THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Special Circuit Court Judge

Case No. 2014-001729

JAMEEL RIZK AND
CHRISTINA RIZK,

Respondent,

v.

JUDY F. SIMMONS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant accurately states the relevant dates regarding the procedural history of the case. Respondents filed their complaint against Appellant to recover their earnest money deposit because of their inability to obtain financing to close the real estate sale.

Respondents filed a motion for summary judgment on two grounds: 1) that a contract never existed between the parties, as a material provision of Respondents' Offer to Purchase was altered by Appellant's purported acceptance, resulting in a mere counteroffer by Appellant, which was never accepted; and, 2) the purported contract contained a financing contingency which Respondents were unable to achieve, which contingency was a condition precedent to their obligation to perform under the alleged contract. Respondents provided their affidavit and that affidavit of their real estate agent in support of their motion for summary judgment.

Based upon Respondents' motion for summary judgment, the affidavits of parties and witnesses, and arguments of counsel for both parties, the trial court found that no genuine issue of material fact existed as to the fact that no meeting of the minds occurred between the parties as to two critical parts of the contract, namely the financing contingency and the date of closing, and, therefore, no contract existed between the parties. The trial court found that because there was no meeting of the minds, there was no contract, and, as such, judgment as a matter of law was appropriate in favor of Respondents. As a result of this finding by the trial court the deposited earnest money was ordered returned to Respondents.

On August 1, 2014, Appellant filed with this Court her Notice of Appeal of a Civil Case. Appellant failed to order the transcript, and Appellant did not file her initial brief within 30-days as prescribed by Rule 208(a)(1), SCACR.

On September 20, 2014, Appellant belatedly requested an extension to file Appellant's Initial Brief by October 10, 2014. On October 2, 2014, Respondent filed with this Court their Motion For Dismissal of Appeal for Failure to File Brief Within the Time Prescribed.

Appellant's Motion for Leave To File Initial Brief is dated October 9, 2014, and Appellant's Proof of Service of the Motion for Leave to File Initial Brief is dated October 10, 2014, three days prior to Appellant's letter to the Court dated October 13, 2014, purporting to serve the Motion for Leave, and five days prior to the postmark on the letter purporting to serve the same.

FACTS

This case involves a failed real estate transaction in which the Respondents were unable to obtain financing for the purchase. The dispute involves who is entitled to the $50,000.00 earnest money deposit.

On April 26, 2013, Respondents made a written offer to purchase Appellant's home in Wexford Plantation on Hilton Head Island (Respondents' Affidavit P. 2). On May 1, 2013, Appellant verbally countered the offer, with four essential changes: an increase in the purchase price; an increase in the earnest money deposit; a reduction in the financing contingency; and a reduction in the inspection time period (Respondents' Affidavit P. 3). On May 6, 2013, Respondents accepted the Appellant's proposal and revised their initial written offer by initialing the changes indicated (Respondents' Affidavit P. 4, Exhibits A and B). Thereafter, the revised offer, along with $50,000 in earnest money was delivered to the Appellant's real estate agent (Respondents Affidavit P. 5). On June 1, 2013, Appellant executed the revised contract with two critical revisions: the financing contingency period was reduced from 25 business days to June 15; and the closing date was changed from June 14 to June 30 (Respondents' Affidavit P. 6, Exhibit E). Respondents were never notified of the material changes, never negotiated the material changes, and never executed the contract accepting the material changes (Respondents' Affidavit P. 6, Exhibit E). These issues relating to the back and forth revisions to the proposed contract are not in dispute.

The changes made by Appellant relating to the financing contingency and the closing date are essential terms, as Respondents were unable to obtain the necessary purchase money mortgage. Both Respondents' and their realtor's affidavits state the

Respondents never agreed to the proposed changes by the Appellant, nor were such changes ever discussed with the Respondents (Respondents' Affidavit P. 7, Dollenberg Affidavit P. 7). Appellant does not present evidence to dispute this issue. Further, the emails submitted with the affidavits show the parties were never in agreement as to these issues.

