THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

Steven H. John, Circuit Court Judge

Appellate Case No. 2012-208586
Lower Court Case No. 2007-CP-23-3206

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S.C. Supreme Court

North American Rescue Products, Inc.,..... Respondent/Petitioner,

v.

P. J. Richardson,..... Petitioner/Respondent.

RESPONDENT/PETITIONER'S REPLY BRIEF

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I. Introduction

The Petitioner-Respondent (Richardson) devotes much of his Brief of Respondent to arguments on his testimony and "evidence" on the meaning of the Termination Agreement, the verdict form and jury's findings thereunder, and the meaning of the trial court's judgment. (Rich. Resp. Br. at 2-11, *passim*; 13-16; 20-21). He even suggests that NARP should have but failed to challenge the jury's verdict by way of a new trial motion. (Rich. Resp. Br. 20). None of this, however, is relevant to the issue presented in NARP's appeal, *i.e.*, whether the Termination Agreement is ambiguous on its face, which it is not.

Richardson correctly cites the general standard of review for directed verdict motions and then accuses NARP of ignoring this standard of review. (Rich. Resp. Br. 11; 12-13). Richardson, however, is the one that ignores the proper standard of review. NARP's appeal is premised upon the question of whether the Termination Agreement is ambiguous on its face. It is axiomatic that this issue is a question of law subject to *de novo* review by this Court. Richardson's testimony on the meaning of the Termination Agreement and the jury's findings on the verdict form are simply irrelevant to this question of law. (See Rich. Resp. Br. 12-13).

To support his argument on these irrelevant issues, Richardson cites several cases for the general proposition that the meaning of a contract can be determined by reference to other written agreements signed and entered by the same parties around the same time and dealing with the same subject matter. (Rich. Resp. Br. 14-15; 18). Those cases, however, are irrelevant and inapplicable to this case, because there is no other written agreement entered into and signed by the parties at any time.

The same is true of Richardson's reliance on cases for the general proposition that evidence can be introduced to show a contemporaneous and independent agreement that does not contradict or vary the terms of the agreement at issue. (Rich. Resp. Br. 21). Richardson's entire contract theory depends exclusively on the alleged oral amendments to the 2000 Agreement arising from the Charleston Meeting in July 2004. This alleged agreement was not contemporaneous with Termination Agreement, which the parties entered at Richardson's repeated request in November 2004, four months after the Charleston Meeting. (Appx. 491, 1035). More importantly, this alleged agreement is in direct contradiction to and varies the terms of the Termination Agreement, which expressly and repeatedly terminated and released any aspect of the 2000 Agreement.[1]

II. The Termination Agreement is not ambiguous.

Richardson's only argument on whether the Termination Agreement is ambiguous is that the references to the "Dec 15" option agreement in the Termination Agreement made it capable of more than one construction and therefore created an ambiguity that had to be explained by other evidence. (Rich. Resp. Br. 22; see also *id.* at 6-7, 17-18). He also argues that these references to a "Dec 15" option agreement demonstrate that the Termination Agreement was part of a three-part agreement, that the Termination Agreement was not the entire agreement, and that it was intended to save Richardson's alleged right under the 2000 Agreement as amended in the Charleston Meeting to buy 7.5% of NARP's stock for 7.5% of the proceeds from the sale of RMI's assets. (*Id.*).

[1] Richardson makes a similar argument regarding the merger clause in the Termination Agreement, citing the Court of Appeals' decision in *Lingefelt v. Forest Hills Homes, Inc.*, 406 S.E.2d 394 (S.C. App. 1991). (Rich. Resp. Br. 16-18). There, the Court of Appeals simply stated the general rule that a merger clause does not preclude the enforcement of a contemporaneous oral agreement. Here, there is no evidence of any oral agreement that was entered contemporaneously with the Termination Agreement – indeed, Richardson never argues there was. His entire contract theory depends on alleged oral agreement reached in July 2005, which was not contemporaneous with the November 2005 Termination Agreement.

Richardson simply refuses to read the Termination Agreement. It *plainly* and *only* stated that its release provisions did not did not release the parties from the "Dec 15" option agreement (Appx. 911-912, ¶¶ 3 and 4), and it is uncontested that the parties never entered this agreement or any other agreement after the Termination Agreement. Moreover, nothing in the Termination Agreement makes its provisions, including its termination and release of any and all matters related to the 2000 Agreement, conditional upon the parties entering into the "Dec 15" option or upon any other event. (Appx. 911-913, *passim*). In addition, when Richardson repeatedly asked Castellani to sign the Termination Agreement, he never said its effectiveness was contingent upon any other event, including but not limited to the parties entering into a "Dec 15" option agreement or any other agreement. (Appx. 491; 1035).

