

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEE COUNTY
Court of Common Pleas

Walter Newman, Special Referee

Appellate Case No. 2015-000498

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SC Court of Appeals

A&P Enterprises, LLC

Appellant,

v.

SP Grocery of Lynchburg,
LLC and Suresh "Sam" Patel

Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the Special Referee err in holding that Respondents have an equitable interest in the subject real estate preventing them from being evicted and granting them the right to purchase the property from Appellant according to the terms set forth by the Order?

STATEMENT OF THE CASE

Appellant commenced this action by the filing of an affidavit for ejectment in the Lee County Magistrate's Court pursuant to South Carolina Code § 27-37-20. The Respondents filed a timely return to the Rule to Show Cause in which set up ownership or equitable interest in the property as a defense to the ejectment. The parties consented to transfer their respective claims to the Court of Common Pleas.

A&P Enterprises, LLC is a South Carolina LLC whose sole member is Kamlesh "Kim" Patel. (Order of April 21, 2014; R. ____). SP Grocery of Lynchburg, LLC is a South Carolina limited liability company whose sole member is Payal Suresh Patel. Payal Suresh Patel is the daughter of Suresh "Sam" Patel. (Order of April 21, 2014; R. ____). Sam Patel and Kim Patel are brothers.

Sam Patel moved to the United States from India in approximately 1979. Sam's parents, his brother and sisters followed. The entire family had moved in with Sam and his wife in Chicago by the early 1980's. In approximately 1989, Sam bought a store located at Willow Grove Road in Lynchburg. Sam, his wife and children, along with Sam's parents and brother,

Kim, moved from Chicago to South Carolina. (Order of April 21, 2014; R. ___).

The entire extended family lived on the premises of the store in Lynchburg. Sam, along with the rest of his extended family, worked in the Lynchburg store. The business grew, and eventually a store in Sumter was acquired. There is some dispute as to the circumstances, but by approximately 1992, Kim took over the Sumter store as his own. From this point, Sam and Kim operated their own respective businesses. Both brothers were apparently successful and came to have other stores and investments. (Order of April 21, 2014; R. ___).

Sam's other businesses included construction and development. Sam's financial condition deteriorated, and in 2011 multiple properties Sam owned, including that subject of this appeal, were foreclosed. The Lynchburg store was foreclosed by First Citizens Bank and Trust Company, and on October 15, 2011 A&P Enterprises, LLC, bought the Lynchburg store at foreclosure sale for the sum of \$350,001.00. (Order of April 21, 2014; R. ___). Sam ultimately filed bankruptcy in 2011, and Kim loaned him the money to pay for the filing. (Order of April 21, 2014; R. ___).

Sam continued to operate the Willow Grove Road store, known as Tommy's Grill, after Kim's purchase of the property in October 2011. No rental agreement or writing of any kind ever existed to confirm the nature of Sam's occupancy and use of the property. No rent has ever been paid to Kim by Sam. (Order of April 21, 2014; R. ___).

Sam and Kim give very different accounts of the circumstances of the purchase by Kim and the intended use of the property by Sam thereafter. Kim contends that the purchase of the property was solely an investment, that he expected Sam to pay rent. Kim testified that he was expecting a return on his investment in the property of twelve to fifteen percent. (Transcript; p. 58; ll. 23-25; p. 59, l. 1; R. ___). Kim is adamant that Sam was never going to be able to buy the

store back and that there was no promise that Kim would sell it to him.

Sam Patel's testimony is that Kim purchased the store in order to convey it back to Sam, not to rent it to him. Sam testified that Kim offered to buy back the Lynchburg property for him and that Kim initially wanted to pay for the property and title it in Sam's name. Sam testified that he insisted on paying Kim back for what Kim paid for the property and that he did not want Kim to put the property into his name until he had repaid Kim. (Order of April 21, 2014; R. ___).

