THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2013-CP-10-1647

Virgil "Ray" Passailaigue, Appellant,

v.

Henry Kuznik, Alfred L. Saad, III, Paul D. Hollen, III, and Thornwell Partners, LLC, Respondents

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INITIAL BRIEF OF RESPONDENTS HENRY KUZNIK AND PAUL D. HOLLEN, III

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STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT COMMITTED NO ERROR IN FAILING TO PROVIDE DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN ITS ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

II. NO GENUINE ISSUE OF MATERIAL FACT EXISTS AND RESPONDENTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW; THEREFORE, THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT.

   A. There is No Genuine Issue of Material Fact as to the Definition of "Net Proceeds" in the Promissory Note.

   B. There Is No Genuine Issue of Material Fact as to Whether Respondents Met Their Obligations Under the Promissory Note and Guarantees.

   C. The Issue of Which Promissory Note Controls Cannot Be Raised for the First Time on Appeal.

III. THE TRIAL COURT GRANT OF SUMMARY JUDGMENT WAS PROPER BECAUSE APPELLANT IS NOT A PARTY ENTITLED TO ENFORCE THE PROMISSORY NOTE AND GUARANTEES.

IV. APPELLANT CANNOT CLAIM THIRD-PARTY BENEFICIARY STATUS OF A CONTRACT WHICH HE DISCLAIMED IN BANKRUPTCY.

STATEMENT OF THE CASE

Appellant Virgil "Ray" Passailaigue ("Passailaigue" or "Appellant") commenced the underlying action on March 20, 2013 by filing a Complaint against Respondents Henry Kuznik ("Kuznik"), Alfred L. Saad, III

("Saad"), Paul D. Hollen, III ("Hollen"), and Thornwell Partners, LLC ("Thornwell"). Appellant amended the Complaint on March 17, 2014, asserting claims of breach of a Promissory Note and associated Guarantees (the "Agreements"). See Amended Complaint. Respondents answered Appellant's Amended Complaint asserting that the Agreements were drawn in favor of Passailaigue Homes, Inc., a corporation that Appellant legally dissolved. These Agreements were not drawn in favor of, nor did they so much as mention, Appellant in his individual capacity. Respondents also defended that, under the terms of the Promissory Note, payment was to be made to Passailaigue Homes, Inc. only from the "net proceeds" of the sale of certain real property. The sale of such property generated no net proceeds, but rather a loss of $238,093.38, as affirmed by the sworn affidavit of Thornwell's certified public accountant. See Affidavit of Jerry T. Saad, CPA ("Saad Aff."), Exhibit F to Memorandum in Support of Alfred L. Saad, III and Thornwell Partners, LLC's Motion for Summary Judgment, p.1, ¶ 5.

In September 2014, Respondents filed Motions for Summary Judgment, which were heard on September 10, 2014 and granted on September 16, 2014. See Motions for Summary Judgment of Respondents Kuznik, Saad, Hollen, and Thornwell; Order Granting Summary

Judgment. On September 29, 2014, Appellant filed a Motion to Alter or Amend Order Granting Defendants' Motions for Summary Judgment pursuant to Rule 59(e) and asserting that there existed issues of material fact. See Appellant's Motion to Alter or Amend. The circuit court denied Appellant's Motion to Alter or Amend on December 9, 2014. See Order Denying Motion to Alter or Amend.

Appellant filed notice of the instant appeal on January 7, 2015. See Notice of Appeal. Appellant filed its initial brief on or about April 15, 2015.

RELEVANT FACTS

At one time, Appellant and Respondents Kuznik, Saad, and Hollen were all members of Respondent Thornwell. In late 2007 or early 2008, Appellant transferred his membership interest in Thornwell to a corporation named Passailaigue Homes, Inc. ("Passailaigue Homes"). See Appellant's Deposition, Exhibit A to Memorandum in Support of Alfred L. Saad, III and Thornwell Partners, LLC's Motion for Summary Judgment ("App. Depo."), p. 56, line 6 through p.58, line 16. Passailaigue Homes held a contract to purchase certain real estate referred to by the parties as the Dassinger Tract. See Deposition of Jerry T. Saad ("Saad Depo."), Exhibit B to Memorandum in Support of Alfred L. Saad, III and Thornwell

Partners, LLC's Motion for Summary Judgment, p. 49, line 25 through p.51, line 11. Respondents agreed to pay Passailaigue Homes one million dollars over the contract amount in exchange for an assignment of the contract to purchase the Dassinger Tract. See App. Depo., p. 15, line 3 through p.16, line 13.

