THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY

R. Lawton McIntosh, Circuit Court Judge

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SC Court of Appeals

Circuit Court Civil Action No: 2012-CP-04-00041
Appellate Case No: 2013-001518

Harold P. Threlkeld d/b/a Harold P. Threlkeld, Attorney at Law .....Plaintiff,

v.

Lyman Warehouse, LLC, Lyman Pacific, LLC, Mills Demolition, LLC, Susan C. Stanley, Peter M. Stanley and Donald J. McWhirter.....Defendants

Of Whom Lyman Warehouse, LLC is the .....Appellant,

Of Whom Donald J. McWhirter is the..... Respondent.

INITIAL BRIEF OF RESPONDENT

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ISSUES ON APPEAL

1. Is Appellant entitled to Respondent Don McWhirter's One Hundred Thousand ($100,000.00) Dollars even though Appellant released all claims to it?

2. Did the Circuit Court err in holding that Appellant failed to prove its damages?

STATEMENT OF THE CASE

This is an appeal from the Circuit Court's judgment after a bench trial on March 6, 2013. On January 4, 2012, Thelkeld brought this interpleader action to determine the parties' respective rights to $100,000.00.[1] Lyman Warehouse, LLC answered the complaint asserting it was entitled to the monies. **ROA____.** Donald McWhirter ("McWhirter") through his Amended Answer and Cross Claim asserted he was entitled to the monies. **ROA _____.** Lyman Pacific, Susan Stanley, Peter Stanley, and Mills Demolition asserted they had an interest in the monies. **ROA ____.** The matter proceeded to a bench trial and the Trial Court ordered that McWhirter's money be returned to McWhirter.

STATEMENT OF THE FACTS

This controversy involves the proposed purchase of 22 +/- acres of land in Lyman, South Carolina ("the Property"). **ROA___ DLW Exhibit 1.** Initially, Peter Stanley (and his company Lyman Pacific LLC), Don McWhirter, and Elliott Edwards sought to purchase the Property from Lyman Warehouse for demolition and reclamation of steel. **ROA ___ Tr. 74 ll 9-17; 75 ll 10-17.**

On April 7, 2011, Pacific and Lyman Warehouse entered into a contract. Defendant Lyman Warehouse **ROA___ DLW Exhibit 1.** The contract was signed at a

[1] Plaintiff Threlkeld is an attorney who represented Lyman Warehouse and its manager Richard Bennett for a long time. **ROA __. Tr. 4 ll 8-15.**

meeting at Stax's Restaurant in Greenville, SC. See **ROA___ Tr. 75 II 19-22.** Present at the meeting were Peter Stanley, Richard Bennett, Elliott Edwards and Don McWhirter. **ROA ___ Tr. 75 II 19-22.**

The closing date on the contract was May 7, 2011. The contract set forth a purchase price of $1.3 million with $100,000.00 placed in trust. McWhirter individually wrote a check for $100,000.00 to satisfy the earnest money provision of the contract. **ROA___ DLW Exhibit 2**. Paragraph 15 of the contract states in pertinent part:

> REMEDIES FOR BREACH: In the event of default or breach of this Agreement on behalf of Purchaser, Seller's remedy against Purchaser shall be limited to receipt of all monies paid by Purchaser. In other words, if Purchaser does not pay any or all of subsequent payments mentioned in paragraph four (4) then seller's sole remedy for breach against Purchaser shall be limited to all monies paid by the Purchaser thru the date of default.

On May 3, 2011, Stanley, on behalf of Pacific, requested that Bennett and Warehouse move the closing seven days from May 7, 2011 to May 14, 2011. Bennett refused. **ROA___ DLW 4.**

On May 4, 2011, unbeknownst to McWhirter, Stanley and Bennett entered into a second contract for the sale of the Property and set the closing for May 14, 2011. The contract was between Mills Demolition, LLC (another Stanley company) and Lyman Warehouse. The sales price is the same as the Lyman Pacific contract and a deposit of earnest money in the amount of $50,000.00 was placed into the account of Harold Threlkeld. **ROA___ DLW 9.**[2]

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[2] On the closing day of May 7, 2011, Stanley sent a self serving letter to Appellant Lyman Warehouse that McWhirter's escrowed money should be turned over to Lyman Warehouse. **ROA___ DLW 6.**

