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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Joe M. Crosby, Master-In-Equity

Case No. 2011-CP-22-0180
Appellate Case No. 2013-001447

Kennedy Funding, Inc. as predecessor-in-interest, and Respondents,
BNP Paribas,.....

v.

Pawleys Island North, LLC, Will Darwin Wheeler,
Peggy Wheeler-Cribb, and J. Mars Sapp, Defendants,
Of Whom Pawleys Island North, LLC, Will Darwin
Wheeler and Peggy Wheeler-Cribb are Respondents, and

J. Mars Sapp is the..... Appellant.

RETURN TO APPELLANT'S PETITION FOR REHEARING

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Attorneys for Respondents Kennedy Funding, Inc. and
BNP Paribas

Introduction

In accordance with Rule 221, SCACR, Respondents Kennedy Funding, Inc. ("Kennedy") and BNP Paribas ("BNP") submit this return in opposition to Appellant J. Mars Sapp's Petition for Rehearing (the "Petition") of Unpublished Opinion 2015-UP-138 (the "Opinion"). In its unanimous Opinion, the Court correctly determined that Kennedy's loan to Pawleys Island North, LLC ("Pawleys") did not violate the Statute of Elizabeth, codified at S.C. Code Ann. § 27-23-10(A), and that Kennedy's resulting lien recorded fourteen months prior to Appellant's judgment was entitled to priority under the Recording Statute, codified at S.C. Code Ann. § 30-7-10.

Appellant has not presented any new analysis nor has he demonstrated any errors of law which would warrant a rehearing. Moreover, Appellant has again failed to demonstrate by clear and convincing evidence that he is entitled to relief. Accordingly, Respondents respectfully request the Court deny Appellant's Petition.

Argument

A. The Court did not misapprehend Kennedy's conduct or misconstrue *Kirton v. Howard*

In analyzing Kennedy's loan to Pawleys, the Court recited in detail the arguments made by both sides as to whether the transaction violated the Statute of Elizabeth. Weighing the arguments, the Court properly determined Kennedy's loan was not fraudulent, citing eight distinct facts which established the loan from Kennedy to Pawleys was a bona-fide, arms-length transaction. Building upon this finding, the Court correctly cited to *Kirton v. Howard* as additional authority supporting its finding that the Kennedy loan was not fraudulent. 137 S.C. 11, 36, 134 S.E. 859, 868 (1926). Appellant's Petition

does not offer any new analysis; rather, it simply regurgitates arguments already made and considered by this Court and should be summarily denied.

B. The Court did not misconstrue *Coleman v. Daniel*

Appellant re-argues in his Petition that *Coleman v. Daniel* requires a finding in his favor. (See Petition at pp. 8-11). This Court, however, correctly interpreted *Coleman* and distinguished it from the facts of this case. In *Coleman*, the debtor was proven to be insolvent when he transferred virtually his entire estate to his daughter and son-in-law for roughly 58% of the appraised value. 261 S.C. 198, 204, 199 S.E.2d 74, 77 (1972). The transfer included the property where the debtor had lived his entire life and a separate agreement the debtor made with his daughter to continue living on the property rent free. *Id.* at 203, 199 S.E.2d at 76. Moreover, the debtor admitted under oath that he was insolvent at the time of transfer. *Id.* at 206, 199 S.E.2d at 78. Under these facts, the South Carolina Supreme Court found that the daughter and son-in-law's failure to inquire as to their father's indebtedness to plaintiff Coleman resulted in the knowledge of the debt imputed to them and therefore voided the transfer as a fraudulent conveyance. *Id.* at 211, 199 S.E.2d at 80.

This case does not involve any of the key facts which supported the Court's fraudulent conveyance finding in *Coleman*. First, this was an arms-length loan transaction between a lender based in New Jersey and a South Carolina limited liability company with no prior relationship. (R. p. 178, line 22-p.179, line 10). Second, no property was sold or transferred to Kennedy. Third, the borrower was not insolvent when the loan was executed but retained over \$1.3 million in cash and equity from this transaction alone. Fourth, the borrower was not living on the property when the

transaction closed. (R. p. 225). Finally, the borrower did not retain, via secret agreement, perpetual use of the property rent free. This Court's opinion notes in detail the factors which distinguish *Coleman* from this case, and Appellant's argument to the contrary was properly considered and rejected.

C. The Court did not mistakenly rely on *Atlas Supply Co. v. Davis* and properly interpreted the Recording Statute

In determining lien priorities, the Court correctly interpreted and relied on the Recording Statute, codified at S.C. Code Ann. § 30-7-10, and *Atlas Supply Co. v. Davis*, 273 S.C. 392, 256 S.E.2d 859 (1979), which both support this Court's finding that Kennedy's lien takes priority over Appellant's lien. Appellant's petition does not, and cannot, negate the Recording Statute's application to the Court's finding. With no viable argument regarding the Recording Statute, Appellant simply re-argues that Kennedy's loan transaction was fraudulent and should be voided in an attempt to avoid the Recording Statute's clear priority rules. (Petition at pp. 11-14). Appellant's re-argument of the fraudulent conveyance issue does not warrant a rehearing for the reasons set forth in Sections A and B.

Conclusion

Based on the foregoing arguments of law, Appellant's Petition for Rehearing should be denied.

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Charleston, South Carolina

April 6, 2015

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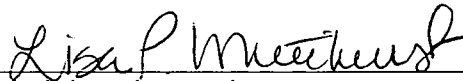
I the undersigned Administrative Assistant of the law firm of Nelson Mullins Riley & Scarborough, LLP, attorneys for Kennedy Funding, Inc. as predecessor-in-interest, and BNP Paribas, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Return to Appellant's Petition for Rehearing

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SC Court of Appeals

April 6, 2015

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
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1220 Senate Street
Columbia SC 29011

RE: Kennedy Funding, Inc., as predecessor-in-interest, and BNP Paribas v.
Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb and
J. Mars Sapp
Civil Action No.: 2011-CP-22-00180
Appellate Case No. 2013-001447
Our File No.: 00121/01501

Dear Ms. Kitchings:

Enclosed are the original and seven copies of Respondents' Return to Appellant's Petition for Rehearing in the above matter. Please return a clocked in copy to me via our courier.

By copy of this letter, we are serving this Return on all counsel of record.

Thank you for your assistance with this matter.

Very truly yours,

Robert H. Jordan by *AMR w/ express permission*
Robert H. Jordan

RHJ:dh

Enclosures

cc: Thomas W. Bunch, II, Esq. (w/enclosure)
Robert H. Gwin, III, Esq. (w/enclosure)