On or about November 7, 2008, Thornwell executed two substantively identical copies of a Promissory Note in favor of Passailaigue Homes for the sum of $130,000.00 (the "Note") in exchange for Passailaigue Homes's membership interest in Thornwell. See App. Depo., p. 76, line 24 through p.77, line 13. The Note expressly stated that "[t]his sum is to be repaid in its entirety from the net proceeds from the future sales of the property known as the Dassinger Tract. . . ." See Promissory Note ("Note"), Ex. A to Appellant's Amended Complaint, p.1, lines 3-6. Respondents each signed a guaranty guaranteeing the obligations of Thornwell under the Note. See Unconditional Guarantees of Kuznik, Saad, and Hollen ("Guarantees"), Ex. B to Appellant's Amended Complaint.

The sale of the Dassinger Tract resulted in a net loss of $238,093.38. See Saad Aff, p.1, ¶ 5. Appellant has failed to present any evidence to dispute that there were no net proceeds from the sale of Dassinger Tract.

ARGUMENT

I. THE TRIAL COURT COMMITTED NO ERROR IN FAILING TO PROVIDE DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN ITS ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

The trial court's reasoning for granting summary judgment is clear from the record below; therefore, the trial court was not required to state detailed findings of fact and conclusions of law in its order granting Respondents' Motion for Summary Judgment.

It is well settled under South Carolina law that findings of fact "must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." Porter v. Labor Depot, 372 S.C. 560, 568-69, 643 S.E.2d 96, 100-101 (Ct. App. 2007) (citing Heater of Seabrook, Inc. v. Pub Serv. Comm'n of S.C., 332 S.C. 29, 34, 503 S.E.2d 739, 742 (1998)). However, reviewing courts are permitted to review written documents and records of proceedings as bases for final decisions. Id. (citing Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 34, 606 S.E.2d 209, 212 (Ct. App. 2004)). In addition, in ruling on a motion for summary judgment, there is no requirement that a trial judge make findings of fact. See e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). In fact, "there is no blanket requirement that the trial court set

forth a separate explanation on all of its rulings." Clark v. S.C. Dep't of Pub. Safety, 353 S.C. 291, 312, 578 S.E.2d 16, 26 (Ct. App. 2002). In Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001), this Court held that a form order stating merely the court's denial of appellant's post-trial motions was, together with the record of the proceedings, adequate to enable appellate review. Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001).

Appellant's own Initial Brief cites the recent South Carolina Supreme Court case of Woodson v. DLI Properties, LLC, 406 S.C. 517, 753 S.E.2d 428 (2014), in which the Court overruled the holding in Bowen v. Lee Process Systems Co., 342 S.C. 232, 536 S.E.2d 86 (2000), that required circuit courts to set forth detailed findings of fact and legal analysis so as to permit meaningful appellate review. Woodson v. DLI Properties, LLC, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014). In overruling Bowen, the Supreme Court quoted and upheld the contrary holding in Porter that "not all situations require a detailed order, and the circuit court's form order may be sufficient if the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal." Woodson, at 527, 753 S.E.2d at 433 (2014). The Court found that since a decision on a motion for summary judgment is based upon evidentiary material provided by the

parties, including interrogatory answers, affidavits, depositions, and otherwise, the Court of Appeals had a sufficient record before it to permit meaningful appellate review. Id.

In the case at bar, Respondents presented affidavit and deposition testimony from Appellant, Respondents, and Respondents' accountant, as well as supporting factual documentation and thoroughly briefed memoranda of law supporting its Motion for Summary Judgment. See Motions for Summary Judgment of Kuznik, Saad, Hollen, and Thornwell; see also Saad Aff. Despite a standard of review heavily favoring Appellant, he failed to provide evidence demonstrating the existence of any genuine issue of material fact to counter Respondents' entitlement to judgment as a matter of law.

It is clear from the transcript of the hearing that the circuit court reviewed all documentation and factual materials provided by the parties in granting Respondents' Motions for Summary Judgment. See Transcript of Hearing on Motions for Summary Judgment ("Hearing Transc."). The circuit court found that Appellant failed to provide affidavits or other evidentiary documentation countering the affidavit of Thornwell's accountant which was provided by the Respondents. See Hearing Transc., p. 10, line 11-25. In his affidavit, Thornwell's accountant testified that no

individuals were disbursed any money from the sale of the properties at issue, and, as there were no net proceeds, there was no money to be paid under the Promissory Note and Guarantees. See Saad Aff., p.2, ¶ 7. Appellants failed to provide evidence that there were any net proceeds from the sale of the property. In fact, under oath, Appellant testified that he has no knowledge whether there were net proceeds. See App. Depo. p. 85, lines 5-12, 14-19. Therefore, Appellant failed to show any genuine issue of material fact. See Hearing Transc. p. 9, line 4 through p.11, line 5.

