 2022, N&G received a confidential fraud bulletin email that identified Ricardo as a potential fraudulent party on real estate transactions. Several N&G staff members began immediately to investigate the validity of Ricardo's cashier's check that N&G deposited. Ahumada was contacted by N&G staff and informed of the issue. By

1:41 pm on December 29, 2022, N&G's IOLTA account successfully placed a hold on the wire of \$23,395.06 to Ricardo (the overage amount to be paid to him). N&G also held the commission check payable to the real estate brokerage involved and held the payoff to the private lender involved.

Because N&G held the brokerage commission, successfully stopped the \$23,395.06 wire to Ricardo, and held the loan payoff to the private lender, the only money paid out in the transaction was \$17,349.27 to ASHomes and \$360.42 to Greenville County for ASHomes' 2022 property tax. The amount totaled \$17,709.69. Ahumada was asked to return these funds to N&G due to the fraudulent check from Ricardo. Unbelievably, Ahumada refused.

At 1:54 p.m. on January 6, 2023, four (4) business days after Ricardo's check was deemed fraudulent, N&G timely transferred from the N&G Operating Account to N&G's IOLTA account the \$17,709.69 in funds that Ahumada refused to return. Accordingly, N&G complied with Rule 1.15(f)(2) of the SC Rules of Professional Conduct and replenished its IOLTA account within five (5) business days.

B. 139 Boxbury Way Transaction

The second closing, scheduled for Friday, January 6, 2023, involved the purchase of 139 Boxbury Way, Fountain Inn, South Carolina ("139 Boxbury"). On the Contract for Sale, the Buyers of 139 Boxbury Way were Ahumada and Mizrahi. DR Horton, a national builder, was the Seller of 139 Boxbury. N&G was again the selected law firm to close 139 Boxbury. In furtherance of that purchase, Plaintiffs Ahumada and Mizrahi deposited \$23,244.20 into N&G's IOLTA account on January 6, 2023 at approximately 2:01 pm.

On the afternoon of January 6, 2023, Galbreath realized that Ahumada and Mizrahi were the buyers for the 139 Boxbury closing his office was handling later that day and that his escrow

account held \$23,244.20 of their funds. N&G also knew that Ahumada and Mizrahi were the sole owners of ASHomes. Galbreath decided to retain the \$17,709.69 of the \$23,244.20 in his IOLTA account as disputed funds and not apply the funds to Ahumada and Mizrahi's purchase of 139 Boxbury. Galbreath also felt that ethically, he had no choice but to refuse to close the 139 Boxbury transaction because Plaintiffs' refusal to return N&G's funds created a conflict of interest between Plaintiffs and N&G.

When Ahumada arrived at the closing for 139 Boxbury on Friday, January 6, 2023, Galbreath had the receptionist deliver to Ahumada an envelope that contained a letter from Galbreath and a check. The letter explained that N&G was retaining \$17,709.69 of the \$23,244.20 deposit from Ahumada and Mizrahi as disputed funds for the 119 Woodland closing and returning the remaining \$5,894.93 to Plaintiffs. He also informed Ahumada that if she and Mizrahi wanted to purchase 139 Boxbury, they would need to find another closing attorney.

On Sunday, January 8, 2023, Galbreath received an email from Desa Ballard ("Ballard"), informing Galbreath that Plaintiffs had retained her, accusing Galbreath of converting the \$23,244.20 escrow funds, and demanding that he immediately return the funds the next day (Monday, January 9, 2023). On Monday, January 9, 2024, N&G cancelled the check in the amount of \$5,894.93 that it gave Ahumada and wired \$23,244.20 Ballard's trust account. N&G returned the funds in one (1) business day.

C. The Companion Case

The deed transferring 119A Woodland Drive from ASHomes to Ricardo was filed with the Greenville County Register of Deeds on December 27, 2022 using Greenville County's online system before the fraudulent check was detected. On January 24, 2023, N&G filed an equitable action in the case of Nelson & Galbreath v. Eric. K. Ricardo, Americas Signatures Homes, LLC

and Everardo A. Gutierrez, CA No. 2023-CP-23-00347 (“the companion case”)¹ to set aside the deed, for a constructive trust to be imposed on the funds that had been disbursed to ASHomes, and for the funds to be returned to N&G once the fraudulent deed was set aside.