The contract did not close on May 7, 2011. A dispute arose as to who was entitled to the One Hundred Thousand ($100,000.00) Dollars. See **ROA___ DLW 7 and 8.** Threlkeld exchanged correspondence with representatives of Lyman Pacific and McWhirter outlining the dispute. See **ROA___ DLW 7 and 8.** Threlkeld also had conversations with individuals about claims being made to the $100,000.00. **See ROA ___, TR. 26 II 3-9; TR. 27 13-19.**

On May 27, 2011, an Agreement for Rescission of Contract and Full and Final Release ("Release") was reached between Lyman Warehouse, Mills Demolition, Lyman Pacific, Bennett, and the Stanleys. See **ROA___ DLW Exhibit 5.** The Release was drafted by the counsel for Lyman Warehouse on behalf of his client with the knowledge that McWhirter had a claim to the money in escrow. See **ROA___ DLW Exhibit 7; ROA ___ Tr. 38-39 II 22-7.** The Release states in pertinent part that Lyman Warehouse:

> [F]orever discharge Lyman Pacific, Mills, Peter and Susan from all of the Claims, both past and present, including but limited to all claims, demands, actions, and causes of action including without restricting the foregoing generality, any and all claims for damages, liquidated damages, exemplary damages, punitive damages, incidental, special, indirect or consequential damages, damages and all losses of money and economic opportunity and for mental anguish or emotional distress, damages for loss of reputation damages for fraud, civil conspiracy, interference with contractual relations . . .
>
> It being the specific intent of the releasing Parties to fully release the Parties herein released of and from any Claims or right of the releasing Party to claim or to make any of the Claims against the Parties herein released for any losses or damages the releasing Party may have sustained or may hereafter sustain, known or unknown, **arising out of the Circumstances or arising out of any other transaction** or relationship between or among the releasing Party and the Parties herein released and all incidents and consequences thereof.

See ROA___ DLW Exhibit 5 at p. 5-6 **emphasis** added. Lyman Warehouse received $27,500.00 in exchange for the release.

On June 3, 2011, Lyman Warehouse sold the rights to demolish the property for $1,475,000.00 to Hook Construction. See **ROA___ DM Exhibit 12.**

The main question before this Court is who is entitled to the $100,000.00 sitting in Attorney Threlkeld's trust account. The evidence at trial was clear, Lyman Warehouse released its rights to Don McWhirter's $100,000.00. Furthermore, the evidence at trial was clear, Lyman Warehouse did not suffer any damages by selling the Property for $1,475,000.00; which is greater than the Lyman Warehouse and Lyman Pacific contract of $1,300,000.00.

ARGUMENT: APPELLANT DOES NOT HAVE A LEGAL OR EQUITABLE INTEREST IN RESPONDENT MCWHIRTER'S MONEY

The Trial Court got it right; (a) Appellant has no right to Respondent's monies because Appellant released its claims to Respondent's monies; (b) Assuming *arguendo* that Appellant did not release its claim to the $100,000, Appellant failed to provide any competent evidence that it incurred any damages that would justify receipt of $100,000; (c) Appellant would be unjustly enriched if it received the $100,000; and (d) Respondent has standing to claim his $100,000.

A. Appellant released its rights to the $100,000.00

On April 7, 2011, Respondent tendered $100,000.00 to be placed into the escrow account of Mr. Threlkeld. By law, the $100,000 in Mr. Threlkeld' s escrow account does not belong to Mr. Threlkeld. See Rule 1.15, RPC, SCACR Rule 407 and Moore v.

Weinberg, 373 S.C. 209, 225, 644 S.E.2d 740, 748 (Ct. App. 2007). See **ROA ___ Tr. 47 II 3-10**. At no time did the money leave Mr. Threlkeld's escrow account.[3]

Appellant has only one legal ground to claim the $100,000: Appellant's contractual rights under the April 7, 2011 agreement. See **ROA ___ TR. 47 II. 11-14**. The April 7, 2011 agreement called for a May 7, 2011 closing date and no closing occurred.

