THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2014-002711

J. S. Sanders Company LLC.....Respondent,

v.

Steven P. Levesque.....Appellant.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in finding that the Promissory Note allows a personal judgment against Appellant as maker, and that therefore there was an irreconcilable conflict between the terms of the Promissory Note and the Mortgage, such that the non-recourse provision in the Mortgage should not be enforced?

II. Did the Circuit Court err in finding that the Agreement To Purchase and Sell Real Estate and integration clause contained therein overrode the plain and unambiguous non-recourse provision in the later executed Promissory Note, such that the non-recourse provision in the Mortgage should not be enforced?

III. Did the Circuit Court err in finding the plain and unambiguous non-recourse provision in the mortgage to be unenforceable, even though there was no cause of action asserted for reformation on the basis of mutual mistake?

STATEMENT OF THE CASE

This action arises from the sale of a lot (the "Lot") by Respondent to Appellant. In connection with the sale, Respondent provided partial seller financing, accepting a promissory note (the "Promissory Note") from Appellant for portion of the sales price; the balance of the price was paid in cash at closing. This Promissory Note was secured by a purchase money mortgage executed by Respondent to Appellant simultaneously with the Promissory Note, encumbering the Lot sold.

Appellant seeks in this action to recover the unpaid balance on the Promissory Note. Although the Promissory Note is secured by the Mortgage executed at closing simultaneously with the Promissory Note, Respondent has elected not to foreclose the Mortgage, and simply seeks a money judgment on the note.

The dispute in the case arises from the fact that the Mortgage contains a non-recourse provision, providing that the liability of Appellant under the Promissory Note will be limited to his interest in the Lot, and that Appellant will not be liable for a personal or deficiency judgment. The Promissory Note does not have a non-recourse provision.

The fundamental issue in this case is whether the non-recourse provision in the Mortgage should be given effect so as to bar a personal or deficiency judgment against Appellant.

FACTS

Respondent J. S. Sanders Company, L.L.C. is a limited liability company that was formed by John S. Sanders, Jr., his wife Nell S. Sanders, and their son John S.

("Sammy") Sanders to serve as a vehicle for the purchase and sale real estate by the Sanders family. (R. p. 61). Articles of Organization (R. p. 97). John S. Sanders, Jr. and Sammy Sanders were each a manager of the LLC. (R. p. 63); Articles of Organization (R. p. 98). Each of John S. Sanders, Jr., Sammy Sanders, and Nell S. Sanders owned one-third of the company. (R. p. 63).

John S. Sanders, Jr. was a graduate of the Citadel, with a degree in business. Sammy Sanders completed two years of college. Nell S. Sanders completed high school. (R. pp. 65-66).

In December of 2004, Nell S. Sanders and Appellant entered into an Agreement to Buy And Sell Real Estate (the "Agreement") (R. p. 62). Agreement to Buy and Sell Real Estate (R. p. 100). Under this Agreement, Nell S. Sanders agreed to sell and Appellant agreed to purchase the Lot known as "Lot 10, Bridle Gate." Agreement to Buy and Sell Real Estate (R. p. 100). Under the Agreement, the purchase price for the Lot was $250,000. The Agreement also provided that Appellant would pay $35,000 down at closing, and that Nell S. Sanders as seller would provide seller financing for the $215,000 balance at an interest rate of six percent. Agreement To Buy And Sell Real Estate, § 13 (R. p. 101).

Ultimately, Nell S. Sanders did not sell the Lot to Appellant. Rather, on December 30, 2004, she conveyed the Lot to the family LLC – Respondent J. S. Sanders Company, L.L.C. Title to Real Estate (R. p. 104). Subsequently, on or about March 10, 2005, Respondent J. S. Sanders Company, L.L.C. conveyed the Lot to Appellant. Title to Real Estate (R. p. 104).

There is no testimony or other evidence in the record that the Agreement was ever assigned by Nell S. Sanders to J. S. Sanders Company, L.L.C., and as a result there is no testimony or other evidence that there was any contract between J. S. Sanders Company, L.L.C. and Appellant prior to the closing of the Lot purchase and sale. At the closing, Appellant executed and delivered to J. S. Sanders Company, L.L.C. both the Promissory Note and the Mortgage securing the Promissory Note.

At the closing of the sale of the Lot to Appellant, Appellant paid $35,000 down at closing. Settlement Statement (R. p. 109). Appellant also executed the $215,000 Promissory Note in favor of the J. S. Sanders Company, L.L.C., which represented the balance of the $250,000 purchase price. (R. p. 81); Promissory Note (R. p. 118).

