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SC Court of Appeals

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.

INITIAL BRIEF OF RESPONDENTS ALFRED L. SAAD, III, AND THORNWELL PARTNERS, LLC

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TABLE OF CONTENTS

Table of Authorities iii

Statement of Issue on Appeal 1

Statement of the Case 2

Statement of the Facts 3

Arguments 5

I. The trial court complied with Rule 52, SCRCP, and no additional finding is required for appellate review. 5

II. No genuine dispute exists over the fact that no payment is due to Appellant because of the net loss on the sale of the Dassinger Tract; therefore, the trial court properly granted Respondents' Motion for Summary Judgment. 7

III. The grant of summary judgment is proper because Appellant has no standing to sue under the Agreements. 11

Conclusion 15

TABLE OF AUTHORITIES

CASES

Porter v. Labor Depot, 372 S.C. 560, 643 S.E.2d 96 (Ct. App. 2007) 6

Clark v. S.C. Dep't of Pub. Safety, 353 S.C. 291, 578 S.E.2d 16 (Ct. App. 2002) 6

Woodson v. DLI Properties, LLC, 406 S.C. 517, 753 S.E.2d 428 (2014) 6

Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009)...... 8

Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) 8

S. Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008) 8

C.A.N. Enters., Inc. v. South Carolina Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988) 8, 9

Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc., 362 S.C. 12, 605 S.E.2d 750, (Ct. App. 2004).. 8

Ebert v. Ebert, 320 S.C. 331, 465 S.E.2d 121 (Ct. App. 1995)... 8

Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997).................................. 9

Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997)...... 10

Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006)... 10

S. Carolina Dep't of Labor, Licensing, & Regulation v. Chastain, 392 S.C. 259, 708 S.E.2d 818 (Ct. App. 2011).. 11

I'On LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716,(2000)....................... 11

Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827 (Ct.App.1997) 12, 13

1500 Range Way Partners, LLC v. JPMorgan Chase Bank, Nat. Ass'n, 800 F.Supp.2d 716 (D.S.C. 2011)... 12

Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994) 12, 13

Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005)............... 12

Brantley v. Republic Mortgage Ins. Co., 424 F.3d 392 (4th Cir. 2005) 13

R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157 (4th Cir. 2004) 13

Gardner v. Mozingo, 293 S.C. 23, 358 S.E.2d 390 (1987) 13

Glass v. United States, 258 F.3d 1349, opinion amended on reh'g, 273 F.3d 1072 (Fed. Cir. 2001) 13

German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220 (1912) 13

AMESCO Exports v. Associated Aircraft Mfg. & Sales, 977 F.Supp. 1014 (C.D.Ca. 1997) 14

Citicorp Intern. v. Western Oil & Refining, 771 F.Supp. 600 (S.D.N.Y 1991) 14

Tredennick v. Bone, 647 F.Supp.2d 495, 498 (W.D. Pa. 2007) 14

COURT RULES

RULE 220, SCACR 11

RULE 52, SCRCP 5, 6

RULE 56, SCRCP 8

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT PROVIDED SUFFICIENT FINDINGS AND CONCLUSIONS IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

II. WHETHER THE APPELLANT PRESENTED NO GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER THE CONDITION PRECEDENT FOR PAYMENT, SPECIFICALLY THE REALIZATION OF NET PROCEEDS, EVER OCCURRED.

III. AS AN ADDITIONAL SUSTAINING GROUND, WHETHER THE GRANT OF SUMMARY JUDGMENT IS PROPER BECAUSE APPELLANT IS NOT ENTITLED TO ENFORCE THE PROMISSORY NOTE AND GUARANTEES.

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 Partner, LLC ("Thornwell"). [Complaint]. Appellant amended the Complaint on March 17, 2014, asserting claims of breach of a Promissory Note and supporting individual Guarantees (the "Agreements"). [Amended Complaint]. On April 10, 2014, Saad and Thornwell timely answered Appellants Amended Complaint. [Answer to Amended Complaint]. In their Answer, Saad and Thornwell raised challenged Appellant's standing to bring an action under the Agreements, as Appellant's claims are based exclusively on Agreements drawn in solely in favor of Passailaigue Homes, Inc., a corporation that Appellant dissolved without any distribution to Appellant. Respondents also defended on the basis that, under the terms of the Promissory Note, the Agreements only required payment from the "net proceeds," if any, of the sale of certain real property.