On July 1, 2013 Respondents notified Appellant that they were denied their mortgage loan and that because the financing contingency was not met Respondents requested return of their earnest money (Respondents' Affidavit P. 10). Appellant refused to return the earnest money (Respondents' Affidavit P. 11).

ARGUMENT

I. NO CONTRACT EXISTED BETWEEN REPONDENTS AND APPELLANT SINCE APPELLANT MATERIALLY ALTERED THE TERMS OF RESPONDENTS OFFER TO PURCHASE REAL ESTATE

The evidence presented by Respondents on their Motion for Summary Judgment consisted of Respondents' affidavit and Respondents' real estate agent's affidavit. On May 1, 2013 Respondents' real estate agent informed Respondents that Appellant verbally countered Respondents' purchase offer, by the following: increasing the purchase price to $685,000; increasing the earnest money deposit to $50,000; reducing the financing contingency to 25 business days; and, reducing the inspection period to 10-days (Respondents' Affidavit P. 3). Appellant's counteroffer was accepted by Respondents as evidenced by Respondents initialing the changes (Respondents Affidavit P. 4). Appellant, however, would not accept the revised contract until the entire $50,000 of earnest money was deposited, which occurred on May 31, 2013 (Respondents' Affidavit P. 5;

Dollenberg Affidavit P. 5). Then, on June 1, 2013, Appellant made two significant changes to the purchase contract, neither of which were presented to or approved by Respondents, namely reducing the financing contingency from 25 business days to June 15, 2013 (essentially a 21-day reduction in the financing contingency) and changing the closing date to June 30, 2013 (Respondents' Affidavit P. 6; Dollenberg Affidavit P. 7). Respondents never agreed to a reduction in the time period for financing and would not have been able to agree to such a reduction due to the amount of time necessary for a bank to consider a financing application (Respondents' Affidavit P. 7).

Appellant presented no evidence that Respondents ever agreed to the financing contingency change unilaterally placed into the contract by Appellant. Construing all of the evidence presented to the Court in the light most favorable to the non-movant, Appellant, there was not even a mere scintilla of evidence presented to the Court that Respondents had been presented with or agreed to Appellant's material changes to the contract.

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). "It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms." Potomac Leasing Co. v. Otts Mkt., Inc., 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct.App.1987). "The necessary elements of a contract are an offer, acceptance, and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct.App.1997).

The first element of contract formation and the essence of a contract is a meeting of the minds. "In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Clardy v. Bodolosky, 383 S.C. 418, 679 S.E.2d 527 (Ct.App. 2009). Here, the parties failed to reach agreement on two critical issues, the financing contingency and the date of closing. In fact, there has been no evidence presented that Appellant ever made an offer of these changes to essential terms of the contract, and there is no evidence that Respondents accepted these material changes. Because there was no meeting of the minds, and Appellant presented no evidence that would create an issue of fact as to whether there was a meeting of the minds, the Court properly granted summary judgment.

Appellant attempts to now argue facts not presented as evidence at the summary judgment hearing, namely that Respondents did not make a financing application to "...a lender customarily making such loans in Beaufort County and the surrounding area." Appellant has not presented any evidence that creates an issue of fact that the institution that Respondents sought financing from did not customarily make home financing loans in Beaufort County and the surrounding area. However, this issue has no bearing on the Court's ruling. Because there was no formation of a contract, to whom Respondents applied for financing does not create any issue of fact as to the valid formation of a contract between the parties.

Next, Appellant attempts to argue that Respondents' delivery of additional earnest money after the date Appellant unilaterally changed the contract constitutes Respondents' acceptance of Appellant's material changes. Appellant's argument fails for at least two

reasons. First, the earnest money and prequalification letter were delivered to Appellant's agent prior to Appellant making the unilateral changes to the contract. Secondly, there has been absolutely no evidence presented by Appellant to dispute Respondents' affidavit that they did not know about Appellant's changes to material portions of the contract, there has been no evidence presented by Appellant that Respondents and Appellant discussed the material changes to the contract, and there is no evidence that Respondents accepted Appellant's changes to the contract. There was no contract, so there is no need for the Court to consider other provisions contained within a non-existent contract.

