

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
R. Lawton McIntosh, Circuit Court Judge

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

Harold P. Threlkeld d/b/a Harold P. Threlkeld,
Attorney at LawPlaintiff,

v.

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

Of Whom Lyman Warehouse, LLC is theAppellant,

Of Whom Donald J. McWhirter is theRespondent,

REPLY BRIEF OF APPELLANT

Peter D. Protopapas
RIKARD & PROTOPAPAS, LLC
pdp@rplegalgroup.com
1329 Blanding Street
Post Office Box 5640 (29250)
Columbia, South Carolina 29201
(803) 978-6111
Attorneys for Respondent, McWhirter

J. Calhoun Pruitt, Jr.
PRUITT & PRUITT
101 North Murray Avenue
Anderson, South Carolina 29625
(864) 224-3121
Attorneys for Appellant

J. Christopher Pracht
THOMASON & PRACHT
P.O. Box 4025
Anderson, South Carolina 29622
(864) 226-7222
Attorneys for Respondent, McWhirter

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ARGUMENT IN REPLY

APPELLANT IS THE ONLY PARTY WITH A VALID CLAIM TO THE ESCROWED FUNDS, THE ONLY REMAINING PARTY WITH STANDING TO ENFORCE THE TERMS OF THE CONTRACT, AND THE ONLY PARTY FINANCIALLY DAMAGED THROUGH NO FAULT OF ITS OWN.

This case concerns entitlement to funds placed in escrow under the terms of a breached contract with a specified remedy. The crux of Respondent's argument lies in repetitious assertions that this case somehow involves competing claims to "McWhirter's Money." That characterization is legally and factually erroneous. Rather, and for the reasons that follow, ownership of the escrowed funds is governed by the contract that initially called for the funds to be placed in escrow.

First, the Appellant is the only remaining party with standing to claim the escrowed funds and the Respondent fails to appreciate the nature of the standing issues in this case. Second, and despite the fact that Appellant was not required to prove damages under the terms of the contract, there is ample evidence of damages flowing from the Buyer's breach of contract. Next, the Appellant never released its claim to the escrowed funds, is contractually entitled to the escrowed funds, and all other parties to the contract have released any claims thereto. Finally, in light of the terms of the contract and ample proof of damages, the Respondent's unjust enrichment claim is fatally flawed.

Accordingly, the decision below should be reversed to the extent that Court determined Respondent was entitled to the disputed funds.

A. Appellant Remains the Only Party with Standing to Assert a Claim to Escrowed Funds Notwithstanding Respondent's Misapprehension of the Standing Issues in this Case

Respondent McWhirter was not a party to the underlying contract in this case. ROA ____ DLW Exhibit 1. Similarly, he was not a party to a release that followed

breach of two separate contracts. ROA ____ DLW Exhibit 5.¹ In order to recover the escrowed monies under ANY theory, Respondent is necessarily seeking to enforce the terms of one or both contracts.² As he was not a party to either contract, he lacks standing to seek enforce either and is thus unable to establish entitlement to the escrowed funds. *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 553-54, 581 S.E.2d 858, 861 (2003) (“an individual who is not a party to a contract lacks privity to enforce it.”)

First, the Trial Court correctly concluded that Respondent was not a party to the May 7 contract. See ROA ____ Order at 4-5. The Court below also concluded that Appellant’s entitlement to the escrowed funds was a question of its rights under the contract. ROA ____ Order at 6. However, the Court below then failed to apply that same logic to recovery by the Respondent. In this, the Court erred. To wit, any entitlement to the escrowed funds was contract based. The funds were placed in escrow under the terms of a contract and necessarily belonged to one of the contracting parties.³

¹ As detailed below, the release involved parties to two separate contracts. However, by its terms, the release covered only the “Contract” and “Circumstances” of the second contract. ROA ____ DLW Exhibit 5.