On June 30, 2014, Saad and Thornwell filed their Motion for Summary Judgment, and they filed their Memorandum in Support of the Motion for Summary Judgment on September 4, 2014. [Motion for Summary Judgment of Respondents Saad and Thornwell and supporting Memorandum]. Judge Dennis heard all of the Respondents' Motions for Summary Judgment September 10, 2014. Judge Dennis granted the Respondents' Motions for Summary Judgment at the hearing. [Transcript of Hearing on Motions for Summary Judgment p. 11, lines 1 through 14]. On September 16, 2014, Judge Dennis issued an Order confirming his ruling. [Order Granting Defendants' Motion for 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) on the sole basis that the circuit should reconsider whether issues of material fact exist. [Appellant's Motion to Alter or Amend]. Judge Dennis is an Order denying Appellant's Motion to Alter or Amend on December 9, 2014. [Order Denying Motion to Alter or Amend].

Appellant filed notice of the instant appeal on January 7, 2015, challenging both of Judge Dennis' Orders. [Notice of Appeal]. Appellant filed its initial brief on or about April 15, 2015.

STATEMENT OF THE FACTS

Appellant, Saad, Kuznik, Hollen were all once members of defendant Thornwell Partners, LLC ("Thornwell"). However, Appellant instructed Jerry T. Saad, CPA, Thornwell's accountant, to indicate in the corporate records of Thornwell that Appellant had transferred his membership interest prior to 2008 to a corporation held solely by Appellant, Passailaigue Homes, Inc. [Appellant's Depo. pp. 56:6 - 58:16].

Thornwell was a single purpose entity. [Saad Depo., pp. 48:18 - 49:6]. The purpose of Thornwell was to acquire and sell a piece of real estate referred to by the parties as the Dassinger Tract. [Id. pp. 49:25 - 51:11]. Appellant held the membership interest of an LLC that had a contract to purchase the Dassinger Tract. Respondents agreed to pay the LLC $1 million over the contract amount in exchange for the LLC's assignment of the contract to purchase the Dassinger Tract. [Appellant's Depo., pp. 15:3 - 16:13]. Appellant's limited liability company received full payment of the $1 million obligation.

On or about November 7, 2008, Thornwell executed two (2) substantively identical copies of a promissory note in favor of Passailaigue Homes, Inc. for the sum of $130,000.00 (the "Note"). Appellant states that Passailaigue Homes, Inc. gave up its

membership interest in Thornwell in exchange for the Note. [Appellant's Depo., pp. 76:24 - 77:13]. The individual Respondents, including Saad, signed guarantees that would trigger in the event Thornwell did not meet its payment obligations under the Note. [Unconditional Guaranties].

Neither copy of the Note includes any unconditional promise to pay. Rather, first copy of the Note expressly states 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...." [Promissory Note, Appellant's Depo., Ex. 1.] The word "net" was hand-written into the first copy of the Note. [Id.]. On the second copy of the Note, the language regarding the conditional obligation to pay is the same, but the difference is that the word "net" was actually typed into the document. [Promissory Note, Appellant's Depo., Ex. 2]. Appellant testified that the word "net" was intentionally added into the Note as a result of the parties' negotiations, that the word "proceeds" without the qualifier "net" was insufficient to reflect the parties' agreement, and that the addition of "net" was not superfluous but was intended to carry meaning. [Appellant's Depo., pp. 88:6 - 90:12].

After Passailaigue Homes, Inc. received the Note, Appellant filed for Chapter 7 bankruptcy in the United States District Court for the District of South Carolina, Case No. 11-01866 DRD. Appellant did not claim or disclose any personal interest in the Note during his bankruptcy, but rather he represented to the Bankruptcy Trustee that the Note was an asset of the insolvent corporation Passailaigue Homes, Inc. [Appellant's Depo., pp. 61:12 - 62:20].