Richardson also seems to argue that the Termination Agreement was ambiguous because "Dec 15" was a "future date." (Rich. Resp. Br. 22). Again, the Termination Agreement *plainly* and *only* stated that its provisions did not apply to the "Dec 15" agreement, and nothing in the Termination Agreement made its provisions contingent upon entering this agreement or any other event. At best, this "future date" indicated a possible agreement to agree in the future. Such provisions in a contract are not enforceable, but the remainder of the contract is enforced as written. *Ellis v. Taylor*, 449 S.E.2d 487, 488-489 (S.C. 1994). If Richardson desired that the Termination Agreement be conditional upon the happening upon some event, including but not limited to the execution of the "15 Dec" option agreement or some other agreement, it was his responsibility to place that condition in the Termination Agreement. *Southern Atl. Fin. Servs., Inc. v. Middleton,* 590 S.E.2d 27, 29 (S.C. 2003). Having failed to do so, and having failed to note any such condition

in his repeated requests that Castellani sign the Termination Agreement, he cannot now claim any such condition or any resulting ambiguity.[2]

Richardson argues the Termination Agreement should not be construed against him, because it is not an adhesion contract. (Rich. Resp. Br. 22-23). This rule of construction is not limited to adhesion contracts. Moreover, it is NARP's primary position that the Termination Agreement is not ambiguous – thus, there is no need to construe the agreement. Finally, Richardson never challenges NARP's argument that it was Richardson's duty, as the party now seeking to impose a condition on the effectiveness of the Termination Agreement, and as the party drafting the Termination Agreement, to include a provision in the Termination Agreement making it conditional upon some future event or future contract. He did not, and thus the courts must enforce the Termination Agreement as written. *Middleton,* 590 S.E.2d at 29; *Ellis*, 449 S.E.2d at 488-489.

Finally, Richardson argues that Castellani conceded that the Termination Agreement did not end Richardson's right to acquire 7.5% of NARP's stock. (Rich. Resp. Br. 16). This is simply false. Richardson cites a May 2005 email from Castellani to Richardson. (Appx. 1043). This email never concedes anything about the Termination Agreement – indeed, it never mentions the Termination Agreement. Rather, this email simply represents ongoing negotiations, after the

[2] Richardson complains that NARP did not earlier cited this Court's opinion in *Bardsley v. Government Employees Ins. Co.*, 747 S.E.2d 436 (S.C. 2013),which holds: "[W]hen a court makes a finding of ambiguity, it must set forth either how a provision is capable of more than one meaning or is obscure in meaning. A simple finding of ambiguity, absent any reasoning, is insufficient." *Id.* at 440. (Rich. Resp. Br. 18, 19-20). This Court issued *Bardsley* on August 14, 2013. The Court of Appeals issued its decision on November 9, 2011 and denied rehearing on January 27, 2012. NARP petitioned this Court for certiorari on April 9, 2012. This Court issued its initial memorandum opinion without any further briefing from the parties on March 26, 2014. NARP petitioned this Court for rehearing on April 10, 2014, and cited *Bardsley*, which was the first opportunity for NARP to do so. (NARP's Cert. Pet. at 3). In any event, the controlling question in NARP's appeal is whether the Termination Agreement is ambiguous – NARP has consistently raised and preserved this issue from the directed verdict motion to the trial court, to the appeal before the Court of Appeals, and to the certiorari and rehearing proceedings before this Court. Richardson does not argue otherwise. And contrary to Richardson's argument to this Court, evidence does not create an ambiguity – rather, the ambiguity must appear in the document and then explanatory evidence becomes relevant. (See Rich. Resp. Br. 20). Here, there is no ambiguity in the Termination Agreement.