² As covered in greater detail below, Respondent relies on enforcement of one or both contracts under each of his theories of recovery. Respondent argues that there was no proof of damages following breach as he erroneously suggests should have been required under the contract. Respondent was not a party to the contract and lacks standing to enforce its terms. Similarly, Respondent erroneously argues that Appellant released any claim to the escrowed funds by virtue of the executed release. Again, Respondent was not a party to the Release Agreement and lacks standing to seek enforcement. Finally, in attempting to prove unjust enrichment, Respondent is again forced to argue either a) lack of damages makes retention unjust or b) previous payments under the terms of a separate release make receipt of additional funds unjust.

³ The Trial Court’s reliance on *Moore v. Weinberg*, 373 S.C. 209, 225, 644 S.E.2d 740, 748 (Ct.App. 2007) is correct to the extent that case clarifies obligations regarding funds held in attorney trust accounts. It is undisputed that Plaintiff, Mr. Threlkeld, did not own the funds at issue here. In *Moore*, Defendant Attorney Weinberg improperly dispersed funds despite a proper assignment of the right to those funds. *Id.* In this case, there was no assignment to rights under the contract. Furthermore, the Trial Court correctly concluded that Respondent was not a third-party beneficiary under the contract. ROA ____ Order at 4-5. Accordingly, *Moore* is inapplicable to the present facts beyond the undisputed conclusion that the escrowed funds did not belong to Plaintiff and is of no assistance in bolstering the unsupported conclusion that followed: that Respondent’s claim to the funds could be other than contract based. *Moore*, 373 S.C. at 225.

Accordingly, Respondent lacks standing to assert his claim as he was not a party to the contract.

Next, Respondent lacks standing to complain regarding the asserted lack of proof as to damages. *Gilbert v. Miller*, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct.App. 2003).⁴ As discussed in further detail below, there is no contractual language requiring proof of damages in order for the Appellant to claim the escrowed funds. However, as he was not a party to the contract, Respondent cannot now assert entitlement to the disputed funds for want of proof he is ill-positioned to demand.

Finally here, absent standing to demand proof of damages or enforce the terms of an inapplicable release, Respondent cannot prove unjust enrichment. As discussed more fully below, in arguing that Appellant would be unjustly enriched by receipt of the escrowed funds, Respondent reiterates arguments regarding contract damages and the effect of the release. Respondent cites several authorities for the proposition that he has standing to prove his claim to the stake here, but none that support the contention that an unjust enrichment claim serves to enlarge his authority to rely on contracts to which he is not a party to prove his claim.⁵

⁴ See also *Bob Hammond Const. Co. v. Banks Const. Co.*, 312 S.C. 422, 440 S.E.2d 890 (Ct.App.1994) (stating a third person not in privity of contract with the contracting parties generally may not enforce the provisions of a contract unless it is entered into for the benefit of the third person)

⁵ See, e.g., *Charleston County School Dist. v. Charleston County Election Commission*, 336 S.C. 174, 519 S.E.2d 567 (1999) (standing requires that party asserting claim be real party in interest); *Sea Pines Association for Protection Wildlife, Inc. v. SC Dept. of Natural Resources*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) (requiring “real, material, or substantial interest” in the subject matter of the action). Neither cited case, both relied on by Respondent, stands for the proposition that general standing to assert a claim alters the otherwise applicable limitation on non-parties to seek enforcement of the terms of a contract. Respondent fails to explain how, once in the action and assuming he has standing, he may proceed to enforcing contractual terms absent privity.

B. Appellant Provided Ample Evidence of Damages Despite Having No Contractual Obligation to Prove Damages

There is substantial evidence in the record relative to Appellant's Damages. Furthermore, the uncontradicted testimony of the contracting parties reflects their understanding that the escrowed funds would be forfeited to the Seller in the event of breach as liquidated damages. ROA ____ Bennett 123: 2-24 and ROA ____ Stanley Deposition at 54:8-22, 56:3-11. Finally, Respondent lacks standing to demand proof of damages under the contract.

Under the terms of the April 7, 2011 contract, the parties agreed to limit damages to "receipt of all monies paid by purchaser." ROA _____ DLW Exhibit 1 ¶15. That language suggests a specific remedy rather than a general cap subject to subsequent proof, as urged by the Respondent. Indeed, forfeit of the escrowed funds as liquidated damages is the only reading of the key language that makes sense. Specifically, by limiting the remedy in the event of breach to "receipt" of monies paid through default, the parties could only have intended to direct release of the escrowed funds to Seller following breach.⁶ Furthermore, both parties to the contract testified as to their understanding that the deposit would be forfeited as liquidated damages in the event of

⁶ The full text of the key paragraph provides

"(15) 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" ROA _____ DLW Exhibit 1.

