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S.C. Supreme Court

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Op. No. 2014-UP-306 (S.C. Ct. App. filed July 30, 2014)

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 . . . . . Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This Return is filed pursuant to Rule 242(f), SCACR. Petitioner served Respondent with a copy of the Petition for Writ of Certiorari (the "Petition") on October 27, 2014; therefore, this Return is timely filed. Through this Counter-Statement of the Case within the Return, Respondent seeks to draw the Court's attention to a few particular facts not mentioned in Petitioner's Statement of the Case.

First, Respondent has a final deficiency order of judgment against Petitioner which it did not contest in the amount of $1,523,221.80 plus interest at the rate of 3.75% per annum from November 2, 2011 until the date of payment in full. Practically, Petitioner's appeal is in pursuit of the academic possibility on a weak record of a remand and jury verdict in excess of the deficiency judgment including accrued interest thereon.

Second, the principals of Petitioner each testified that they were not in possession, nor had they ever received, a final, signed commitment to lend from Respondent. (R. p. 330-31, 340-41.) In the draft document Petitioner alleges it received, the "terms were wrong, interest rate was wrong." (R. p. 330.) Petitioner's testimony that a copy of the alleged commitment was sent to the seller of the fifty-one (51) lots at issue was contradicted by the testimony of the seller, who would not state under oath that he received a copy of the letter. (R. p. 309.) Despite Petitioner's allegations to the contrary, there is zero evidence of a final, signed commitment by Respondent to fund a portion of the acquisition cost of the 51 lots. As the Court of Appeals said, the testimony is at best self-serving and conflicting. (App. p.3.)

Third, the only evidence in the record related to the alleged destruction of data by Respondent is that there is no evidence of any such destruction. (R. p. 313.)

Fourth and finally, the Court of Appeals based its opinion (the "Opinion") on two grounds. Under South Carolina law, Petitioner was required to produce the written commitment to lend signed by Respondent. (App. p. 2.) Petitioner did not produce a written commitment. Even if the Court of Appeals had adopted the lost memorandum exception (which it did not), Petitioner failed to produce clear and convincing evidence that the alleged written commitment ever existed and was then lost. (R. pp. 2-3.)

The Petition is an academic exercise to assail the Lender Statute of Frauds, S.C. Code Ann. § 37-10-107 (2002 and Supp. 2010) (the "Lender SoF"). The Petition is not to correct an injustice apparent from a strong factual record in the trial court.

ARGUMENTS

I. The Petition does not present novel issues of law in accordance with the requirement of Rule 242(b)(1), SCACR.

In the Petition, Petitioner concedes that Rule 242(b)(2) through (5), SCACR, are inapplicable, and the only basis asserted is Rule 242(b)(1) - novel questions of law. Despite Petitioner's assertion to the contrary, the proper application of the Lender SoF to a commercial loan is not a novel question of law.

The Lender SoF was examined at length by this Court in *Sea Cove Dev., L.L.C. v. Harbourside Cmty. Bank*, 387 S.C. 95, 691 S.E.2d 158 (2010). This Court considered in-depth what a commercial borrower must present in the way of evidence to come within the requirements of the Statute. *See Id.* at 106-108, 691 S.E.2d at 164-165. This Court ruled, "Sea Cove has not shown that the documents *satisfy the writing requirement of section 37-10-107*" and because Sea Cove failed to do so, summary judgment was proper. *Id.* at 107, 691 S.E.2d at 164 (Emphasis added.). If insufficient written documents do not satisfy the writing

requirement, it follows *a fortiori* that the absence of any document would be unsatisfactory. Petitioner's attempt to frame the question cleverly does not change the reality that the question has been submitted to and answered by this Court. Because the case does not involve a novel issue of law, the Petition should be denied.

II. The Court of Appeals did not base its ruling on an argument that was not raised in the trial court or that exceeds the scope of the summary judgment record.