Termination Agreement, whereby the parties would enter an agreement that would allow Richardson to buy 7.5% of NARP's stock at fair market value. The parties never entered this agreement or any other agreement. Castellani's reference to "my share" (quotes in email) of the sale of RMI's assets was made solely in reference to Castellani having already satisfied the charitable contribution pledges that he had earlier made when he believed the parties would enter an agreement whereby Richardson would make a contribution to a charity of Castellani's choosing and Richardson would then receive an option to purchase 7.5% of NARP's stock or would purchase the stock from the charity. The parties never entered this agreement, because Richardson refused to do so.[3]

In short, there is nothing ambiguous about the Termination Agreement. It plainly terminated and released any and all matters related to the 2000 Agreement. The reference to the "Dec 15" option agreement did not make the Termination Agreement ambiguous – the Agreement simply stated that its release provisions did not apply to the "Dec 15" agreement (a date inserted by Richardson himself). The parties never entered the "Dec 15" agreement or any other agreement after the effective date of the Termination Agreement. Richardson failed to protect his alleged rights by not making the Termination Agreement conditional upon some future event or some future agreement. Thus, this Court "must enforce [the] unambiguous [Termination Agreement] according to its terms regardless of its wisdom or folly, apparent unreasonableness, or [Richardson's] failure to guard [his alleged] rights carefully." *Lee v. University of S.C.*, 757 S.E.2d 394, 397 (S.C. 2014) (citations omitted).

[3] Richardson also cites Castellani's testimony at Appx. 291. Nothing in that testimony, or the surrounding testimony, concedes that the Termination Agreement is not effective. Indeed, this testimony concerns the Atlanta Meeting, which occurred before Richardson drafted the Termination Agreement, signed it, and repeatedly asked Castellani to sign it without imposing any conditions on the effectiveness of the Termination Agreement.

III. There is no evidence of any promissory estoppel after the Termination Agreement.

Richardson argues that his wife's testimony is evidence of promissory estoppel arising after the Termination Agreement. (Rich. Resp. Br. 25). That testimony, however, concerns statements allegedly made by Castellani at the Charleston Meeting, which occurred before the Termination Agreement. (See Appx. 600-601). Richardson also argues that the earlier noted email from Castellani to Richardson and Castellani's testimony is evidence of promissory estoppel after the Termination Agreement. This argument fails for the same reasons that this evidence failed to prove any concession by Castellani that the Termination Agreement did not terminate Richardson's alleged right to buy 7.5% of NARP's stock. (See n.3 and accompanying text, *infra*). The remainder of Richardson's "supporting" citations do not show any promissory estoppel after the Termination Agreement. At most, this evidence shows that the parties continued to negotiate a potential agreement for Richardson to acquire 7.5% of NARP's stock, but the parties never entered any such agreement. Manifestly, failed contract negotiations cannot and do not give rise a promise that would support a claim for promissory estoppel.[4]

CONCLUSION

The Termination Agreement is not ambiguous – neither the trial court nor the Court of Appeals identified any part of the Agreement as being ambiguous. Nothing in the Termination Agreement makes its provisions contingent upon any event, including but not limited to the execution of the "15 Dec" option agreement or any other agreement. The plain language of the Termination Agreement obliterates the 2000 Agreement and anything related to it, including the

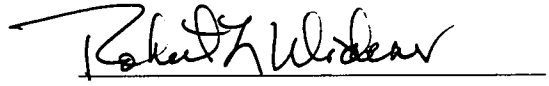
[4] Richardson argues that NARP failed to preserve its appeal of the denial of its directed verdict motion on promissory estoppel because NARP did not make such a motion. (See Rich. Resp. Br. 26, n.1). NARP, however, moved for a directed verdict on promissory estoppel. (Appx. 664-665; see also Appx. 660-661, 683-684). Moreover, Richardson's only promissory estoppel claim at trial was based on statements at the Charleston Meeting, which the Termination Agreement plainly captured and repeatedly extinguished.

agreement allegedly reached in the Charleston Meeting before the parties entered the Termination Agreement. The courts cannot rewrite the Termination Agreement to protect Richardson's alleged right to acquire stock in NARP. That was his obligation as the party who drafted the Termination Agreement, signed it, and then repeatedly requested Castellani to sign it. Rather, the courts must enforce the Termination Agreement as written, regardless of its wisdom or folly, and regardless of Richardson's failure to protect any alleged rights to NARP's stock.

There is no evidence of any contract or promissory estoppel arising after the Termination Agreement. Accordingly, NARP is entitled to a directed verdict on all of Richardson's claims. Reversal of the trial court on this basis moots all issues raised in Richardson's appeal, including the question of whether his appeal is proper. It would also moot and immediately end the other appeal and the other litigation between the parties. (See Rich. Resp. Br. 8-9 at n.1; 12 & n.5).

For all of the foregoing reasons, and for the reasons set forth in NARP's Brief of Petitioner, the appealed judgment should be reversed and the case should be remanded for the entry of judgment in favor of NARP.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Respondent-Petitioner's Reply Brief by depositing a copy in the United States Mail, postage prepaid, on September 2, 2014 addressed to the attorneys of record, as follows:

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