Appellant testified he has received no distribution or assignment of the Note on which he now sues. [Id. pp. 46:23 - 47:14]. P Appellant never placed Passailaigue Homes,

Inc. into bankruptcy despite many ongoing creditor lawsuits against the insolvent corporation. [Id. p. 62:21 - 65:11]. P Appellant simply dissolved Passailaigue Homes, Inc. after his personal bankruptcy. [Id. p. 46:2-12]. Appellant could not testify that he ever performed "winding up" of Passailaigue Homes, Inc. or that he ever provided notice to its many creditors of its dissolution under S.C. Code Ann. §§ 33-14-106 and 107. [Id. pp. 47:15 - 48:2]. Appellant could not testify that he ever received a distribution from Passailaigue Homes, Inc. of any interest in the Note. [Id. pp. 48:3 - 49:15].

Appellant agrees that the Note does not say anything about the Defendants "taking any money out of their pocket" to pay the balance of the Note in the event there are not available net proceeds from the sale of the Dassinger Tract, but rather the Note requires payment solely from the net proceeds from the sale of the Dassinger Tract. [Appellant's Depo., pp. 84:6 - 85:1]. Appellant testified that he had no knowledge of any net proceeds from the sale of the Dassinger Tract. [Id. p. 85:5-12; 14-19]. Appellant has never provided any evidence of net proceeds from which he could have been paid or any calculation demonstrating any net proceeds from which he could have been paid from the sale of the Dassinger Tract. [Id. pp. 85:2-94:14]. Appellant has never presented any evidence contrary to the affidavit testimony of Jerry Saad, CPA, reflecting that the sale of the Dassinger Tract resulted in a net loss of $238,093.38. [Affidavit of Jerry T. Saad, CPA dated June 30, 2014].

ARGUMENTS

I. THE TRIAL COURT COMPLIED WITH RULE 52, SCRCP, AND NO ADDITIONAL FINDING IS REQUIRED FOR APPELLATE REVIEW.

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

stated, "[N]ot all situations require a detailed order, and the trial court's form order may be sufficient if the appellate court can ascertain the basis for the trial court's ruling from the record on appeal. Porter v. Labor Depot, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007) (citing Clark v. S.C. Dep't of Pub. Safety, 353 S.C. 291, 578 S.E.2d 16 (Ct. App. 2002). "[T]here is no blanket requirement that the trial court set forth a separate explanation on all of its rulings." Id. at 312, 578 S.E.2d at 26.

Appellant correctly draws this court's attention to the recent South Carolina Supreme Court case of Woodson v. DLI Properties, LLC, 406 S.C. 517, 753 S.E.2d 428 (2014). In Woodson, the South Carolina Supreme Court overruled the holding in Bowen v. Lee Process Systems Co., 342 S.C. 232, 536 S.E.2d 86 (2000), which required circuit courts to set forth detailed findings of fact and legal analysis so as to permit meaningful appellate review. The Court stated:

> However, Rule 52, SCRCP, provides that "[f]indings of facts and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56...." Thus, such findings and conclusions are not required for appellate review, and, for this reason, we overrule *Bowen* to the extent it is relied upon to vacate and remand orders granting summary judgment.

Woodson, 406 S.C. at 527, 753 S.E.2d at 433. Quoting Porter, the Court reiterated 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.

In their motion for summary judgment, Saad and Thornwell presented affidavit and deposition testimony from Appellant, Respondents, and Respondents' accountant Jerry Saad, as well as supporting factual documentation and a thoroughly briefed memorandum of law supporting their Motion for Summary Judgment. 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.

In support of their motion for summary judgment, Respondents offered the deposition testimony described in the statement of facts above and the affidavit of Jerry T. Saad, CPA, which together demonstrated that there was no "net proceeds," as that term is commonly used and understood, arising from the sale of the Dassinger Tract, and Appellants failed to counter this factual evidence. [Transcript. p. 9, line 4 through p.11, line 5]. During the hearing, Appellant expressly conceded that none of the Respondents ever received any money or distribution from the sale of the Dassinger Tract. [Transcript, p. 10, lines 11 through 25].

It is clear from the transcript of the hearing that Judge Dennis reviewed such all such documentation and factual materials in making his finding that Appellant failed to provide affidavits or other evidentiary documentation countering the record provided by the Respondents. Moreover, Judge Dennis confirmed that he had considered the record in his written Order denying Appellant's Motion for Reconsideration. 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 commit error.