Petitioner contends the Court of Appeals based its ruling on reasoning that the trial court did not utilize, i.e., Petitioner failed to present clear and convincing evidence of the existence of a writing that was then lost. The ruling of the Court of Appeals is clear from the first line of the Opinion, which states: "We find the trial court did not err in holding Oaktree's counterclaims against Yadkin Valley failed as a matter of law because it was unable to produce a written loan agreement." (App. p.2.) The Opinion then says, "The lender statute of frauds precludes certain actions regarding loans for money where there is no writing evidencing the alleged promise or agreement." (App. p.2.) Petitioner's failure to produce a writing signed by Respondent is the basis upon which both the trial court and the Court of Appeals ruled.

This ruling was then supplemented by a discussion of the issue of sufficiency of the evidence. The Opinion states, "*even if this court were to accept the lost memorandum exception,*" which is not tantamount to the Court saying it had, Petitioner failed to meet the requisite evidentiary burden of clear and convincing evidence. (App. p.2.) (Emphasis added.). The Court of Appeals did not rule that the lost memorandum exception applicable to the *general* statute of frauds *in other jurisdictions* was applicable to the Lender SoF in South Carolina. The words "even if" were used not to adopt this exception, but to emphasize the

overreaching of Petitioner'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 they were advocating.

Further, the concept of the submittal of parol or extrinsic evidence *was* raised to and resulted in a ruling by the trial court. The trial court examined the law under the Lender SoF and the general statute of frauds, and determined that there was no South Carolina case law "upholding that the requirement of a writing may be circumvented through testimony." (R. p. 13.) The trial court also examined whether "the statutory requirement of a writing may be displaced by oral testimony that the writing has been lost." (R. p. 14.) In finding it could not be, the trial court relied upon the case of *Windham v. Lloyd*, 253 S.C. 568, 573, 172 S.E.2d 117, 119 (1970), which specifically states that the "preliminary inquiry as to whether there had been sufficient evidence tending to prove the loss, destruction or unavailability of an original document . . . is an inquiry, the answer to which, in large measure, is within the discretion of the trial judge." This is not novel. Rather, it has been in our jurisprudence for almost 45 years.

Two of the cases cited by the Court of Appeals, *Chakur v. Zena*, 233 S.E.2d 200 (Tex. Civ. App. 1950), and *Mossman v. Hawaiian Trust Co.*, 361 P.2d 374 (Haw. 1961), were also cited by counsel for Respondent at the hearing on the motion for summary judgment. (R. p. 261.) In citing *Chakur* and *Mossman*, counsel for Respondent stated, "there had to be uncontradicted, unimpeached evidence as to the existence of the writing . . ." (R. p. 261.) Petitioner is incorrect that the question of the sufficiency of the evidence was not raised to and set forth in a ruling by the trial court. As evidenced by the transcript of the hearing and the trial court's order granting summary judgment, it most certainly was. The Court of Appeals'

discussion of the evidentiary standard under the lost memorandum exception was proper.

III. The Court of Appeals did not err in its decision to disregard Petitioner's argument that Respondent allegedly destroyed information during discovery.

"'The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court.'" *Davis v. Parkview Apartments*, 409 S.C. 266, 281-82, 762 S.E.2d 535, 543 (2014), *quoting Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). "Therefore, an appellate court will not interfere with 'a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters' unless the court abuses its discretion.'" *Id., quoting Karppi v. Greenville Terrazzo Co., Inc.,* 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). "'An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law.'" *Id.* at 282, 762 S.E.2d at 543, *quoting Dunn v. Dunn,* 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989). *See also 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.) "The appealing party bears the burden of demonstrating that the lower court abused its discretion." *Davis*, 409 S.C. at 282, 762 S.E.2d at 543.