By consent of all parties, this matter was referred to the Honorable Walter Newman, as Special Referee for Lee County. A hearing was held on February 18, 2014. Judge Newman issued his Order on April 17, 2014. The Appellant filed a timely motion for reconsideration and/or motion for relief from judgment on May 1, 2014. This motion and arguments in support thereof were heard by Judge Newman in Sumter, South Carolina on October 22, 2014. Judge Newman issued his order denying Appellant's Motion for Reconsideration on February 18, 2015. This order was filed and served on the parties on or about March 4, 2015 and Appellant timely filed Notice of Appeal on March 10, 2015.

STANDARD OF REVIEW

The character, as legal or equitable, of an action is determined by the complaint in its main purpose, the nature of the issues as raised by the pleadings or the pleadings and proof, and the character of the relief sought under them. Jones v. Leagan, 384 S.C. 1, 681 S.E. 2d 6 (S.C. Ct. App. 2009). The Amended Complaint of Appellant states causes of action for eviction, breach of contract, and quantum meruit. The Answer and Counterclaims of Respondent assert promissory estoppel as the basis for Respondent's claim of an equitable interest in the property. Therefore, the issues raised in this matter involve both legal and equitable claims.

In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law. The appellate court will not disturb the trial court's factual findings unless they are without evidence reasonably supporting those findings. In equitable actions, the appellate court may find facts in accordance with its own view of the preponderance of the evidence. When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal. S.C. DOT v. Horry County, 391 S.C. 76; 705 S.E.2d 21 (2011).

In an appeal from an action in equity, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses. Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings. Pinckney v. Warren, 344 S.C. 382; 544 S.E.2d 620 (2001).

ARGUMENT

I. APPELLANT'S CLAIM AS TO LACK OF STANDING IS UNSUPPORTED BY EVIDENCE.

Appellant contends that any judgment benefitting Respondent based on promissory estoppel is precluded by Sam Patel's bankruptcy. However, these arguments have no evidentiary support. The only evidence of record is that Kim Patel loaned his brother \$5000.00 to pay for a bankruptcy filing and that this filing occurred sometime in 2011. (Order of April 21, 2014; R. ___). No testimony or evidence establishes the date of any filing, what assets or liabilities were included or any disposition of the petition in support of this position.

The Appellant cites Bragg v. Bragg, 347 S.C. 16; 553 S.E.2d 251 (S.C. App. 2001) for the proposition that only the bankruptcy court would have had control of the bankruptcy estate of Sam Patel. The actual holding of the Court, as to this point, is that only a bankruptcy court is competent to apportion a debtor's property and that state courts cannot issue orders interfering with the bankruptcy court's exclusive jurisdiction over the property of a bankrupt estate. There is simply no evidence that this property is subject to a bankruptcy estate at the time of this litigation. Moreover, it certainly appears that the bankruptcy was not an issue that prevented the foreclosure from which Appellant obtained legal title to the property. Accordingly, the Special Referee did not err in holding that simply the allegation that the bankruptcy has some bearing on these matters, without any further evidence, would result in a lack of standing as to Respondents' claims of Promissory Estoppel.

**II. RESPONDENTS ARE NOT BARRED FROM THE REMEDY OF
PROMISSORY ESTOPPEL BASED UPON THE DOCTRINE OF
UNCLEAN HANDS.**

The Appellant argues that the filing of bankruptcy by Sam Patel results in his having “unclean hands” so as to preclude him from any benefit in equity. While Respondent denies that the filing of his bankruptcy was done in any way to circumvent or defraud anyone, even if that were true, the doctrine would be of no benefit to Kim Patel.

The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998). The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others. Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735 (1943). The rule must be understood to refer to some misconduct concerning the matter in litigation of which the opposing party can, in good conscience, complain in a court of equity. Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (S.C. Ct. App. 2010).

Though the facts with regard to Sam Patel’s bankruptcy filing are limited, Kim testified he loaned him \$5000.00 for the filing of a petition. (Transcript of Record, p. 29, ll 14-25; p. 30, ll. 1-6; R, ____). Though Kim denied that he ever had any agreement with Sam to sell the property back to him, the Special Referee did not find Kim’s testimony credible. Based upon the credible evidence, the Special Referee found that there was an unambiguous promise from Kim that he would convey the property back to Sam. (Order of February 18, 2015; R. ____). Kim had knowledge of all the matters that he now complains constitute “unclean hands” and none of the matters described, if true, constitute any misconduct directed toward Kim. Kim may not avail himself of the doctrine of unclean hands under the circumstances he alleges.