II. NO GENUINE DISPUTE EXISTS OVER THE FACT THAT NO PAYMENT IS DUE TO APPELLANT BECAUSE OF THE NET LOSS ON SALE OF THE DASSINGER TRACT; THEREFORE, THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT.

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). "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.

The construction of a clear and unambiguous contract presents a question of law for the court. S. 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. 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 unrefuted affidavit testimony of a certified public accountant that this same definition is the plain and ordinary understanding of the term among accountants. [Affidavit of Jerry T. Saad, CPA, paragraph 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 apply the common definition of "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. There is no dispute that the inclusion of "net" before the word "proceeds" was an intentional, negotiated act. [Appellant's Depo., pp. 88:6 - 90:12]. As the term "net proceeds" has a

clear, common meaning and is reasonably subject to more than one definition. *See* Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (defining an ambiguous contract as one where the terms of the contract are inconsistent on their face or are reasonably susceptible of more than one interpretation). Therefore, 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 he disagrees with the common definition of "net proceeds." Because this term is not ambiguous, his disagreement is irrelevant for purposes of construing the contract. Moreover, Appellant never provides a coherent definition of his own, suggesting only that even there are no "net" proceeds, but rather "negative" proceeds, then he should still be paid from that negative amount. Appellant's self-serving testimony is insufficient to give rise to a genuine dispute of any material fact.

Under any definition of the term "net" or "net proceeds," Appellant has failed to demonstrate what those "net proceeds" are and what payment calculation is due to him. Therefore, Appellant fails to create any genuine issue of material fact as to whether the Respondents met their obligations under the Promissory Note and Guarantees.

Appellant attempts to create an issue of fact because there are two signed promissory notes; one that has "net" hand-written into the agreement and one that has it typed into the agreement. This issue is first raised 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). More importantly, Appellant's own testimony confirms that he intended for the word "net" to be included in the Promissory Note, and so there is no genuine issue of

material fact that as suggested in Appellant's argument. [Appellant's Depo., pp. 88:6 - 90:12].

Finally, Appellant attempts to create an issue of fact by stating that there is some independent basis for liability against the individual Respondents, including Saad, under the Guarantees even if there is no amount due under the Note. However, Appellant ignores that the Guarantees is purely a "guarantee of payment" of "all Obligations of Borrower due by Borrower to Lender." [Guarantee of Al Saad, p. 1]. The "Obligations" are nothing more than payments that have become due under the Note. [Id.] There is no independent obligation of payment under the Guarantees, and therefore Appellant's attempt to create a genuine issue of material fact separate and apart from whether there is a payment due under the Note must fail.

III. THE GRANT OF SUMMARY JUDGMENT IS PROPER BECAUSE APPELLANT HAS NO STANDING TO SUE UNDER THE AGREEMENTS.

As this court recognized in S. Carolina Dep't of Labor, Licensing, & Regulation v. Chastain, 392 S.C. 259, 262, 708 S.E.2d 818, 820 (Ct. App. 2011), a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, even if those reasons have not been presented to or ruled on by the lower court." (quoting I'On LLC v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." Id. "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

In their Memorandum in Support of the Motion iSaad and Thornwell argued to Judge Dennis that a cursory review of the Agreements demonstrates Appellant is not a

party or a signatory to any of the Agreements. Appellant admits that the consideration given for the Note came from Passailaigue Homes, Inc., the entity that Appellant testified gave up its membership interest in Thornwell in exchange for the Note. [Appellant's Depo., p. 77:8-13]. Therefore, Appellant amended its complaint in an attempt to avoid a prior pending motion to dismiss by adding the allegation that Appellant is the "real party in interest" under the Agreements. However, the Agreements themselves offer no support to Appellant's argument.

Generally, a third person not in privity of contract with the contracting parties does not have a right to enforce the contract. Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct.App.1997) (holding that other tenants are not third-party beneficiary under lease terms regarding illegal actions in common areas); *see* 1500 Range Way Partners, LLC v. JPMorgan Chase Bank, Nat. Ass'n, 800 F.Supp.2d 716 (D.S.C. 2011) (holding that JPMorgan was not liable under lease agreement for lease of prior bank tenant because of lack of any assignment). "However, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994) (finding no third party beneficiary relationship).