Respondent's reference to the clarification sentence is unavailing. First, the clarification does not alter the preceding language specifying the appropriate remedy: i.e. receipt of funds paid. Next, the clarifying language itself suggests that the only remedy shall be "all" monies paid. Required receipt of all monies paid leaves no room for doubt concerning proof of damages up to that amount. Finally, Respondent's urged interpretation reads language into the contract that quite simply is not there. The parties did not agree that the Seller would be entitled to damages up to a specified amount, nor did they employ language requiring any particularized proof after breach in order to make the receipt of damages language operable. Rather, the parties specified that all monies paid up thru breach would be forfeited to the seller.

breach.⁷ Accordingly, the Court below erred in holding that Appellant was required to prove damages.

Even assuming, *arguendo*, that the Appellant was required to prove damages, there is substantial evidence of damages in the record. There were two subsequent contracts related to the sale of portions of the same property as the contract at issue here. The first, between Appellant Lyman Warehouse and Mills Demolition dated May 4, 2011 failed to close. The second, between Appellant Lyman Warehouse and Hooks Construction dated June 6, 2011, closed on terms less favorable to the Appellant. While the specified purchase price in the June 6th contract was higher than the price in the April 7th contract, Appellant was only able to sell the valuable portions of the property and was forced to retain the environmental liability associated with the ground itself and ongoing financial responsibility for taxes and other expenses incident to continued ownership. Based on the record, the question is not whether Mr. Bennett and Appellant suffered any damages, but the amount by which his actual damages exceeded the available damages under the terms of the contract.⁸

⁷ See ROA _____, Bennett testimony at 123:2-24 (explaining that deposit would be sole remedy without required proof of damages). See also ROA _____, Stanly deposition at 54:8-22 and 56:3-11 (answering that deposit would be liquidated damages as in all of his previous real estate contracts calling for earnest money). See also Black's Law Dictionary 584 (9th ed.2009) (defining earnest money as "[a] deposit paid (often in escrow) by a prospective buyer (especially of real estate) to show a good-faith intention to complete the transaction, and ordinarily forfeited if the buyer defaults.")

⁸ By way of illustration, assume that the parties had contracted for the sale of a business. Further assume that the contract called for the purchase of the entire business, including all assets and liabilities. If, following breach of our hypothetical contract, the Seller then contracted to sell the assets of the business while retaining all liabilities, one could hardly argue a better deal had been struck even where the subsequent contract had slightly higher consideration. Yet that is precisely the situation here. With breach of the April 7th contract near certain, Appellant entered a back-up contract. With breach of the first back-up contract similarly imminent, Appellant then struck another deal under different terms. Under the terms of the contract that ultimately closed, the June 6th contract with Hook Construction, Appellant sold the valuable portions of the property while retaining substantial liabilities akin to having entered into an asset purchase agreement rather than a straightforward sale of the property as originally envisioned.

Finally, for the reasons previously stated, Respondent lacks standing to demand proof of damages under the contract. He was not a party to the contract and cannot now assert his view as to proper interpretation or required proof of damages following breach.⁹

C. Appellant Never Released its Claim to the Escrowed Funds While the Only Other Party to the Controlling Contract Released its Claim

Following breach of two separate contracts, and in anticipation of possible litigation, the parties to both contracts entered into an “Agreement for Rescission of Contract and Full and Final Release”. ROA _____ DLW Exhibit 5. The Court below erroneously found that said release relates to the escrowed funds at issue here. That conclusion is unsupported by either the language of the release or the conduct of the parties preceding that agreement. Furthermore, Respondent again lacks standing avail himself of the contractual benefits of an agreement to which he is not a party.