On May 27, 2011, Lyman Warehouse, Lyman Pacific, Mills Demolition, Richard Bennett, Peter Stanley, and Susan Stanley (the Parties) entered into full and final Release. See **ROA___ DLW Exhibit 5**. The release states in pertinent part:

> [F]orever discharge Lyman Pacific, Mills, Peter and Susan from all of the Claims, both past and present, including but limited to all claims, demands, actions, and causes of action including without restricting the foregoing generality, any and all claims for damages, **liquidated damages**, exemplary damages, punitive damages, incidental, special, indirect or consequential damages, damages and all losses of money and economic opportunity and for mental anguish or emotional distress, damages for loss of reputation damages for fraud, civil conspiracy, interference with contractual relations . . .
>
> It being the specific intent of the releasing Parties to fully release the Parties herein released of and from any Claims or right of the releasing Party to claim or to make any of the Claims against the Parties herein released for any losses or damages the releasing Party may have sustained or may hereafter sustain, known or unknown, **arising out of the Circumstances or arising out of any other transaction** or relationship between or among the releasing Party and the Parties herein released and all incidents and consequences thereof.

See ROA___ DLW Exhibit 5 at p. 5-6 **emphasis** added. In addition to addressing the May 4, 2011 contract, the release affects any claim for damages arising out of any other

[3] A trial judge's findings of fact for issues of law tried without a jury are not disturbed unless found to be without evidence which reasonably supports a judge's findings. Chapman v. Allstate Ins. Co. 263 S.C. 656, 211 S.E.2d 876 (1975).

transaction or relationship between or among the parties. This language is inclusive of the April 7, 2011 contract.

In South Carolina, when the terms of a Release are clear and unambiguous, they are enforced by their terms. Bowers v. Dept. of Transp., 360 S.C. 149, 156, 600 S.E.2d 543, 546 (Ct. App. 2004) ("In construing [a] release, the court must seek to ascertain and give effect to the intention of the parties."). Gardner v. City of Columbia Police Dep't, 216 S.C. 219, 223, 57 S.E.2d 308, 309 (1950); The Wilson Group, Inc. v. Quorum Health Resources, Inc., 880 F.Supp. 416, 425 (D.S.C.1995). S. Glass & Plastics Co. v. Duke, 367 S.C. 421, 428, 626 S.E.2d 19, 22-23 (Ct. App. 2005) (A release is a contract, and the scope of a release is gathered by its terms). Here, the release itself reveals the parties' intent: "It being the specific intent of the releasing Parties ..."

Lyman Warehouse released all claims to the earnest money in exchange for $27,500. **See ROA___ DLW Exhibit 5** pp. 4-6. Furthermore, to the extent that Lyman Warehouse sought McWhirter's $100,000, Lyman Warehouse failed to include any reference to the $100,000 in the release. Lyman Warehouse, Lyman Pacific, Mills Demolition, Peter and Susan Stanley all released their claims to McWhirter's $100,000. **ROA ___ Tr. 145 ll2 – p 146 ll1; ROA ___ DLW Exhibit 5.** The only party that did not release its claims to the $100,000 is Don McWhirter **ROA ___ Tr. 147 ll 6-10**. [4]

[4] Appellant contends that Appellant did not release McWhirter from the $100,000. See Appellant Brief at ___. (Initial Brief at pages 26-27). Appellant misapprehends the Trial Court's Order. The Trial Court held that when Lyman Warehouse released Lyman Pacific for breach of the April 7, 2011 contract, Lyman Warehouse released any rights to the disputed $100,000.

B. Lyman Warehouse failed to prove damages

Even if the Release did not end this matter, McWhirter would still be entitled to the interpleaded funds as Lyman Warehouse has failed to prove any damages from the default of the April 7, 2011 contract. Generally, the construction of a contract is a question of law for the court. Soil Remediation Co. v. Nu-Way Envtl., Inc., 325 S.C. 231, 234, 482 S.E.2d 554, 555 (1997). If the language employed by the agreement is plain and unambiguous, the contract should be enforced by its terms. First-Citizens Bank Trust Co. v. Conway Nat'l Bank, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct.App.1984).

The April 7, 2011 contract provides the following remedy for Lyman Warehouse if Pacific does not close:

> Remedies For Breach: In the event of default or breach of this Agreement on behalf of Purchaser, Seller's remedy against Purchaser shall be limited to receipt of all monies paid by Purchaser. In other words, if Purchaser does not pay any or all of subsequent payments mentions in paragraph four (4) then Seller's sole remedy for breach against Purchaser shall be limited to all monies paid by the Purchaser thru the date of default.