II. BECAUSE A CONTRACT DID NOT EXIST BETWEEN THE PARTIES THERE COULD NOT HAVE BEEN PARTIAL PERFORMANCE

Partial performance of a contract cannot occur if no contract existed. Appellant argues that partial performance may evidence a contract when there is: 1) clear evidence of an agreement; [**AND**] 2) that the agreement has been partly carried into execution on one side with the approbation of the other; **AND** 3) that the party asserting the contract has been and remains able and willing to perform his part of the contract, citing Stackhouse v. Cook, 271 S.C. 518, 521, 248 S.E.2d 482, 483 (1978), Scurry v. Edwards, 232 S.C. 53, 60-61, 100 S.E.2d 812, 816 (1957), and Settlemeyer v. McCluney, 359 S.C. 317, 320, 596 S.E.2d 514, 516 (Ct. App.2004). Respondents disagree that any of these cases have any precedence on this case. Appellant has not presented any evidence that removes the subject contract from the statute of frauds as is required to assert partial performance of a contract. See Stackhouse v. Cook, 271 S.C. 518, 248 S.E.2d 482, (1978), Scurry v. Edwards, 232 S.C. 53, 100 S.E.2d 812 (1957), and Settlemeyer v. McCluney, 359 S.C. 317, 596 S.E.2d 514 (Ct. App.2004). As stated in S.C. Code Ann.

§32-3-10 "No action shall be brought whereby:...(4) To charge any person upon any contract or sale of lands...or any interest in or concerning them...unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized." Appellant has not presented any evidence that Respondents agreed to her unilateral changes of the material terms of the contract in writing or otherwise.

It is basic contract law that sufficient part performance of a parol contract for the conveyance of land will remove the contract from the statute of frauds. Scurry, et al. v. Edwards, 232 S.C. 53, 100 S.E.2d 812 (1957). Case law has developed the following factors to be considered in determining whether sufficient part performance has occurred: (1) Actual possession, Wilson et al. v. Cooper et al., 226 S.C. 538, 86 S.E.2d 59 (1955). (2) Improvements to the property, Mims v. Chandler, 21 S.C. 480 (1884); Aust et al. v. Beard et al., 230 S.C. 515, 96 S.E.2d 558 (1957). (3) Partial payment of the purchase price, Mims v. Chandler, supra. Appellant's argument fails because the contract at issue was not a parol or oral contract, and no evidence has been presented by Appellant to the contrary. Because there is no evidence that suggests the subject contract was oral, the Court need not address the issue of partial performance.

However, even under Appellant's analysis of the cases she cites, her argument fails. The first condition that must be met under Appellant's analysis for partial performance to evidence a contract is "clear evidence of an agreement." From the affidavits presented to the Court, there is no question of fact that Respondents and Appellant did not have a meeting of the minds and an agreement as to the unilateral changes made to the contract by Appellant. Because there was no meeting of the minds

between the parties there was no agreement, and, therefore, no contract to partially perform. In order to satisfy the statute of frauds, there must be a writing signed by the party against whom enforcement is sought, and the writings must establish the essential terms of the contract without resort to parol evidence.

III. APPELLANT PRESENTED NO EVIDENCE THAT AN ORAL CONTRACT EXISTED BETWEEN THE PARTIES AND SHE PRESENTED NO EVIDENCE THAT ASSERTED OR IMPLIED THAT SHE SUFFERED A DEFINITE, SUBSTANTIAL AND DETRIMENTAL CHANGE IN POSITION, AND, THERFORE, ESTOPPEL IS AN INAPPROPRIATE DEFENSE TO THE STATUTE OF FRAUDS

Appellant presented no evidence of facts that she relied to her detriment on Respondents' actions. In order to overcome the statutory requirement of a writing the party asserting the estoppel must show that he has suffered a definite, substantial, detrimental change of position in reliance on the contract, and that no remedy except enforcement of the bargain is adequate to restore his former position. Collins Music Co., Inc. v. Cook, 281 S.C. 580, 583, 316 S.E.2d 418, 420 (S.C. App. 1984). It is not sufficient to show merely that he has lost an expected benefit under the contract. See Id. Appellant has not presented any evidence that she has suffered a definite, substantial, detrimental change in position. This evidence is simply not before the Court.