Appellant argues that because it is a "better practice" to include findings of fact and conclusions of law in an order granting a motion for summary judgment, this matter "must" be vacated and remanded. See Appellant's Brief, p.3-7. This misstates the law. A "better practice" is, by definition, not a required practice, particularly where the record below contains sufficient factual evidence to support the legal conclusions drawn in the trial court's order.

Because the record below is sufficiently detailed to enable the reviewing court to determine whether the trial court's findings are supported by the evidence and whether the law has been properly applied to those findings, the trial court did not err in issuing a form order granting Respondents' Motions for Summary Judgment.

II. NO GENUINE ISSUE OF MATERIAL FACT EXISTS AND RESPONDENTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW; THEREFORE, THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT.

Respondents properly filed with the circuit court their Motions for Summary Judgment with supporting affidavits and documentation demonstrating that there existed no genuine issue of material fact. Appellants failed to provide factual evidence or documents countering such showing.

To prevail on a motion for summary judgment, the movant must, based on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), S.C.R. Civ. P. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009) (citing Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994)). "Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine

issue of material fact." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party carries its initial burden, the nonmoving party must come forward with specific facts that show that there is a genuine issue of fact remaining for trial. Id.

A. There is No Genuine Issue of Material Fact as to the Definition of "Net Proceeds" in the Promissory Note.

The construction of a clear and unambiguous contract presents a question of law for the court. South Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008). It is also a question of law whether the language of a contract is ambiguous. Id. (citing South Carolina Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001)). When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. C.A.N. Enters., Inc. v. South Carolina Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988); Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc., 362 S.C. 12, 14, 605 S.E.2d 750, 752 (Ct. App. 2004).

Where an agreement is clear and capable of legal construction, the court's sole function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it. Ebert v.

Ebert, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995). South Carolina courts lack authority to alter an unambiguous contract by construction or to make new contracts for the parties. C.A.N. Enters., Inc., 296 S.C. at 378, 373 S.E.2d at 587. Rather, our courts must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997).

Under the plain language of the Promissory Note, Thornwell must repay the entire balance solely from the "net" proceeds from the sale of the Dassinger Tract. Black's Law Dictionary defines "net" as "an amount of money remaining after a sale, minus any deductions for expenses, commissions, and taxes." Black's Law Dictionary (9th ed. 2009). Respondents provided the trial court the affidavit testimony of a certified public accountant that this same definition is the plain and ordinary understanding of the term among accountants. See Saad Aff., p.1, ¶ 6. In addition, the Merriam-Webster online dictionary defines "net" when used as an adjective, as "free from all charges or deductions: as remaining after the deduction of all charges, outlay, or loss." See www.merriam-webster.com/dictionary/net. Finally, South Carolina courts and legislature appear to have no issue with the definition of the term "net

proceeds." See State v. County of Florence, 406 S.C. 169, 177-78, 749 S.E.2d 516, 520 (2013) (wherein the Court reviewed the State Local Option Sales Tax statute, which included the term "net proceeds," and despite the legislature's failure to provide a definition the term, the Court did not find the term ambiguous.).

The plain meaning of the word "net" controls the construction of the Note. Because there is no dispute that the inclusion of "net" was an intentional, negotiated term and the term has a clear, common meaning, the trial court properly found that there was no genuine issue of material fact as to the intention of the parties and the definition of the term "net."

Appellant attempts to show that there is disagreement as the meaning of the term; however, in Appellant's own deposition testimony, Appellant uses the term "net proceeds," never providing a definition one way or another, simply stating the word as though its meaning is clear. See Appellant Brief.... In addition, at his deposition, Appellant testified that "net" was intentionally added to the Note to clarify the term "proceeds." See App. Depo., p. 89, lines 10-20. This does not demonstrate that the definition is ambiguous; rather, it demonstrates the opposite: that all parties understood the meaning and intended for the term to be used in its common meaning in the Promissory Note.

Even if the Court somehow finds that the term "net" is ambiguous, Appellant failed to assert to the trial court that under any interpretation of the term, there would have been any proceeds to be paid to Appellant after the sale of the Dassinger Tract; therefore, where any definition of the term "net" or "net proceeds" is applied and there is no payout to the Appellant, there is, nonetheless, no genuine issue of material fact.

B. There Is No Genuine Issue of Material Fact as to Whether Respondents Met Their Obligations Under the Promissory Note and Guarantees.

"Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party carries its initial burden, the nonmoving party must come forward with specific facts that show that there is a genuine issue of fact remaining for trial. Id.