The parties to two separate contracts entered into the release at issue. However, the language of the release limited its operation to the parties to the release and to the May 4, 2011 Contract between Lyman Warehouse and Mills Demolition. ROA _____. Defendant’s Exhibit DLW-5 at ¶1.6 (“Contract” defined as May 4, 2011 Agreement) and ¶1.3 (“Circumstances” referencing background of the May 4, 2011 contract with no mention of the April 7th contract). The terms of the release divided the escrowed funds deposited under the May 4 contract between the parties to that contract. Simply put, the release cannot be read to effectuate release of any claim to the funds at issue here given the dearth of language to that effect.¹⁰

⁹ *Gilbert*, 356 S.C. at 30.

¹⁰ The Court below erroneously interpreted language in the release to apply to claims beyond the scope of the May 4th contract. See ROA _____ Order at 6-7. That interpretation is flawed for three reasons. First,

Furthermore, there was no need to address the funds at issue here under the terms of the release. The Buyer in the April 7th contract, Lyman Pacific, had already released any claim to the funds at issue in this case through letters dated April 30th and May 7th. ROA _____ Def. Exhibits DLW 3 and DLW 6. As a result, when the release was negotiated and signed there was no need to address the escrowed funds from the April 7th contract as by that time Appellant was the only remaining party to that agreement with a claim to the funds.

Finally, as previously addressed, Respondent lacks standing to seek enforcement of the terms of the release. Respondent was not a party to the release and cannot properly seek to enforce its terms, or more accurately stated seek to enlarge its scope.¹¹

The interpretation adopted below and now urged by Respondent assumes that the parties to the release gathered for the august purpose of conferring Respondent's right to claim contractually allocated funds when he failed to protect his own interests. Such an

the definitions and limitations recited earlier in the release carry over to the language quoted in the Order below and indeed the cited language refers back to "Claims." See ROA ____ Order at 6-7 quoting DLW Exhibit 5. The capitalization is highly relevant to proper interpretation. As noted at the heading of section I of the release, capitalized terms shall have the definition ascribed. ROA ____ DLW Exhibit 5. The particularized definition of "Claims" relates back to the definitions of both "Circumstances" and "Contract" both of which are intentionally limited to the May 4th contract. Accordingly, the general language of the release is still limited to "Claims" as used in the release and limited by the other definitions pertaining to said release. Second, by its very terms the release only related to "Claims" against the parties released. By that time, Appellant had no need to make a claim against any of the parties to the release in order to receive the escrowed funds from the April 7th contract for the reasons discussed above. Finally, the Court below erred in relying on *Bowers v. Dept. of Transp.* 360 S.C. 149, 156, 600 S.E.2d 543, 546 (Ct.App. 2004). While correct that "[i]n construing [a] release, the court must seek to ascertain and give effect to the intention of the parties," the Trial Judge failed to note and apply a subsequent distinction of *Bowers* on facts directly applicable here. *Id.* In *Ecclesiastes Prod. Ministries v. Outparcel Assocs.*, 374 S.C. 483, 649 S.E.2d 494 (Ct.App. 2007), that Court noted that in construing the release at issue in that case, there was no language releasing the entire world only the parties to the release. The distinction applies with equal force to the facts of this case. Appellant never released any claim to the escrowed funds despite the possibility of a claim from Respondent, nor was Respondent released. Applying *Ecclesiastes* to the facts of this case, it is clear that the parties to the release did not intend to release anyone not a party to the release.

Id.

¹¹ *Gilbert*, 356 S.C. at 30

interpretation of the release, and the underlying facts, is at odds with the literal language of the release and common sense.

D. Appellant's Contractual Right to Escrowed Funds and Evidence of Substantial Damages are Fatal to Respondent's Unjust Enrichment Claim

In light of the ample proof of damages and Appellant's contractual right to the escrowed funds, Respondent's unjust enrichment claim fails as a matter of law. First, Respondent would have the Court erroneously conclude that retention of liquidated damages in a manner customary to real estate contracts is somehow unjust. Second, any claim to unjust enrichment requires evaluation of the substantial damages suffered by the Appellant. Next, Respondent is not entitled to equitable relief given the availability of an adequate remedy at law. Finally, Respondent lacks the standing required to prove his unjust enrichment claim.