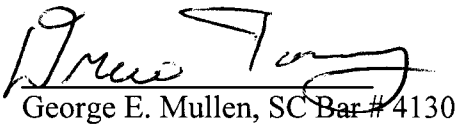
The Appellant goes on to cite SPRINGBOB v. University of South Carolina, 407 S.C. 490, 757 S.E.2d 384 (2014) in support of her position regarding estoppel. SPRINGBOB is distinguishable to the facts of this case, as there was evidence in SPRINGBOB that an oral agreement existed between the parties, which created an issue of fact. "Before the estoppel doctrine can be invoked...there must be competent proof of the existence of the oral contract." Atl. Wholesale Co. v. Solondz, 283 S.C. 36, 40, 320

S.E.2d 720, 723 (Ct.App.1984). Appellant has not presented a single piece of evidence of the existence of an oral contract between the parties. As such, Appellant cannot assert the doctrine of estoppel in this case. There was no issue of fact presented to the Court that an oral contract existed, or that Appellant suffered a definite, substantial, and detrimental change in position, and, as such, Summary Judgment was appropriate.

CONCLUSION

Appellant cannot unilaterally change material portions of the contract and then attempt to enforce those unilateral changes to the detriment of Respondents. Appellant did not present any evidence that created an issue of fact that implied Respondents and Appellant entered into a Contract for the sale and purchase of the house. To the contrary, Respondents presented evidence that they never discussed, negotiated, or agreed to unilateral, material changes made to the contract by Appellant. Appellant has not presented any evidence that proves otherwise and does not contest Respondents' assertion. Furthermore, Appellant has not presented any evidence that would remove the contract from the statute of frauds, and Appellant has not created an issue of fact concerning partial performance or estoppel. In view of all of the evidence in the light most favorable to Appellant, there was no issue of material fact created that a meeting of the minds ever occurred between the parties as to essential terms of the contract between the parties. Because no issue of fact exists as to a meeting of the minds between the parties, no contract was formed, and, as such, Summary Judgment was appropriate in favor of Respondents.

For the reasons stated herein the Court should affirm the ruling of the Circuit Court.



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December 3, 2014

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JAMEEL RIZK AND
CHRISTINA RIZK,

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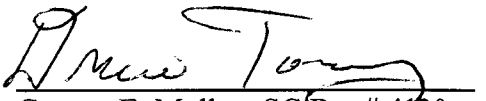
v.

JUDY F. SIMMONS, Appellant.

PROOF OF SERVICE

This is to certify that I have on this 3rd day of December, 2014 delivered a true and correct copy of Respondents' Initial Brief and Certificate of Service in the above captioned case by depositing a copy of the same in the United States Mail with correct postage to ensure delivery to:

Stephen E. Carter
Carter Law Firm
100 WatersEdge
Hilton Head Island, SC 29928
Attorney for Appellant



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December 3, 2014

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1015 Sumter Street (29201)
Post Office Box 11629
Columbia, SC 29211

RE: ***Jameel Rizk and Christina Rizk v. Judy F. Simmons***
Case No.: 2014-001729

Dear Ms. Kitchings:

Please find enclosed the originals and one copy each of the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal, regarding the above referenced matter. I would appreciate if you would please file the originals and return the clocked copies in the enclosed self-addressed stamped envelope.

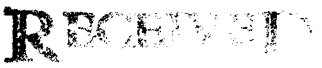
If you have any questions, please feel free to contact me. Thank you in advance for your assistance with this matter. I remain,

Very truly yours,

MULLEN WYLIE, LLC

Aubrey E. Disbrow
Paralegal

cc: Stephen E. Carter, Esquire



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