Because the terms of the contract are clear and it is undisputed that there was a net loss on the sale of the Dassinger Tract, there is no genuine issue of material fact as to whether the Respondents met their obligations under the Promissory Note and Guarantees. Not only have Respondents provided documentation and affidavits supporting that there was a net loss on the sale, at the hearing on Respondents' Motions for Summary

Judgment, the trial court found that there were no affidavits or supporting documentation indicating that the Respondents received any moneys from the sale of Dassinger Tract. In Respondents' Motions for Summary Judgment, Respondents properly carried their initial burden of showing there was no issue of material fact that no moneys were distributed, and, therefore, there were no net proceeds with which to pay the amount under the terms of the Promissory Note and therefore no obligation thereunder. Appellant, as the nonmoving party, failed in its consequential burden to counter Respondents' assertions and to come forward with specific facts that show that there was a genuine issue of fact remaining for trial. Therefore, the trial court's grant of Respondents' Motions for Summary Judgment were proper.

C. The Issue of Which Promissory Note Controls Cannot Be Raised for the First Time on Appeal.

It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved. Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006).

Appellant did not present the issue of which Promissory Note controls at the initial summary judgment motion, hearing, or in his Rule

59(e) motion. Therefore, this issue is not properly before the Court of Appeals and cannot be considered for the first time on appeal.

Even if the issue was preserved for appeal, the only two differences in the two Promissory Notes are, first, that "net" was hand-written into the terms of one Note prior to its execution, making it a term of the contract, regardless of whether typed or handwritten. The second difference is that, in the sentence "The lender grants the irrevocable right to one extension of 24 months, if property remains unsold," the word "irrevocable" was struck in one copy. Because the property was ultimately sold, this fact is immaterial. Thus, Appellant has failed his burden to show that there exist genuine issues of **material** fact.

III. THE TRIAL COURT GRANT OF SUMMARY JUDGMENT WAS PROPER BECAUSE APPELLANT IS NOT A PARTY ENTITLED TO ENFORCE THE PROMISSORY NOTE AND GUARANTEES.

It is well settled under South Carolina law that a person not in privity of contract with the contracting parties nor an intended third party beneficiary under the terms of the contract does not have a right to enforce the contract. E.g., Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997) (holding that tenants not party to a lease are not third-party beneficiaries under the lease terms); Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488

(2005) (holding that real estate listing broker is not a third-party beneficiary of a real estate sales contract). "The mere fact that [a third person] might ultimately and indirectly benefit from the contract between the [signatories to the contract] is not sufficient" to make that third person a third-party beneficiary under the contract. Bob Hammond Const. Co., Inc. v. Banks Const. Co., 312 S.C. 422, 425, 440 S.E.2d 890, 892 (Ct. App. 1994).

To determine whether the parties to a contract intended a third person to be a third-party beneficiary to that contract, South Carolina courts look to the four corners of the contract itself. E.g., Goode, at 445, 494 S.E.2d at 833 ("Thus, to determine if Goode was a third party beneficiary of the lease, we must construe the terms of the lease to ascertain the intentions of the parties."); Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 391-92 (1987) (holding that the intention of the parties "must be found within the four corners of the [contract]."). The construction of an unambiguous contract is a question of law for the court. Gardner, at 25, 358 S.E.2d at 392. Where the terms of a contract are clear and unambiguous, those terms may not be varied or contradicted by evidence drawn from sources other than the contract itself. Id.; See also Kingman v. Nationwide Mut. Ins. Co., 243 S.C. 405, 411, 134 S.E.2d 217, 220

(1964) ("In cases where there is no ambiguity, . . . contracts must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense. If the intention of the parties is clear, the Courts have no authority to change the contract in any particular and have no power to interpolate into the agreement between the [parties], a condition or stipulation not contemplated either by the law or by the contract between the parties." (internal citations omitted)).

The terms of the Promissory Note and Guarantees at issue in this appeal were clear and unambiguous. Thornwell Partners, LLC agreed to pay $130,000.00 to Passailaigue Homes and Henry Kuznik, Alfred L. Saad, III, and Paul D. Hollen, III agreed to guaranty payment under the Promissory Note. See Note. The parties to the Agreements were Passailaigue Homes, Inc., Thornwell Partners, LLC, Henry Kuznik, Alfred L. Saad, III, and Paul D. Hollen, III. See Note. Appellant was not named in any of the Agreements at issue. See Note and Guarantees. Neither of the Agreements made reference to the Appellant individually. See id. The Agreements included no statements or words to suggest that the parties had any intention that Appellant—rather than Passailaigue Homes, Inc., its

shareholders, assigns, successors, and creditors—benefit personally from the Agreements. See id.