In order to secure the repayment of the Purchase Money Promissory Note, Appellant simultaneously with the execution of the Promissory Note executed the purchase money Mortgage on the Lot. (R. p. 81); Purchase Money Mortgage (R. p. 121).

This Mortgage contained a non-recourse provision, which limited the liability of Appellant under the Promissory Note to Appellant's interest in the Lot, thus precluding a deficiency judgment or any other recourse other than foreclosure on the Lot. The non-recourse provision in the Mortgage provides as follows:

> 15. Mortgagor and Mortgagee agree that Mortgagee's recourse of payment of Mortgagor's obligation under the Note secured by this Purchase Money Mortgage are limited to the real property mortgaged under this Mortgage. Under no circumstances shall the Mortgagee or any other person or entity have any other recourse to or claim for payment of such obligations against the Mortgagor except with respect to fraud or willful misconduct.
>
> (R. p. 124)

Appellant testified that the non-recourse provision was part of the transaction as he understood it, and that he would not have entered into the transaction but for the non-recourse provision. (R. pp. 85, 90).

The Promissory Note and the Mortgage were drafted by counsel for Appellant. Respondent, however, hired an experienced attorney, Randall J. Drew, to review the documents prior to closing on behalf of Respondent. (R. pp. 47-48, 52-53). Mr. Drew did not raise any issue with respect to the non-recourse provision with anyone. (R. pp. 51-52). Sammy Sanders also testified that he read the documents prior to closing. (R. p. 70). He never discussed the non-recourse provision with his father, John S. Sanders, Jr., or with the attorney for Respondent, Randall J. Drew. (R. pp. 64, 74). Nell S. Sanders likewise does not recall any discussions about the non-recourse provision in the Mortgage. (R. pp. 58-59). Neither Sammy Sanders nor Nell Sanders attended the closing. (R. pp. 58, 70).

The transaction at issue here is not the only purchase and sale transaction between Respondent J. S. Sanders Company, L.L.C. and Appellant. Concurrently with the purchase and sale now before the Court, Appellant purchased another lot from Respondent. Respondent provided seller financing in this other lot purchase as well, and accepted a mortgage containing the identical non-recourse provision. Purchase Money Mortgage (R. p. 154). Thus, the inclusion of the non-recourse provision in the Mortgage now at issue was not a one-time occurrence, but in fact represents the course of dealing between Respondent and Appellant.

The Promissory Note by its terms matured on March 10, 2010. (R. p. 64; Promissory Note (R. p. 118). The Promissory Note has not been paid (R. pp. 66-67).

The terms of the seller financing provided by Respondent to Appellant were negotiated by John S. Sanders and Appellant. Sammy Sanders admits he never had a single conversation with Appellant prior to the closing about the terms of the sale and seller financing and did not go to the closing. Appellant's uncontroverted testimony is that negotiated the transaction exclusively with John S. Sanders, and never discussed the transaction prior to closing with either Sammy Sanders or Nell S. Sanders. (R. p. 90).

Sammy Sanders had no conversation with Appellant about the non-recourse provision prior to the maturity date of the Promissory Note. (R. p. 64). The record is devoid of any evidence that Respondent or its members had any objection to the terms of the Promissory Note and the Mortgage until after the Promissory Note went into default.

John S. Sanders passed away in 2008, after the transaction at issue but many years prior to trial. (R. p. 56) Thus, the only testimony from a party actively involved in the negotiations that led up to the subject transaction is that of Appellant.

STANDARD OF REVIEW

This is an action on a promissory note, and is therefore an action at law. See, e.g., Chamber v. Pingree, 351 S.C. 442, 449, 570 S.E.2d 528, 532 (Ct. App. 2002). The case was tried before a Circuit Judge without a jury. Therefore, this Court may correct errors of law, and reverse findings of fact to the extent not reasonably supported by any evidence. Townes Associates, Ltd. v. Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

Nevertheless, where, as is the case here, there are mixed questions of fact and law presented, any legal conclusions to be drawn from the same are not entitled to such

deference. Id. In particular, where the meaning of words presented purely legal question, this Court may draw some conclusions without deference to the Circuit Court. Id.