III. THE SPECIAL REFEREE WAS CORRECT IN FINDING THAT RESPONDENT OWNS AN EQUITABLE INTEREST IN THE SUBJECT REAL ESTATE BASED UPON THE DOCTRINE OF PROMISSORY ESTOPPEL.

The Special Referee correctly set forth the burden of proof and elements of promissory estoppel. The elements of promissory estoppel require that a claimant prove, by clear and convincing evidence, that: (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by a party to whom the promise is made; (3) the reliance is expected and foreseeable by a party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise. Satcher v. Satcher, 351 S.C. 477, 570 S.E.2d 535 (S.C. Ct. App. 2002).

Promissory estoppel is a distinct and separate legal theory from contract. Where a contract requires a meeting of the minds and consideration, promissory estoppel looks at a promise, its subsequent effect on the promisee, and in certain cases bars the promisor from making an inconsistent disposition of the property. Satcher, Id. The applicability of the doctrine depends on whether the refusal to apply it "would be virtually to sanction the perpetration of a fraud or would result in other injustice." Citizens Bank v. Gregory's Warehouse, Inc., 297 S.C. 151, 375 S.E.2d 316 (Ct. App. 1988).

A. The Special Referee correctly found there was a promise unambiguous in its terms.

The Appellant has challenged the Special Referee's findings related to the first and second elements of promissory estoppel. The Special Referee had the opportunity to observe the witnesses and assess their credibility, and found by clear and convincing evidence that there was an unambiguous promise that Kim would convey the property to Sam if Sam were able to repay him over a period of five years. The Appellant complains that the only evidence of this promise

is the testimony presented by Respondents, denied by Appellant. However, this statement ignores the testimony provided in addition to that of Sam Patel. The other witnesses supported the Special Referee's finding that there was clear and convincing evidence of the promise by Kim to convey the store back to Sam. These same witnesses contributed to the finding that Kim's total denial of having made such a promise was not credible.

Kim Patel testified that he purchased the Lynchburg store at the foreclosure sale only as an investment. That while he intended to give his brother Sam some time to "get on his feet," he anticipated he would receive rent of some \$5000.00 per month from Sam after a period of six months or so. (Transcript of Record, p. 45 , ll. 6-12 ; R____). Despite his testimony that the property was purely an investment, Kim testified he and Sam never had any discussion with regard to rent of the Lynchburg store. (Transcript of Record, p.45, ll. 17-25; R____).

Sam testified that Kim offered to buy back the Lynchburg property for him and that Kim initially wanted to pay for the property and title it in Sam's name. Sam testified that he insisted on paying Kim back for what Kim paid for the property and that he did not want Kim to put the property into his name until he had done so. (Transcript of Record, p.71,ll.3-12 ; R____). The Court found, and Sam acknowledged that the purchase of the property was not intended as a gift, but rather, Sam intended to pay Kim back within five years. (Order of April 21, 2014; R. ____). Sam testified that he did not object to making some monthly payments toward the amount Kim paid, but that he believed it was fair to credit this toward the purchase price. There is no ambiguity as to the price nor five year term of payment.

Two other witnesses, Payal Patel and Terrence Wilson, testified. The Special Referee considered their testimony in determining what evidence was credible and what was not. Payal Patel is Sam Patel's daughter, and a physician in Florence, South Carolina. She described the

extended families living on the property- in a trailer and later an apartment over the store- at the Lynchburg store when they first moved to South Carolina. She also described Kim's family living with them in Florence for a time after a fire at the apartment. (Transcript of Record, p.140 ,l 1-25; p. 141, ll. 11-25; R____). Payal described visiting with her cousins, weddings and things involving her Uncle Kim and his wife well after 1993. (Transcript of Record, p. 143 ,ll. 1-25; p. 144, ll. 1-25; p. 145, ll. 1-25; p. 146, ll. 1-25 ; R____). The Special Referee found Payal's testimony was very credible as to her description of family relationships. Her description contradicted Kim's testimony, who testified the only time he and Sam saw each other since 1991 or 1992 were times Sam needed money. (Transcript of Record, p.50 ,ll. 3-9; R____). Where Kim described a family that was fractured after 1992, Payal described family birthday parties, weddings and other events that all attended enjoyably after 1992. (Order of April 21, 2014; R. ____). Though Payal did not know all the details of the agreement between her father and uncle, she testified that when her father asked her for help in setting up SP Grocery, the purpose was to allow him to continue to operate the store so that he could buy it back from her uncle. (Transcript of Record, p.147 ,ll. 21-25; R____).

