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 whom

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

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ARGUMENTS

A. It is difficult to see how the Bank can claim that this case does not involve novel issues.

It is difficult to see how the Bank can claim that the law in this area is settled. Neither party has identified a case that considers whether oral evidence can satisfy the Lender Statute of Frauds, and neither party has cited a case discussing the relevant rule of evidence.

i. Neither party has identified any South Carolina case that considers whether oral evidence is admissible to satisfy the Lender Statute of Frauds.

The Bank says that this question was answered in *Sea Cove Development v. Harbourside Community Bank*, but the two questions presented in that case were whether the Lender Statute of Frauds was constitutional and whether "Harbourside's . . . letters, which advised Sea Cove's members that they were 'prequalified' for a loan, contain all of the material terms of the loan agreement." 387 S.C. 95, 105-06, 691 S.E.2d 158, 163 (2010). Sea Cove *did* raise an argument about oral evidence to the circuit court, but the opinion suggests that Sea Cove did not present that argument on appeal. The Court can judge its own precedent for itself, but is hard to see how someone could claim that *Harbourside* considered the same arguments that Oaktree is making. The opinion says nothing about this issue.

The Bank knows this question is not settled. When it argued *Harbourside* to the circuit court, it offered a reading of the case that was much less robust that the reading it is offering now. See (R.p.118). The principal cases that the Bank cited below were trial court cases. See (R.pp.117-18). These are fine to consider as persuasive, but the decisional law in this State suggests that they are not actual precedents. *Ford v. Beaufort County Assessor*,

398 S.C. 508, 515 n.3, 730 S.E.2d 335, 339 n.3 (Ct. App. 2012). The reality is that the Lender Statute of Frauds has a sparse landscape in terms of its construction. The question whether oral evidence can satisfy the statute does indeed seem to be novel.

ii. Neither party has identified any South Carolina case that discusses the burden of proof for a party claiming a dispute of fact which implicates Rule 1008, SCRE.

The Federal Rules of Evidence did not exist until 1975. See Pub. L. 93-595, § 1, 88 Stat. 1926 (1975). The South Carolina Rules of Evidence were adopted 20 years later. See Rule 1103, SCRE. Both rules seem to contemplate that if the parties disagree on whether a written agreement ever existed, that disagreement creates a dispute of fact for the fact-finder. Neither party has identified a South Carolina case that explores these rules.

One of the principal cases the Bank cites is *Windham v. Lloyd.* This is a State court case that predates the adoption of the Rules of Evidence by 25 years. 253 S.C. 568, 172 S.E.2d 117 (1970). Another of the Bank's lead authorities is *Woodruff Oil & Fertilizer v. Portsmouth Cotton Oil Refining.* This is a federal case that predates the Federal Rules of Evidence by 58 years. 246 F. 375 (4th Cir. 1917).

The notes to the State court rule indicate that there are "no cases discussing the role of the trier of fact in this area." Notes to Rule 1008, SCRE. No South Carolina case articulates "clear and convincing evidence" as the standard for proving a contract when the parties dispute whether one exists, and no South Carolina case explains that the decision to admit oral testimony in such circumstances is a discretionary decision for the trial court. Here again, it is difficult to follow the argument that this question has already been answered. If a binding precedent was on point, one would expect the Court of Appeals to have cited it.

B. It is difficult to see how the Bank can plausibly claim that there is "zero" evidence of documents being destroyed and that it was appropriate for the Court of Appeals to ignore this issue entirely.

The return gets part of the facts right. The Bank's information technology director testified during his deposition that he had not found any evidence of data being destroyed during this litigation. (R.p.313, lines 22-23). This testimony centered on the Bank's e-mail communications, and this person explained his answer by saying he knew nothing had been deleted because the Bank does not delete anything from its archive. (R.p.314, lines 7-10).