Finally, The Circuit Court found in this case that the terms of the Purchase Money Promissory Note and the terms of the Purchase Money Mortgage are not ambiguous. (R. p. 8, line 17). The construction of such unambiguous documents are questions of law for the Court. E.g., Lee v. University of South Carolina, 407 S.C. 512, 517, 757 S.E.2d 394, 3977 (2014); Watts v. Monarch Builders, Inc., 272 S.C. 517, 252 S.E.2d 889, 890-91 (1979). Thus, this Court is free to construe the Promissory Note and the Mortgage as it sees fit.

ARGUMENT

I. The Circuit Court erred in finding that the Promissory Note allows a personal judgment against Appellant as maker, and that therefore there was an irreconcilable conflict between the terms of the Promissory Note and the Mortgage, such that the non-recourse provision in the Mortgage is not enforceable.

A. The Circuit Court's Ruling.

The Circuit Court found that the terms of the Promissory Note and the terms of the Mortgagor are not ambiguous. Order of Judgment, paragraph NINE (R. p. 8). Nevertheless, the Circuit Court found that there was "a clear and irreconcilable conflict" between their respective terms. Id. Specifically, the Circuit Court found that the terms of paragraph 15 of the Mortgage limits the recourse of Respondent to its interest in the Property. On the other hand, the Circuit Court found that the terms of the Promissory Note allow Respondent to obtain a personal judgment against Appellant. Id.

B. The provisions in the Promissory Note relied upon by the Circuit Court do not authorize a personal or deficiency judgment.

Even a non-recourse promissory note will contain customary, contractual terms that are necessary to determine the amount due under the note, the entitlement of Plaintiff to judgment, and the entitlement of Plaintiff to declare the outstanding balance on the promissory note immediately due and payable on default. These provisions are separate and distinct from non-recourse provisions in a note and mortgage, and do not affect those non-recourse provisions.

In other words, there is a difference between provisions addressing the amount and entitlement of Plaintiff to judgment in the first instance, and limitations on the enforcement of that judgment; even non-recourse debt may be subject to defenses and may have conditions precedent to enforcement. See, e.g., 225 Assocs. v. Conn. Hous. Fin. Auth., 65 Conn. App. 112, 782 A.2d 189 (Ct. App. 2001) (holding a non-recourse note to be subject to setoff). These provisions do not, however, change the non-recourse nature of the debt.

The Circuit Court overlooked these distinctions in finding that customary, contractual provisions that were included in the Promissory Note conflicted with the non-recourse provision in the Mortgage. As a result, Circuit Court failed to harmonize the terms of the note and mortgage and erred in finding that there a irreconcilable conflict between the promissory note and the mortgage as to the question of recourse.

The Circuit Court determined that there were specific provisions in the Promissory Note authorizing Respondent to obtain a personal or deficiency judgment against Appellant. Order of Judgment, paragraph NINE (R. pp. 8-9). The first provision in the Promissory Note relied upon by the Circuit Court states that the obligations of Appellant under the Promissory Note are unconditional. Order of Judgment, paragraph NINE (R.

pp. 8-9). The relevant provision in the Promissory Note reads as follows:

> The obligation of Borrower to make the payments of principal and interest hereunder shall be absolute and unconditional, and Borrower hereby irrevocably waives any rights of setoff, recoupment, or reduction as to any amounts due hereunder.

This language, given its plain and ordinary meaning, simply provides that there are no conditions precedent to Defendant's obligations (such as performance by Plaintiff of other acts or contracts). Whether there is some condition to Plaintiff's entitlement to enforce the Promissory Note or obtain a judgment in the first instance (whether or not that judgment is recourse or non-recourse) is a separate question from what remedies Plaintiff has in enforcing the judgment.

Likewise, the Circuit Court relied upon language in the Promissory Note that Appellant waived any rights of setoff or recoupment as evidence that Respondent could obtain a personal judgment against Appellant. This provision, however, does not address the issue of recourse at all; there is no logical relationship between a required waiver of set-off or recoupment and whether or not the Promissory Note is non-recourse. Losing the Lot at foreclosure sale is a serious economic consequence, and Appellant might well assert claims of setoff or recoupment to prevent the foreclosure.