By its plain terms, the April 7, 2011 contract requires Lyman Warehouse to prove its damages from the Seller's default for up to the amount of monies paid prior to the default. The monies paid prior to default are the $100,000.

At trial, Lyman Warehouse failed to present competent evidence of any damages from Lyman Pacific's default. Lyman Warehouse did not enter any checks or costs that it incurred as a result of its contract with Lyman Pacific. Rather, the only evidence presented was that Lyman Warehouse entered into two other contracts that financially benefitted Lyman Warehouse, a May 4, 2011 contract with Mills Demolition and a June 6, 2011 contract with Hooks. The May 4, 2011 Mills contract has the identical damages

clause as the Lyman Pacific contract. Compare **ROA __ DLW Exhibit 1 paragraph 15** to **ROA ____ DLW Exhibit 9 paragraph (14).** The Mills contract called for $50,000 in earnest money compared to the $100,000 in earnest money in the Lyman Pacific contract. Lyman Warehouse settled its claims against Mills and Lyman Pacific for $27,500. **ROA ___ DLW Exhibit 5 at paragraph 5.2.**

The June 6, 2011 contract closed for more money than the April 7, 2011 contract. See **ROA ___ DM Exhibit 12 at paragraph 2.** As a result, Lyman Warehouse has failed to prove any damages from the default.

C. Appellant would be unjustly enriched if it received the $100,000

Unjust enrichment (quantum meruit) requires a showing that a benefit was conferred upon the defendant by the plaintiff, realization of the benefit by the defendant, and retention by the defendant of the benefit under circumstances that make it unjust for the defendant to retain the benefit. JASDIP Properties SC, LLC v. Estate of Richardson, 395 S.C. 633, 640, 720 S.E.2d 485, 488 (Ct. App. 2011).

As a result of the release and its improved financial position from the May 4, 2011 Mills contract and June 3, 2011 Hook contract, Lyman Warehouse has no legal or equitable claim to the monies. It would be unjustly enriched if were to obtain the $100,000. As a result, the money should be returned to its rightrful owner, Respondent McWhirter.

D. Appellant's Argument on Standing is without Merit

Finally, Appellant's argument that Respondent did not have standing based on the contract is incorrect and confuses two different legal theories, contract law and equitable law. The Trial Court was correct when it found that Respondent had standing

to assert a claim to Respondent's money because (1) this is an interpleader action; (2) standing is satisfied by Respondent's claim to the monies held in escrow; and (3) Respondent satisfies the elements of unjust enrichment.

This action began as an interpleader action. The historical and still primary purpose of a SCRCP Rule 22 interpleader is to enable a neutral stakeholder, in this case Mr. Thelkeld, to shield himself from liability for paying over the stake to the wrong party; this is done by forcing all the claimants to litigate their claims in a single action brought by the stakeholder. First Union Nat. Bank of South Carolina v. FCVS Communications 321 S.C. 496, 469 S.E.2d 613 (Ct. App. 1996), rehearing denied, certiorari granted, reversed in part 328 S.C. 290, 494 S.E.2d 429. Mr. Threlkeld believed that Respondent might assert a claim to the monies in his possession. Mr. Threlkeld named Respondent to the suit based on this fear. **ROA ____. Tr. 47 ll 19-24.** McWhirter was rightfully brought into the interpleader action.

Once in the action, Respondent had standing to assert his claims to the stake. To have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest. Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 519 S.E.2d 567 (1999). "A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action. Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S. Carolina Dep't of Natural Res., 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). Respondent had a personal stake in the monies involved in the action because it was Respondent's personal check that was

deposited in Mr. Threlkeld's trust account that made up the stake. Hence, Respondent has a substantial interest in the action.

Finally, Respondent has standing to bring a claim of unjust enrichment. The essential elements of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by defendant of the benefit under conditions that make it inequitable for him to retain it without paying its value. Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 474, 366 S.E.2d 12, 15 (Ct. App. 1988). Here there is ample evidence that Appellant would be unjustly enriched by Respondent's monies.

CONCLUSION

The Trial Court heard the witnesses, reviewed the evidence and got it right. Respondent McWhirter is entitled to his money. The Trial Court judgment, respectfully should be affirmed.

Respectfully submitted,

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