In reviewing the decision of the trial court under this elevated standard, the appellate courts must also look at the relief sought by the motion for sanctions. Petitioner sought "an Order striking all defenses to their counterclaims and arguments which rely on or presume that there is not a signed or executed loan commitment in this matter. . ." (R. pp. 106-07.) A

preclusion or exclusion of this type is "a sanction under Rule 37, SCRCP, which should never be lightly invoked. Furthermore, 'where the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party.'" *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996), *quoting Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 109, 410 S.E.2d 537, 542 (1991).

Petitioner sought an evisceration of Respondent's defenses to all counterclaims based upon the unfounded allegation that Respondent *may have* destroyed the alleged draft loan commitment. Counsel for Petitioner deposed Respondent's current IT director, Walter Joyce, and asked him the following question.

> Was there anything that you were able to do in the last couple of months since you were advised of the litigation hold to determine whether any data had been deleted? (R. p. 313.)

Mr. Joyce responded, "I haven't found ***any evidence*** to lead me to believe that any data had been deleted." (R. p. 313.) (Emphasis added.) The only evidence in the record is that no data was deleted during the destruction of Respondent's outdated computer equipment or through the merger between American Community Bank and Yadkin Valley Bank. Despite Petitioner's attempts to skew Mr. Joyce's later testimony related to e-mail traffic among Respondent's employees, it does not change the simple fact that the only testimony regarding the alleged destruction of data is that there was none. There was no evidence of any intentional wrongdoing by Respondent. Because Petitioner failed to show any willful disobedience or gross indifference on the part of Respondent, the trial court was correct in its denial of

Petitioner's unfounded motion for sanctions.[1] There was no abuse of discretion on the part of the trial court.

IV. The Court of Appeals did not err in upholding the ruling of the trial court that Petitioner was required to produce a written loan commitment.

In *Windham*, this Court examined whether or not oral testimony as to the whereabouts of an original deed would allow the introduction of secondary evidence of the existence and validity of that deed. The party alleging the existence of the deed was questioned as follows.

> Q. Mr. Laffoday, do you know where the original deed is?
>
> A. No, I don't, I had this in my possession one time and turned it over to a lawyer and I don't know what he did with it.

Windham, 253 S.C. at 572, 172 S.E.2d at 119. The party never identified the lawyer to whom he supposedly gave the deed, nor did he "specify the time or circumstances, nor does he show that he has made any effort whatsoever to search for or ascertain the whereabouts of the original." *Id.* The court ruled that based upon the "very meager information offered by the appellant as to the whereabouts of the alleged original deed," it was proper for the trial court to exclude the proffered secondary evidence. *Id.* at 573.

Petitioner did not raise Rule 1008, SCRE, in the trial court and may not now for the

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[1] Petitioner's reliance on *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), is misplaced. *Samples* involved the failure to disclose evidence that the party then attempted to introduce at trial, an important fact Petitioner omits in its citation of the test of whether to impose sanctions. *Samples* actually says, "In deciding what sanctions to impose *for failure to disclose evidence during the discovery process*, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness and the degree of prejudice." *Id.* at 112, 495 S.E.2d at 216 (Emphasis added.). Here, there is no attempt to use previously undisclosed evidence. Because the alleged commitment letter did not exist, there was nothing to disclose. *Samples* is inapposite to this case.

first time on appeal.[2] But if the issue were properly preserved for appeal, as set forth in *Windham*, 253 S.C. at 573, 172 S.E.2d at 119, whether to allow secondary evidence or to require the production of the written document "is an inquiry, the answer to which, in large measure, is within the discretion of the trial judge." This was not changed by Rule 1008, which 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." The trial court can make the determination of whether to require the production of the actual written document, or allow oral testimony to prove the document was in fact lost.

