

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

AUG 25 2014

**SC Court of Appeals**

APPEAL FROM YORK COUNTY  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-1673

Yadkin Valley Bank & Trust, ..... Respondent,

v.

Oaktree Homes, Inc.; Dawne M. Ras and  
Thomas C. Ras; Daniel Simpson; Above  
All Services, Inc.; Carter Lumber Company;  
Efficient Painting Contractors, Inc.; Creative  
Concepts; and Solid As A Rock, Inc., ..... Defendants,

Of Which

Oaktree Homes, Inc. is the ..... Appellant.

RETURN TO PETITION FOR REHEARING

This Return is filed pursuant to Rule 240(e) of the South Carolina Appellate Court Rules. Because a return has not been requested by this Court, the Return is not mandatory. The Return is submitted as a precatory filing under the Rule. Appellant served Respondent with a copy of the Petition for Rehearing on August 11, 2014; therefore, this Return is timely filed.

Rule 1008, SCRE, was not argued or raised by Appellant in the trial court. Appellant

did not brief the issue in the trial court, nor did Appellant argue Rule 1008 at summary judgment. The trial court did not enter a decision on Rule 1008. Appellant made no Rule 59(e) motion. Under South Carolina law, an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Rule 1008 was not preserved by Appellant for appellate review and, therefore, cannot be raised for the first time now.

Even if it had been, Rule 1008 is “identical to the federal rule”. (Rule 1008, SCRE, Note.) The Notes of Advisory Committee on Proposed Rules state, “The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations.” (Fed. R. Evid. 1008, Notes of Advisory Committee on Proposed Rules.) The Notes then cite to Fed. R. Evid. 104(b) (identical to the corresponding South Carolina Rule), which grants *the court* control over what evidence is admissible. Rule 104(b) requires evidence that is “sufficient to support a finding that the fact does exist.”

In determining whether evidence exists, the same standard applicable at trial (clear and convincing evidence) is applicable at summary judgment. *See George v. Fabri*, 345 S.C. 440, 453, 548 S.E.2d 868, 875 (2001) (“Rule 56(c) requires that summary judgment be granted where there is no *genuine issue* of *material* fact and the moving party is entitled to judgment *as a matter of law*. In our opinion, the trial court would only be able to make this evaluation if it considered the substantive evidentiary standard applicable at a trial on the merits.”) (Emphasis in original.). Appellant’s assertion that the trial standard should not be used at summary judgment is incorrect and contrary to established South Carolina law.

Even if Appellant could scale the obstacle of the requirement that a writing must be produced to defeat the lender statute of frauds, Appellant would then just run into the brick wall of the clear and convincing evidentiary standard. Appellant only has the self-serving and conflicting testimony of its principal and Appellant's seller of real property, Har-Lee (Bill Hargrove), both of whom stood to gain at the time of their testimony from suggesting a lost loan commitment letter. This Court was correct in its decision that the evidentiary standard for a lost memorandum had not been met.

“The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001), *quoting* Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina*, 309 (1999). Through the Petition, Appellants are rehashing points already offered by them which the Court has declined to find persuasive in its issued opinion (Opinion). The Court did not overlook or misapprehend the arguments of Appellant.

Appellant contends this Court based its ruling solely on the grounds that Appellant failed to present clear and convincing evidence of the existence of a writing. (Petition, p.2.) Appellant has misread the Opinion. The Opinion states the trial court was correct in dismissing Appellant's counterclaims because “it was unable to produce a written loan agreement.” (Unpublished Opinion No. 2014-UP-306, p.1 (2014).) This Court agreed with the trial court that the “lender statute of frauds precludes certain actions regarding loans for money where there is no writing evidencing the alleged promise or agreement.” (*Id.*)

Appellant's failure to produce a writing is the basis upon which this Court ruled.

The Court then explained that, "*even if this court were to accept the lost memorandum exception,*" which is not tantamount to the Court saying it had, Appellant failed to meet the requisite evidentiary burden of clear and convincing evidence. (*Id.*, p.2 (Emphasis added.)) The Court did not rule that the lost memorandum exception applicable to the *general* statute of frauds *in other jurisdictions* was applicable to the lender statute of frauds in South Carolina. The words "even if" were used not to adopt this exception, but to point out the overreaching of Appellant's position, i.e., they had to produce a writing, but *even if* they were not required to do so, they failed to present the requisite level of evidence to fall within the exception.