Terrence Wilson testified that he had been friends with both Sam and Kim for many years, had helped them both in the store, and spoke with them frequently (Transcript of Record, p. 121 ,ll. 10-25; R____). Terrence testified that he had conversations with both Sam and Kim about Sam being able to buy the store back, partly from money that Terrence owed Sam. (Transcript of Record, p.128 ,ll. 1-11 ; R____). Terrence testified that there was never any discussion of rent until the Kim and Sam's wives had an argument over Kim paying a gas bill for Sam in March of 2013. (Transcript of Record, p. 128 ,ll. 13-25; p. 129, ll. 1-14; R____).

The Special Referee noted that he had the opportunity to observe the witnesses, both

parties and non-parties, their demeanor, and the overall context with which the events that were the subject of their testimony unfolded. The finding that Kim Patel's testimony was not credible and the findings that established an unambiguous promise were all supported by the evidence.

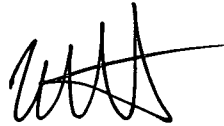
B. The Special Referee was correct in finding reasonable reliance upon the promise.

The Appellant's challenge to the Special Referee's finding as to the reliance element of promissory estoppel is simply that one cannot rely on an ambiguous promise. The statement of law is correct, however, the promise here was not ambiguous. The Special Referee found, that in reliance upon Kim's promise, Sam made expenditures on the property, after the purchase of the property by Kim of over \$68,000.00. The expenditures were for gas pumps and installation, HVAC repairs and general repairs to the property. (Order of April 21, 2014; R. ____). The Special Referee found these improvements reasonable and foreseeable and not the type of improvements an occupant of the premises would have undertaken without some belief that the property was to be theirs. (Order of April 21, 2014; R. ____).

CONCLUSION

For the reasons set forth above, the Special Referee's order denying Appellant's request for eviction and establishing Respondents' equitable interest in the subject property should be affirmed.

Respectfully submitted,



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SC Court of Appeals

A&P Enterprises,
LLC,

Appellant,

v.

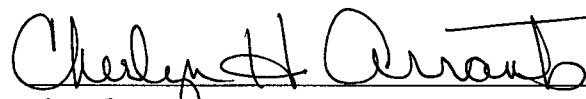
SP Grocery of
Lynchburg, LLC and
Suresh "Sam" Patel

Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that she is a secretary with the law firm of Jennings & Jennings, P. A.; that a copy of the INITIAL BRIEF OF RESPONDENT and DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL were served in the foregoing action by depositing the same in the United States mail with sufficient postage affixed thereto and return address clearly visible on the 10th day of July, 2015, addressed to the following:

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SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Re: A&P Enterprises
Vs. SP Grocery of Lynchburg, LLC and Suresh "Sam"
Patel
Appellate Case No. 2015-000498
Our File No. 13-5810

Dear Ms. Kitchings:

Please find enclosed Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal in the above referenced matter.

By copy of this letter, I am serving same on counsel of record for the Appellant.

Thanking you, and with kind regards, we are

Very truly yours,
JENNINGS & JENNINGS, P.A.


WILLIAM W. WHEELER, III

WWIII/ca

Encs.

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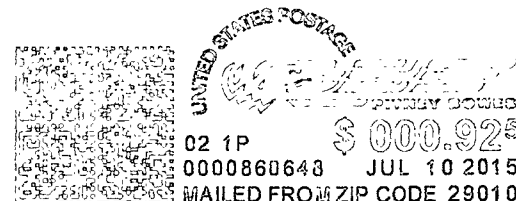
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