In making this determination, the trial court set forth separate bases for its decision, which were upheld by the Court of Appeals. First, there are no South Carolina cases allowing circumvention of the requirement of a writing under the Lender SoF. (R. p. 13; App. p.2.) Second, the intent behind the Lender SoF and the general statute of frauds in South Carolina

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[2] Rule 1008, SCRE, was not argued or raised by Petitioner in the trial court. Petitioner did not brief the issue in the trial court, nor did Petitioner argue Rule 1008 at summary judgment. The trial court did not enter a decision on Rule 1008. Petitioner 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 decided 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). *State v. Gamble*, 405 S.C. 409, 747 S.E.2d 784 (2013), does not help Petitioner. *Gamble* stands for the proposition that a party does not have "to use the exact name of a legal doctrine in order to preserve an issue for appellate review." *Id.* at 416, 747 S.E.2d at 787. While that may be true, the issue itself must actually be raised. Petitioner never raised Rule 1008, SCRE, in the trial court.

is to prevent the use of parol evidence to evade the requirement of a written document.[3] *See Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Refining Corp.*, 246 F. 375 (4th Cir. 1977) (R. p. 13.)

Third, the trial court examined South Carolina decisional law on secondary evidence and determined oral testimony that the writing was lost could not displace the requirement of production of the writing. (R. p. 14.) In the Opinion, the Court of Appeals delved deeper into this question, by analyzing the lost memorandum exception. (App. p.2.) The Court of Appeals determined that the same standard applicable at trial (clear and convincing evidence) is applicable at summary judgment.[4]

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[3] Petitioner's unfounded assertion that a lender could draft a written loan commitment, sign it and then destroy it, to the detriment of an unwitting borrower, misses the mark. Borrower has to have the written commitment in order to be able to prove that borrower received it which is necessary in order to sue on it. Further, the Lender SoF is inapplicable to consumer loans. It is only applicable to commercial loans in the amount of $50,000 or more. The statute "protects consumers seeking personal loans as well as small commercial borrowers by exempting these classes of borrowers from having to meet the statutory requirement." *Sea Cove Development, LLC*, 387 S.C. at 105, 691 S.E.2d at 163. It is not the inexperienced consumer or small business owner impacted by the Lender SoF. Instead, the Statute is designed to prevent experienced commercial borrowers from taking advantage of oral negotiations with lenders and categorizing those negotiations as an agreement to lend.

The case cited by Petitioner in support of its evil lender theory, *Aust v. Beard*, 230 S.C. 515, 96 S.E.2d 558 (1957), is wholly inapplicable, because it involves the application of an exemption from the general statute of frauds (part performance), which was held not to even apply in that case due to the lack of clear and unequivocal evidence as to the part performance. Instead, as cited by the Court of Appeals, the cases on point are those like *Weinsier v. Soffer*, 358 So. 2d 61 (Fla. Dist. Ct. App. 1978), and *Zander v. Ogihara Corp.*, 540 N.W. 2d 702 (Mich. Ct. App. 1995), each of which found the purpose of the statute of frauds was to prevent the "self-serving" testimony of a party to defeat the requirement of a writing.

[4] *See Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009) ("[I]n cases requiring a heightened burden of proof . . . we hold that the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment."); *Turner v. Milliman*, 392 S.C. 116, 125, 708 S.E.2d 766, 770 (2011) (Upholding summary judgment on cause of action for fraud, because "the fraud claim requires proof by clear and convincing evidence; thus, more than a mere scintilla of evidence must be presented to withstand a motion for summary judgment.:); *Froneberger v. Smith*, 406 S.C. 37, 52, 748 S.E.2d 625, 632 n.8 (Ct. App. 2013) ("We recognize that one of the Fronebergers' causes of action is fraud, which requires a heightened standard of proof at the summary judgment stage."); *Stafford v. Prashad*, 2013 WL 8539481, *1 (S.C. Ct. App. 2013) ("Because a clear and convincing evidentiary standard governs fraudulent conveyance claims, the Staffords must submit more than a mere scintilla of evidence to withstand a motion for summary judgment.").