Even construing the evidence in favor of Appellant, there is nothing clear and convincing in the record that shows a final, signed loan commitment from Respondent was ever delivered to and received by Appellant. Whatever Appellant allegedly saw it admittedly rejected. Appellant and Respondent agreed the alleged draft letter would have to be re-typed and re-signed. These are Appellant's assertions. (R. pp. 328, 330, 341.) Bill Hargrove could not testify that he ever saw or received the loan commitment Appellant alleges existed. (R. pp.309-310.) The Opinion says Appellant had to produce a writing and based on the evidence, the Court was not inclined to find a lost memorandum exception to the lender statute of frauds..

As a last ditch effort, Appellant seeks to buttress its absence of clear and convincing testimony by accusing Respondent of intentionally destroying the loan commitment. During appellate review of a motion for sanctions, a "trial court's rulings on discovery matters will

not be reversed on appeal absent a clear abuse of discretion.” *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 220, 493 S.E.2d 826, 836 (1997) (Citations omitted.). The abuse of discretion standard does not allow the trial court’s decision on whether to award sanctions to be “disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual conclusions.” *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 654 (Ct. App. 2011) (Finding no abuse of discretion in trial court’s refusal to award sanctions.) Appellant does not allege an error of law, but seeks reversal on the grounds of unsupported factual conclusions.

The basis for Appellant’s motion for sanctions is the allegation that Respondent may have destroyed the alleged draft loan commitment. The trial court’s decision *not* to award sanctions was rooted in the facts presented at the hearing. Despite Appellant’s attempts to twist the testimony of Walter Joyce, Respondent’s current IT director, related to the destruction of outdated equipment, Appellant cannot change what Joyce actually said. He testified that “I haven’t found any evidence to lead me to believe that any data had been deleted.” (R. p. 313.) He went on to say that the reason he knew nothing had been deleted is “we don’t delete anything in that archive,” referring to the e-mail archive of Respondent. (R. p. 314.) In fact “everything that’s been put in that [e-mail] archive is still in that archive.” (R. p. 315.)

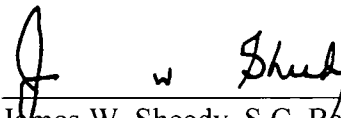
The only evidence in the record is that no data was deleted during the destruction of Respondent’s outdated computer equipment. The only evidence presented was the *lack of evidence* of any destruction of data by Respondent. Likewise, there was no evidence of any intentional wrongdoing by Respondent. There was no abuse of discretion on the part of the

trial court. Appellant cannot transform its self-serving and conflicting testimony on a lost loan commitment into clear and convincing evidence by misconstruing Respondent's IT director's testimony. Lack of evidence added to self-serving and conflicting testimony does not equal clear and convincing.

The Petition should be denied. Appellant cannot raise new arguments on a petition for reconsideration. This Court did not overlook or misapprehend the arguments of Appellant.

Respectfully submitted,

Date: 5 | 21 | 14

  
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Of Which

Oaktree Homes, Inc. is the ..... Appellant.

CERTIFICATE OF SERVICE

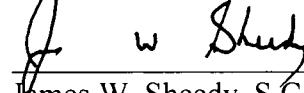
The undersigned hereby certifies that on the date indicated below he served counsel for Appellant with copies of the *Return to Petition for Rehearing* by mailing a copy of the same via First Class, U.S. Mail, postage-paid on the date set forth below.

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Date: 8/21/14

Respectfully submitted,



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August 21, 2014

Honorable Jenny Abbot Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, S.C. 29201

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SC Court of Appeals

**Re: Yadkin Valley Bank & Trust v. Oaktree Homes, Inc. et al.**  
**C.A. No.: 2009-CP-46-1673**  
**Appellate Case No.: 2011-197970**

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Return to Petition for Rehearing and a Certificate of Service in the above captioned matter. Please return a filed copy to me in the enclosed envelope.

With kindest regards, I remain

Respectfully,

DRISCOLL SHEEDY, P.A.

  
James W. Sheedy

cc: Danny Hunter  
Blake A. Hewitt, Esq.  
John S. Nichols, III, Esq.  
William A. McKinnon, Esq.  
Chad McGowan, Esq.

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