But the archive did not always exist. The IT director explained this six pages later, in the same deposition. He said the Bank installed the archive after American Community Bank merged with Yadkin Valley Bank & Trust, (Supp.R.p.4, lines 2-11), and he also explained that the only e-mail accounts the Bank retained in the merger were the accounts of eight (8) people. (Supp.R.p.5, lines 3-15). Derek Franklin—the bank vice president whose conduct is at issue—was not one of those people. (Supp.R.p.6, line 17).

Some of Mr. Franklin's e-mails would almost certainly be saved because they involved one of the eight accounts the Bank retained, but the IT director said that any messages which did not fit into this category—messages between Franklin and Oaktree, for example—would *not* have been saved. (Supp.R.p.6, line 24 - p.7, line 6). He agreed that these messages are gone. *Id.* It is hard to see how to read this testimony differently.

Nobody is saying that the circuit court was *obligated* to sanction the Bank. Sanctions are a discretionary issue (that nobody likes raising), and as this Court knows, the standard of review for discretionary decisions is highly deferential. See, e.g., *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

But the failure to exercise discretion is itself an abuse of discretion, and while it is fair for the Bank to say that Oaktree sought to strike the Bank's affirmative defenses and that this sanction would have been harsh, the Bank conspicuously omits the fact that Oaktree also proposed that the circuit court use spoilation as a reason to deny the Bank's request for summary judgment. See (R.pp.157-58). This milder request happens to be the same request that Oaktree presented to the Court of Appeals. (Brief of Appellant, pp.11-14).

The circuit court might have disagreed, but it was obligated to follow the appropriate analysis. The Court of Appeals might have affirmed, but it was obligated to acknowledge the argument and give reasons for its decision. The rules allow an appellate court to ignore an issue that is manifestly without merit, see Rule 220(b)(2), SCACR, but if this argument fell into that category, one would at least expect the Court of Appeals to have said so.

The reality is that the circuit court's analysis *was* circular. If Oaktree could prove that the written contract existed, it would not have asked for sanctions; it would have won its case. And the fact remains that after the loan fell apart and after American Community Bank filed this lawsuit, American merged with Yadkin, fired Derek Franklin, physically destroyed the hard-drives of most of its computers, and deleted Derek Franklin's e-mails. The destroyed information might have been useless, but nobody will know because it is gone.

C. The only thing that counsels against a grant of certiorari is that the opinion of the Court of Appeals is unpublished. All of the merits seem to be strongly arguable.

The only thing that counsels against certiorari being granted is that the decision below is unpublished. Although it is odd that it took the Court of Appeals 10 months to develop a 2-page memorandum decision, nothing is forcing the Court to review these issues now.

But there *are* novel issues in this case. The Lender Statute of Frauds is not written in a way that requires a party to produce the written agreement at trial. If this was the legislature's intention, it would have been easy to insert language into the statute that accomplished that purpose.

This is not a technical construction or an attack on the statute. It is simply an argument (and observation) that if the legislature intended to require the document's production at trial, the legislature could have written the statute to say so.

The legislature also could have said that a party may not satisfy the requirements of the statute by offering oral testimony, but the legislature did not include any language to this effect. The upshot of the Bank's interpretation is that Rule 1008 is repealed in this area even though there is a perfectly sensible way to read the rule and the statute as working together — in a case like this, the trial court would simply charge the jury that if the jury determines a written contract never existed, the jury is required to enter judgment in the Bank's favor. The Bank says this interpretation would thwart the statute's purpose, but that is not true. In the end, the Bank is arguing against Rule 1008's existence, because this part of the rule only applies when one party says that a written contract existed and the other party denies it.

The Bank says that any argument about Rule 1008 is not preserved because Oaktree never cited the rule to the circuit court. Part of that statement is true—Oaktree did not cite the rule to the circuit court. But that does not mean Oaktree's argument is not preserved. Error preservation rules apply to issues and arguments, not authorities.