Judge Simmons set aside the deed by Order dated August 16, 2023 and restored title to ASHomes. However, he otherwise recused himself in the companion case and referred the issue of ASHomes returning the funds back to the Circuit Court. With title restored, ASHomes sold 119A Woodland on March 1, 2024. On October 4, 2024, N&G moved for summary judgment in the companion case, arguing that no genuine issue remained for ASHomes to keep the seller proceeds. The Court agreed. By Order dated October 30, 2024, ASHomes was ordered to pay to N&G the \$17,349.27 in seller proceeds retained since December 2022 by Plaintiffs, the \$360.42 in 2022 property taxes paid by N&G, and prejudgment interest from December 30, 2022 forward in the amount of \$2,788.00. The total judgment amount was \$20,497.69. Rather than appeal the Court’s Order, ASHomes paid the judgment on November 13, 2024..

STANDARD OF REVIEW

The purpose of summary judgment under SCRCP 56 is to expedite the disposition of cases not requiring the services of a fact finder. *John Deere Constr. & Forestry Co. v. N. Edisto Logging, Inc.*, 443 S.C. 424, 434–35, 904 S.E.2d 889, 894–95 (Ct. App. 2024), reh’g denied (Aug. 12, 2024) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony. Rather, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *Id.*

¹ Everardo A. Gutierrez was later dismissed from the companion case.

ARGUMENT

A. Plaintiffs Wrongfully Converted and Retained N&G's Funds

As stated above, this Court has already found that Plaintiffs wrongfully retained the \$17,709.69 in funds and ordered Plaintiffs on October 30, 2024 to return the funds to N&G. Moreover, pursuant to S.C. Code Ann. § 34-31-20, the Court ordered Plaintiffs to pay prejudgment interest from December 30, 2022, the date Ricardo's check was deemed fraudulent. This is because § 34-31-20 provides that in cases wherein sums of money shall be due, the amount due shall draw interest. Interest shall accrue from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty. *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 147, 641 S.E.2d 53, 60 (Ct. App. 2007) (citing *Babb v. Rothrock*, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993)). By awarding judgment in favor of N&G, including prejudgment interest beginning December 30, 2022, the Court has found by operation of law that Plaintiffs should have returned to N&G the \$17,709.69 on December 30, 2022.

Under the doctrine of collateral estoppel, when an issue of fact or law is litigated and determined by a final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 155–56, 758 S.E.2d 483, 493 (2014) (quoting *Carman v. S.C. Alcoholic Beverage Control Commission*, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994)). It is conclusive, therefore, that Plaintiffs wrongfully retained the \$17,709.69 after December 30, 2022.

B. In Pari Delicto

The common-law defense of *in pari delicto* derives from the Latin, *in pari delicto potior est conditio defendentis*: “In a case of equal or mutual fault ... the position of the [defending] party

... is the better one.” *Proctor v. Whitlark & Whitlark, Inc.*, 406 S.C. 225, 228, 750 S.E.2d 93, 94 (Ct. App. 2013), *aff'd in part, rev'd in part for other reasons*, 414 S.C. 318, 778 S.E.2d 888 (2015) (quoting *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306, 105 S.Ct. 2622, 86 L.Ed.2d 215 (1985)). Pursuant to the doctrine of *in pari delicto*, a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing. *Id.* (quoting *Myatt v. RHBT Fin. Corp.*, 370 S.C. 391, 395, 635 S.E.2d 545, 547 (Ct.App.2006)). Indeed, “[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.” 34 S.C. Jur. Action § 21.

Here, it has been conclusively established that Plaintiffs wrongfully retained the funds after December 30, 2022 until they paid them back on November 13, 2024 following a judgment being entered. This equates to over 460 business days. However, they now found their causes of action on N&G’s attempt to secure the disputed funds in N&G’s IOLTA account by holding the \$17,709.69 in funds for one (1) business day. N&G would not have had to hold the funds had Plaintiffs simply returned the \$17,709.69 when asked and when it was clear to all parties that Ricardo’s check was fraudulent. Plaintiffs’ conduct led to the position that the N&G found itself in January 2023 and now finds itself. Even if N&G erred by holding the disputed funds for one (1) business day, Plaintiffs’ knowing refusal to return the funds to N&G for over 460 business days is (at a minimum) equal to that of N&G. Under the doctrine of *in pari delicto* there is no genuine issue that Plaintiffs may not recover from their wrongful retention of N&G’s funds.

Accordingly, pursuant to SCRPC 56, N&G respectfully prays the Court enter summary judgment in its favor and dismiss Plaintiff’s Complaint.