Appellant argues that because Appellant stated in his deposition the he was paid the $1,022,900.00 for the assignment of the Promissory Note that there exists a question of fact as to whether he is a third-party beneficiary of the Agreements. See Appellant's Brief.... Respondents disagree for a number of reasons. First, Appellant's own statement from a deposition regarding being paid a certain amount of money is clearly not a provision within the four corners of the document. Because the language of the document is clear, unambiguous, and fails to mention Appellant at all, the intention of the parties clear within the terms of the contract, and no extrinsic evidence is admissible.

Second, Appellant never stated in his deposition or otherwise that he was paid the $1,022,900.00 in his individual capacity, rather than as a shareholder of Passailaigue Homes, Inc. Finally, Appellant's assertion that he received money, no matter the capacity, does not indicate that the parties to the contract actually **intended** for Appellant to receive these funds in his individual capacity, rather than that of a shareholder of a party to the contract, much less that they **intended** for him to benefit from the Agreements in his individual capacity. Appellant can offer no set of

facts to dispute that these funds were received, if by him rather than to Passailaigue Homes, that he did so in his capacity as a former shareholder. More importantly, Appellant has not and cannot offer any set of facts to dispute that he was not intended, in his individual capacity, to receive any benefit of the Agreements at issue.

IV. APPELLANT CANNOT CLAIM THIRD-PARTY BENEFICIARY STATUS OF A CONTRACT WHICH HE DISCLAIMED IN BANKRUPTCY.

It is a general principle of law that parties may enter into a contract for the benefit of a third person, and that third person may enforce the contract. E.g., Kingman v. Nationwide Mut. Ins. Co., 243 S.C. 405, 412, 134 S.E.2d 217, 221 (1964) (citing Pharr v. Canal Ins. Co., 233 S.C. 266, 104 S.E.2d 394 (1958)). To prove third-party beneficiary status, a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly. Glass v. U.S., 258 F.3d 1349, 1354, opinion amended on reh'g, 273 F.3d 1072 (Fed. Cir. 2001); see also, Brantley v. Republic Mortgage Ins. Co., 424 F.3d 392, 396 (4th Cir. 2005) (finding that "in order to determine whether the parties intended a nonsignatory to be a third-party beneficiary, we must look within 'the four corners of the [contract].'"

(quoting R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157, 164 (4th Cir. 2004)).

This Court has held that shareholders of a business do not have third-party beneficiary status under corporate contracts simply by virtue of their shareholder status. Glass, at 1354. In addition, "where a third party elects to avail h[im]self of a contract entered into between others for [his] benefit, [he] makes the contract [his] own, and must bear the burden as well as reap the benefits that properly belong to [him] as a party to the contract." Kingman, at 412, 134 S.E.2d at 221 (1964).

Appellant attempts to assert that he is an intended third-party beneficiary of the Promissory Note and Guarantees executed by Respondents; however, Appellant has failed to provide any fact, document, or evidentiary support for this argument other than his status as a shareholder of a party to the Promissory Note, Passailaigue Homes. This is an insufficient ground for third-party beneficiary status under South Carolina law, and nothing within the four corners of the contract or any other document provided by Appellant indicates any intention on the part of the parties to provide a direct benefit to Appellant individually. See Note and Guarantees.

In addition, Appellant specifically disclaimed his interest or any status as a beneficiary to the Promissory Note and Guarantees when, in filing for Chapter 7 bankruptcy, he abandoned his claim to any interest in Passailaigue Homes, Inc.'s "real estate assets," and notably stated that the Promissory Note belonged to the corporation. See App. Depo. p. 91, line 12 through p. 62, line 20.

Since Appellant has already disclaimed any interest in the Promissory Note, he cannot now claim third-party beneficiary status under it.

CONCLUSION

For the foregoing reasons, the trial court properly granted Respondents' Motions for Summary Judgment, and Respondents respectfully request this Court to uphold same. Pursuant to Rule 208(b)(6), S.C.R. App. P., Respondents Henry Kuznik and Paul D. Hollen, III join together in this Brief and adopt by reference all of the Brief of Respondents Alfred L. Saad, III and Thornwell Partners, LLC.

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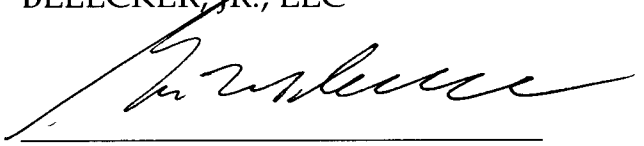

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