The parties are arguing the same issues they argued at the summary judgment hearing. Those arguments centered around how to construe the Lender Statute of Frauds and whether

Oaktree could present evidence that would satisfy that statute. Part of Oaktree's argument was that the oral testimony tended to establish that a written contract *did* exist, and the circuit court held that this testimony was categorically inadmissible. This was after the court heard the Bank cite Rule 1008 and claim that oral evidence of a contract's existence was totally out of bounds. See (R.p.212, lines 2-4). Oaktree was certainly allowed to file a motion to reconsider after the circuit court ruled, but it was not required to do so. The circuit court's ruling was a direct rejection of Oaktree's theory of the case.

Error preservation rules are rules of fairness, and the circuit court's ruling occurred after the parties offered extensive arguments about this statute and how it should be interpreted. It might have been prudent to specifically direct the circuit court to the fact that its ruling was contrary to the rule's language, but saying that something is prudent is different from saying that something was required. Oaktree offered the oral testimony, but the circuit court adopted the Bank's theory that the Lender Statute of Frauds required the writing's production and that secondary evidence was categorically inadmissible. The circuit court heard Oaktree's argument about the statute and rejected it. One "no" was enough.

Finally, the Bank says that *if* Rule 1008 applies, the question whether to admit this evidence is a discretionary decision and the record reveals that the circuit court refused to consider the oral evidence, acting in its discretion.

This is reading an awful lot into the circuit court's decision. Nothing in the decision indicates that the court believed it had any ability to consider oral testimony. The court held that oral evidence was inadmissible and that the statute required the writing to be produced. (R.p.17). In order to *exercise* discretion, the court must first believe that it *has* discretion.

The jury might not believe Oaktree's witnesses, or a trial judge (not a summary judgment judge) might decide to remove the issue from the jury's consideration after hearing the evidence in person. See Rule 104(b), SCRE. But it is also possible that the witness testimony will be compelling. The jury might conclude that this financial institution acted dishonestly and that Oaktree's version of events is accurate.

And suppose that Oaktree's version *is* true; suppose Derek Franklin did take a fully-executed commitment letter and destroy it. The Bank's view of the Lender Statute of Frauds would say that such conduct is insulated from liability and that the case never goes to the trial. To contend that this view is wrong does not amount to attacking the Lender Statute of Frauds. It is simply arguing *why* the statute does not mean what the Bank says it means.

This appeal is not an academic exercise. The only way to say this is "much ado about nothing" is to forget about construing doubts in favor of the non-moving party and to start weighing one view of the evidence versus another. Yes, the Bank has a significant deficiency judgment from its foreclosure claims. But Oaktree has claimed a significant amount of damages too, and Oaktree pled entitlement to pre-judgment interest, see (R.p.93), which has a higher rate than the post-judgment interest that is running on the Bank's award. Perhaps it depends on your net worth, because the million-dollar difference between the deficiency judgment and Oaktree's claim for lost profits does not jump out as trivial.

Oaktree would again invite the Court to review the four foreign decisions that the Court of Appeals cited in its opinion. As the petition describes, none of these cases support the decision to affirm. This is not a "lost contract" case. See Rule 1004, SCRE. This case involves a dispute of fact, and disputes of fact are resolved through a trial.

CONCLUSION

Though the decision below is unpublished, it involves issues that are novel in this State. This Court should grant certiorari, reverse the Court of Appeals, and remand the case with instructions that the Court of Appeals review the alternative grounds for circuit court's decision.

Respectfully submitted,

December 9, 2014

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Reply Supporting Certiorari* by mailing a copy of the same via United States Mail with first class postage prepaid to the following address:

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ATTORNEYS AT LAW

December 9, 2014

VIA HAND DELIVERY

Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Yadkin Valley Bank & Trust v. Oaktree Homes, Inc.
Case Tracking No.: 2014-002182

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven (7) copies of the *Reply Supporting Certiorari* in the above referenced matter. I have also enclosed a proof of service of this document upon counsel for the Respondent. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

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Paralegal to Blake A. Hewitt
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Enclosures
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Chad McGowan, Esquire
James Sheedy, Esquire
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