C. Unclean Hands

Like the common law doctrine of *in pari delicto*, the equitable doctrine of unclean hands “precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.” *Williams v. Jeffcoat*, No. 2021-001296, 2024 WL 4234721, at *4 (S.C. Sept. 18, 2024). The unclean hands doctrine recognizes the principle that one who seeks redress from the court must himself not be guilty of wrongdoing. 12 S.C. Jur. Equity § 7 (1992). For a party to succeed on an unclean hands defense, the conduct of the person sought to be barred from recovery under the doctrine “need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character.” 27A Am. Jur. 2d Equity § 21 (2019). “[A]ny willful act concerning the cause of action that rightfully can be said to transgress equitable standards of conduct is sufficient” to establish the defense. *Id.* This is because under public policy, a party should not be allowed to profit from their wrongdoing.

Here, Plaintiffs’ retention of N&G’s funds did justify legal proceedings. During the hearing on N&G’s motion for summary judgment in the companion case, the Court ordered Plaintiffs to return the funds and pay prejudgment interest from December 30, 2022. Moreover, N&G is the only party in this matter that has been without funds from December 30, 2022 until November 13, 2024, when Plaintiffs returned the funds after the judgement was entered. Furthermore, because Plaintiffs refused to return N&G’s funds, N&G was forced to file the companion case and request a constructive trust be imposed for the funds instead of a simple action to set aside the deed filed for 119 Woodland. Yet, Plaintiffs brought this action in March 2023 seeking redress from the Court for N&G’s actions, despite Plaintiffs wrongful retention of N&G’s funds and the subsequent cascade of consequences.

There is clearly no genuine issue that Plaintiffs have come with unclean hands. Accordingly, pursuant to SCRPC 56, N&G requests the Court enter summary judgment in its favor and dismiss Plaintiff's complaint.

CONCLUSION

There is no genuine issue of fact as to whether Plaintiffs should have returned the funds. There is no genuine issue of fact as to whether Plaintiffs' refusal to return the funds is at least equal to any subsequent wrongdoing by N&G. Finally, there is also no genuine issue of fact as to whether any of the subsequent events would have taken place had Plaintiffs returned the \$17,709.49 in funds when asked. These facts are not contested. Accordingly, N&G is entitled to summary judgment.

WHEREFORE, N&G moves the Court for Summary Judgment and to dismiss Plaintiffs' claims with prejudice.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

/s/ Samuel W. Outten

Samuel W. Outten

SC Bar No. 4295

E-Mail: sam.outten@nelsonmullins.com

Laura McDonald

SC Bar No. 15997

E-Mail: laura.mcdonald@nelsonmullins.com

2 W. Washington Street Suite 400

Greenville, SC 29601

(864) 373-2300

Greenville, South Carolina
November 26, 2024

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Feb 07 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
PERRY H. GRAVELY, CIRCUIT COURT JUDGE
Appellate Case No. 2024-002035

Nelson & Galbreath, LLC,.....Respondent,

v.

Eric K. Ricardo, Americas Signature Homes, LLC and
Everardo A. Gutierrez, Defendants,

Of Whom Americas Signature Homes, LLC is the,Appellant.

PROOF OF SERVICE

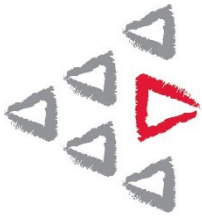
I, Beth Cogan, an employee with Ballard & Watson, do hereby certify that on February 7, 2025, I served a copy of the **Return to Motion to Dismiss Appeal** in the above-captioned case on the following individuals by electronic mail using their email address listed in the Attorney Information System, addressed as follows:

Bernie Ellis, Esquire
Burr & Forman LLP
bellis@burr.com



Beth Cogan, Paralegal

February 7, 2025



Ballard & Watson
Attorneys at Law
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M Watson III
Haley Hubbard

226 State Street West Columbia, SC 29169
ph 803.796.9299 | fx 803.796.1066 | desaballard.com

February 7, 2025

Via Email (ctappfilings@sccourts.org)
The Honorable Jenny Abbot Kitchings
Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED

Feb 07 2025

SC Court of Appeals

Re: *Nelson & Galbreath, LLC v. Eric K. Ricardo, et al.*
Appellate Case No.: 2024-002035

Dear Ms. Kitchings:

Enclosed for filing, please find a Return to Motion to Dismiss Appeal and Proof of Service for the above-referenced matter. By copy of this letter and as evidenced by the Proof of Service, this filing has been served upon counsel for the Respondent and is being filed with the Trial Court. If you have any questions, please do not hesitate to contact our office. With warm personal regards, I am,

Sincerely yours,

Haley A. Hubbard

Haley Hubbard
haley@desaballard.com

Enclosures

cc: Via Email
Bernie Ellis, Esquire
America Ahumada