First, as discussed above, the escrowed funds here were intended as standard liquidated damages originating as earnest money to secure a real estate contract. ROA _____, Stanley Deposition 56:3-11. The purpose of placing the funds in escrow, as is standard in real estate transactions, was to "seal to deal." Unfortunately for the Respondent, he agreed to provide the earnest money for a contract without solidifying his role in the Buyer LLC. However, Respondent's failure to act with the prudence suggested by the circumstances does not operate to transform liquidated damages into unjust enrichment.

Next, unjust enrichment would necessarily require that receipt of the escrowed funds by the Appellant would be inequitable. *Ellis v. Smith Grading & Paving, Inc.* 294 S.C. 470, 474, 366 S.E.2d 12, 15 (Ct.App. 1988) (explaining that unjust enrichment

requires, *inter alia*, retention of a benefit under inequitable conditions). In light of the previous discussion of substantial damages suffered by the Appellant, how can it now be inequitable to retain contractually entitled damages? Here, the question suggests the answer. It cannot be inequitable to receive contractually limited damages where proven damages exceed the amount proposed for receipt.¹²

Respondent's unjust enrichment claimed is also flawed in that he has an adequate remedy at law. *Barret v. Miller*, 283 S.C. 262, 321 S.E.2d 198 (1984) (equitable remedies unavailable where there is an adequate remedy at law). Here Respondent could pursue claims against Lyman Pacific, Peter Stanley, and perhaps others. Failure to pursue legal remedies does not afford Respondent the ability to seek equitable remedies.

Finally, Respondent does not have standing to pursue his unjust enrichment claim. In order to prove that Appellant would be unjustly enriched, Respondent is necessarily relying on enforcement of contracts to which he is not a party. While he may be unhappy with the terms of those agreements, he cannot argue for his preferred interpretation given his lack of standing to do so. Respondent's contentions regarding standing to pursue equitable versus legal remedies are unavailing and against the weight of authority.¹³ Assuming Respondent's standing to lay claim to the escrowed funds, he still lacks standing to enforce contractual obligations to which he is not a party. His inability to do

¹² Indeed, no matter the outcome of this case Appellant will not be "enriched." Damages following breach left Appellant far worse-off than he would have been had the contracting parties performed as required, and resolution of this case will ultimately only determine whether Appellant is closer to being as well off as he would have been in the absence of breach. Accordingly, arguments that the Appellant would be unjustly enriched are untenable as either way Appellant will not be enriched, let alone in a manner that would be inequitable.

¹³ See, e.g., *Shasta Beverages v. South Carolina Tax Commission*, 280 S.C. 48, 55, 310 S.E.2d 655, 659 (1983) (doubting, in dicta, third-party ability to invoke unjust enrichment), citing *United States Rubber Products v. Town of Batesburg*, 183 S.C. 49, 55, 190 S.E. 120, 123-24 (1937); 66 Am.Jur.2d. Restitution and Implied Contracts, §4.

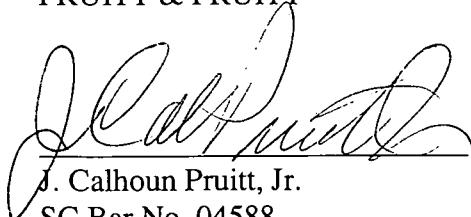
so prevents proper proof that receipt of the escrowed funds would be unjust and is fatal to his claim.

CONCLUSION

The Appellant is contractually entitled to the escrowed funds at issue in this case. Respondent now claims he is owed \$100,000 lost in hasty efforts to help consummate what could have been a lucrative deal. However, Respondent's poor planning ought not invite judicial intervention to correct his error. To the extent Respondent is entitled to any relief, he should direct his claims towards the appropriate parties. The Order below should be REVERSED in so far as the Trial Court determined Respondent was entitled to any of the escrowed funds.

Respectfully Submitted,

PRUITT & PRUITT



J. Calhoun Pruitt, Jr.
SC Bar No. 04588
101 North Murray Avenue
Anderson, South Carolina 29625
(864) 224-3121
Attorney for Appellant

May 16, 2014