Petitioner failed to submit clear and convincing evidence that would demonstrate the existence of an original, written and signed loan commitment that was subsequently lost. Petitioner provided nothing other than the self-serving testimony of one of its principals that the alleged loan commitment ever existed. As in *Windham*, Petitioner admitted that it was not in possession of the alleged commitment, nor did it have any idea where it was. (R. p. 328-332.) Petitioner further admitted the alleged commitment was not in final form, nor was it signed by Respondent. (R. p. 330.) Petitioner testified that the "terms were wrong, [the] interest rate was wrong" in the alleged draft commitment. (R. p. 330.) Nor would the seller of the 51 lots testify that he had seen a written commitment letter, signed by Respondent. (R. pp. 309-310.) As ruled by the Court of Appeals, Petitioner did not present clear and convincing evidence of a final, signed loan commitment that was lost. Instead, the only evidence consisted of alleged oral representations by Respondent (R. pp. 310, 330-331), which is the exact situation the Lender SoF was enacted to prevent. The Court of Appeals was correct in upholding the ruling of the trial court, i.e., Petitioner failed to produce the original, written and signed loan commitment, and the trial court decided not to allow secondary evidence, including oral testimony, to establish the existence of the alleged commitment.

Petitioner's attempt to distinguish cases from other jurisdictions cited by the Court of Appeals based on the status or results of those cases is equally unavailing. In *Mossman*, the party objecting to the use of oral testimony never took the deposition of the party seeking to introduce the oral testimony, nor did it propound any interrogatories on that party, so the court ruled that "Defendant did not seek to determine whether plaintiffs were able to prove the letter as a lost document." *Mossman*, 45 Haw. at 10-11, 361 P.2d at 379. Genuine issues of fact

were present because the defendant in *Mossman* did nothing to uncover the facts.

Respondent engaged in extensive discovery, including depositions of both principals of Petitioner, which lasted multiple days. Respondent also propounded interrogatories on Petitioner and took the deposition of every party involved in the transactions that were the subject of this action. Respondent undertook the work that the defendants failed to do in *Mossman.*

In *Chakur*, the party had to first prove the loss of the written document by clear and convincing evidence before oral testimony as to it contents would be allowed. *Chakur*, 233 S.W.2d at 202. The holding in *Chakur* is in line with that in *Windham*. Absent more than a mere allegation of the document's existence, oral testimony will not be allowed to prove its contents. Petitioner did not produce a writing signed by Respondent, as required by the Lender SoF, nor did it present clear and convincing evidence of a final, written signed loan commitment from Respondent that was later lost. Because Petitioner failed on both points, the Court of Appeals was correct that the trial court did not err in requiring Petitioner to produce the alleged loan commitment.

CONCLUSION

The requirement of a writing under the Lender SoF has been recently decided by this Court. The evidentiary standard for displacing the requirement of a writing under the general statute of frauds has been in our decisional law for decades. Petitioner has no law, precedential or persuasive, that there is a lost memorandum exception to the Lender SoF. The record from the trial court is replete with arguments about whether Petitioner had to produce a writing. There is no basis in the trial court record for finding abuse of discretion in the denial of the

discovery motion. Although Petitioner alleges that Respondent destroyed information during discovery, its allegation is not supported by the factual record. Petitioner unabashedly champions this argument in order to buttress its absence of clear and convincing evidence. The Court of Appeals was correct. Petitioner failed to present an actual written loan commitment signed by Respondent, or clear and convincing evidence that one ever existed and was lost (even if there were a lost memorandum exception). The Petition should be denied.

Respectfully submitted,

Date: 11/24/14

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Of Which

Oaktree Homes, Inc. is the . . . . . Petitioner.

CERTIFICATE OF SERVICE

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

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November 24, 2014

Honorable Daniel E. Shearhouse
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

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

Dear Mr. Shearhouse:

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

With kindest regards, I remain

Respectfully,

DRISCOLL SHEEDY, P.A.

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