THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAY 14 2015
S.C. 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.

REPLY BRIEF

Chad A. McGowan # 9943
William A. McKinnon # 69463
McGOWAN HOOD & FELDER
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800

Blake A. Hewitt # 73674
John S. Nichols # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

(South Carolina)

(Other Jurisdictions)

Statutes & Other Authorities

ARGUMENT

There are still three reasons why this Court should reverse the Court of Appeals.

First, the Court of Appeals based its decision on a "sufficiency of the evidence" argument that was not presented below and that exceeds the scope of the record. The circuit court did not use a "sufficiency of the evidence" standard. If it had followed that approach, the Bank would have argued the point to the Court of Appeals.

Second, the circuit court's reasoning is incorrect. If one party says that there was a signed contract and the other party says that it never happened, that dispute is a factual dispute, and the legal system resolves factual disputes through a trial. The Lender Statute of Frauds does not provide differently. This is a plain case of statutory construction.

Finally, it was error for the Court of Appeals to refuse to acknowledge Oaktree's argument regarding sanctions. The court seemed to ignore the issue completely.

The following are brief responses to the Bank's arguments.

A. The Bank acknowledges it is denying that a loan commitment ever existed. That makes this case a garden variety factual dispute, and the Lender Statute of Frauds, which *is* a consumer protection statute, says nothing about making oral evidence inadmissible.

The Bank's brief acknowledges the Bank is denying that a written commitment letter ever existed. That makes this case a credibility dispute between Oaktree's witnesses and the Bank's witnesses. Juries handle these disputes on a routine basis. There is nothing remarkable about this dispute just because it involves a bank.

It would have been easy for the legislature to write the Lender Statute of Frauds in a way that supports the Bank's argument. Instead of saying that the borrower must have

"received" a written loan agreement, the statute could have said that the writing must be "retained," "produced," or "produced at trial." But the statute does not say that, and at the end of the day, the best the Bank can do is argue that the natural reading of the word "received" encompasses the additional acts of continued possession and production.

That construction cannot bear the weight of scrutiny. Even if this statute did not appear in the South Carolina Consumer Protection Code—and it *does*, see S.C. Code Ann. § 37-1-101 (2015)—the Court would still be bound to read the statute narrowly because it restricts a plaintiff's common law right to sue. The Bank proposes a broad construction of the statute, not a narrow one. The Bank also reads Rule 1008 to be meaningless in this area.

B. The Bank's brief impermissibly views the facts in the Bank's favor, and although the Bank denies it, there *is* evidence that everyone signed this commitment letter and that it was binding.

Tom Ras said that he signed the commitment letter, and Tom's testimony appears to be that the bank vice president signed the letter as well. There were errors on the letter as it was originally drafted, but Tom explained that the bank vice president told him "We'll sign it. We'll redo this. We'll bring another one to closing." (App.p.420, lines 5-10).

This process might seem unorthodox, but the Bank's version of events is odd too. Surely one purpose of a commitment letter is to establish a firm commitment to lend in advance of a closing. It would be odd for that sort of letter to make its first appearance when the loan is actually closed. That commitment would have a very short duration.

The Bank is just as partisan when it comes to the alleged destruction of information. Sure, it is possible to parse the relevant testimony to be that no electronic information was destroyed during discovery, but that is not the natural reading of the testimony in question.

See (Brief of Petitioner, pp.14-15). And it still seems quite strange for the Bank to show up to the sanctions hearing with new information, to claim that it is still looking for discoverable information when discovery has closed, and to then ask for the lawsuit to be dismissed with prejudice. In that context, the claim about an ongoing investigation seems less than genuine.

C. The Bank refuses to acknowledge that this is not a "lost contract" case, and the Bank also refuses to acknowledge that there is more testimony than the testimony of Oaktree's principles.

The Bank's brief continues to ignore the distinction between "lost contract" cases, which are governed by Rule 1004, SCRE, and "denied contract" cases, which are governed by Rule 1008.

One of the Bank's principle cases is *Windham v. Lloyd.* This is a "lost contract" case involving a deed, and it predates the adoption of the South Carolina Rules of Evidence by 25 years. See 253 S.C. 568, 570, 172 S.E.2d 117, 118 (1970); see also Rule 1103(b), SCRE (rules effective September 3, 1995).

Another of the Bank's principal cases is *Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Refining Corp.* See 246 F. 375 (4th Cir. 1917). This is a Federal case about a party's authority to sign a contract. It pre-dates the Federal Rules of Evidence by more than 50 years, and under the Bank's reading, the case says that oral evidence can never satisfy a statute of frauds. Of course, the rules of evidence say precisely the opposite.

The Bank emphasizes that it told the circuit court about two of the same cases the Court of Appeals cited in its decision, but when the Bank argued those cases to the circuit court, the Bank described those cases incorrectly. The Bank is arguing that there has to be uncontradicted and unimpeached evidence about a writing's existence before the court will

even *allow* secondary evidence, but during the circuit court hearing, the Bank was talking mostly about a writing's *contents*. See (App.p.351). The Bank told the court, "[y]ou can offer secondary evidence of contents, but I don't think you can offer secondary evidence of existence." (App.p.302). Rule 1008 says precisely the opposite, and *Chakur v. Zena* and *Mossman v. Hawiian Trust Co.* do not provide to the contrary. See *Mossman*, 361 P.2d 374, 379-380 (Haw. 1961); and *Zena*, 233 S.W.2d 200, 202 (Tex. Civ. App. 1950).

And the Bank continues to ignore the testimony of Bill Hargrove, who is not a party to this case. He is also not a principal or an employee of Oaktree Homes, and he testified in his deposition that he knew a commitment to lend existed because Derek Franklin, the bank vice president whose conduct is in question, "told me it existed[.]" (App.pp.399-400). This testimony seems plain, and while Mr. Hargrove *did* have a stake in the underlying deal to develop this subdivision, he has no stake in this lawsuit. Ignoring his testimony involves weighing evidence and taking sides in a credibility dispute, which this Court has repeatedly explained is impermissible in the context of deciding summary judgment. *Harris Teeter v. Moore & Van Allen*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010).

CONCLUSION

This Court should reverse the Court of Appeals, and the case should be remanded with instructions that the Court of Appeals review the alternative grounds for circuit court's decision as well as the denial of Oaktree's request for a jury trial. The principal basis of the court's decision was that the Lender Statute of Frauds required Oaktree to physically produce a written agreement that satisfied the statute. That holding is inconsistent with the statute's text as well as the South Carolina Rules of Evidence.

This Court need not reach the issue of sanctions because the Court's disposition of the preceding issues should be dispositive.

Respectfully submitted,

May 14, 2015

Blake A. Hewitt
John S. Nichols
BLUESTEIN NICHOLS THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Petitioner

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.

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 Brief* by mailing a copy of the same via United States Mail with first class postage prepaid to the following address:

James W. Sheedy, Esquire
Susan E. Driscoll, Esquire
DRISCOLL SHEEDY, P.A.
11520 North Community House Rd., Suite 200
Charlotte, North Carolina 28277

Erin Bridges

May 14, 2015
Columbia, South Carolina

Erin Bridges
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC

BNTD
BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

May 14, 2015

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 fifteen (15) copies of the Reply Brief in reference to the above matter. I have also enclosed a Proof of Service of this document on 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 need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

Erin Bridges
Paralegal to Blake A. Hewitt
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: William A. McKinnon, Esquire
Chad McGowan, Esquire
James Sheedy, Esquire
Susan E. Driscoll, Esquire