A third-party beneficiary is a party that contracting parties intend to directly benefit. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) (holding real estate listing broker is not a third party beneficiary of a real estate sales contract). South Carolina courts have stated, "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]." Brantley v. Republic Mortgage Ins. Co., 424 F.3d 392, 396 (4th Cir. 2005) (quoting R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157, 164 (4th Cir.2004) and Gardner v. Mozingo, 293 S.C. 23, 358 S.E.2d 390, 392 (1987) and holding mortgage insurer could not compel mortgagors to arbitrate FCRA claim under their arbitration agreement with mortgagee). Third party beneficiary status is an "exceptional privilege" and, to avail oneself of this exceptional privilege, a party must "at least show that [the contract] was intended for his *direct* benefit." Glass v. United States, 258 F.3d 1349, 1354 opinion amended on reh'g, 273 F.3d 1072 (Fed. Cir. 2001) (emphasis in original) (quoting German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 230 (1912)).

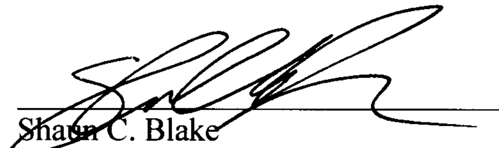
None of the Agreements at issue make any reference to Appellant individually. The Agreements do not include any statements or words to suggest any intent by the parties that Appellant - and not Passailaigue Homes, Inc.'s future shareholders, assigns, successors, creditors, etc. – benefit personally from the payment of the amount due under the Note. Appellant points to no other fact than his status as a former shareholder of this now dissolved, insolvent company as the basis for his claim to sue under the corporation's Agreements. Therefore, Appellant's contention that his deposition testimony creates a genuine issue of material fact regarding his third party beneficiary status fails as a matter of law. Goode, 329 S.C. at 445, 494 S.E.2d at 833; Bob Hammond Constr. Co., 312 S.C. at 424, 440 S.E.2d at 891; *see also* Glass, 258 F.2d at 1354 (holding that shareholders, simply by virtue of their shareholder status, do not have third-party beneficiary status under corporate contracts and citing additional authorities with the same holdings); Macksey v.

Egan, 633 N.E.2d 408, 411-412 (Mass.App.Ct. 1994) (reversing lower court and holding that shareholder was not a third-party beneficiary to corporation's contract with venture capitalists);

If this court allows Appellant to proceed as a third-party beneficiary solely by virtue of his status as a shareholder of Passailaigue Homes, Inc., this court would indicate that all shareholders and members of corporate entities have third-party beneficiary standing to sue on corporate obligations by virtue of the mere possibility of receiving a distribution from the corporation. *See* AMESCO Exports v. Associated Aircraft Mfg. & Sales, 977 F.Supp. 1014, 1016 (C.D.Ca. 1997) ("But the contract was not entered into by the corporation with the intention of fulfilling an obligation to pay money to [shareholder]. Rather, as a shareholder of AMESCO, he receives an incidental benefit from the contract. To find otherwise would indicate that any shareholder may sue on any contract upon which the corporation was a signatory. This is clearly too broad a finding.") (vacated on other grounds); *see also* Citicorp Intern. v. Western Oil & Refining, 771 F.Supp. 600, 604 (S.D.N.Y 1991) (holding shareholders were not intended third-party beneficiaries of corporation's agreement); Tredennick v. Bone, 647 F.Supp.2d 495, 498 (W.D. Pa. 2007) (Granting motion to dismiss and holding that shareholder was not a third-party beneficiary to the contract for tax services between corporation and accountant). Such a broad, sweeping conclusion is unsupported by the weight of binding and persuasive authority.

CONCLUSION

For the foregoing reasons and those reasons set forth in the briefs submitted by Respondents Kuznik and Hollen, which Saad and Thornwell adopt by reference under Rule 208(b)(6), Respondents Saad and Thornwell respectfully contend the trial court properly granted Respondents' Motions for Summary Judgment, and they respectfully request this Court affirm the decision of the trial court.



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