The Circuit Court also relied on language in the Promissory Note to the effect that that Defendant waives any right to require Plaintiff to first proceed against any collateral, and that Plaintiff may sue on the note without pursing the collateral Order of Judgment, paragraph NINE (R. pp. 8-9). These provisions are simply intended to address the established rule that a maker of a promissory note is discharged to the extent the payee of the note releases or impairs collateral without authorization of the maker. See, e.g., Costas v. First Federal Sav. & Loan Assoc., 283 S.C. 94, 321 S.E.2d 51 (1984). Although

this language would seem to be of limited utility in the current circumstance, it is promissory note boilerplate that by its terms does not address the issue of whether or not the Promissory Note is or is not non-recourse.

Although not expressly relied upon by the Circuit Court, the Promissory Note has a waiver of appraisal rights provision. Although unnecessary or inapplicable because there could be no deficiency judgment, the waiver does not purport to override the non-recourse provision in the Mortgage. In fact, the Mortgage itself, has the same waiver of appraisal rights, even though it has the express non-recourse provision. (R. p. 125).

C. Specific express contractual provisions should not be overridden by general, implied provisions.

All the provisions just cited, and relied upon by the Circuit Court, at best produce an implication that the subject mortgage indebtedness would not be non-recourse. An implied term in a contract, however, cannot contradict an express term. E.g., Commercial Credit Corp. v. Nelson Motors, 247 S.C. 360, 147 S.E.2d 481 (1966). The non-recourse provision in the mortgage is absolutely clear and unambiguous; it should not be written out of the contract by mere indirect implications.

Likewise, every word in a contract should be given effect to the extent possible, and not rejected as mere surplusage, if it is possible to discover any reasonable interpretation leading to that result. E.g., Bolt v. Ligon, 144 S.C. 218, 142 S.E. 504 (1928). The interpretation adopted by the Circuit Court violates this rule of construction, and reads out of existence the plain and unambiguous non-recourse provision in the Mortgage.

Finally, specific provisions—such as the express non-recourse provision in the Mortgage—should be given more weight than general provisions, such as the boilerplate terms set forth in the Promissory Note. Restatement (Second) of Contracts, § 203(c)

D. A note and mortgage executed as part of the same transaction are to be construed together as a single instrument, and their terms should be harmonized.

Under South Carolina law, a note and mortgage made at the same time are to be construed together as one instrument. Rhodus v. Goins, 129 S.C. 40, 41; 123 S.E. 645, 646 (1924); Saro Investors v. Ocean Holiday Partnership, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994). This is in fact the general rule under American law:

> [I]t is a widely accepted general rule that a mortgage or deed of trust and a note or bond secured by it are to be deemed parts of one transaction and construed together as such; the provisions of both should be given effect, if possible, and the intention of the parties as determined from an examination of both, not from one separately, must prevail.
>
> 54A Am Jur 2d Mortgages, § 10 (1996).

Where there is a conflict between two provisions, or between two instruments which are part of the same transaction, the Court should if possible harmonize any apparent conflicts. E.g., Lee v. Sumter Pine & Cypress Co., 113 S.C. 190, 102 S.E. 2 (1920). Where a contract contains arguably inconsistent clauses, those clauses must be construed so as to give effect to the parties intent as shown by the entire instrument; provision of which are in apparent conflict must to the extent possible be reconciled, so as to give effect to each. It is only where apparently contradictory provisions are "so radically repugnant" that an interpretation should be adopted to render them ineffective. De Vore v. Piedmont Insurance Co., 144 S.C. 417, 142 S.E. 593 (1928). As shown above, the provisions in the Promissory Note are not inconsistent with the non-recourse

provision in the Mortgage, and thus the construction adopted by the Circuit Court—resulting in the complete elimination of the non-recourse provision in the Mortgage—was error.

E. A non-recourse provision is enforceable even though it is in the mortgage and not in the promissory note.

The non-recourse provision in a mortgage loan transaction may be set forth in either the note or the mortgage. The Restatement (Third) of Property: Mortgages specifically affirms this rule:

> Terms that limit or eliminate the mortgagor's personal liability may be found in either the note or the mortgage. No special formula need be employed, and any words reasonably expressing an intent to limit or eliminate the mortgagor's liability will have the effect of doing so.
>
> Restatement (Third) of Property: Mortgages § 1.1 Comments & Illustrations.

F. NationsBank v. Scott Farm is not applicable.

In finding that the promissory note executed by Defendant was not entitled to the benefit of the non-recourse provision, this Circuit Court relied in part on NationsBank v. Scott Farm, 320 S.C. 299, 465 S.E.2d 98 (Ct. App. 1995), which considered a similar issue. The Court of Appeals in Scott Farm held that the promissory note before the Court there was not subject to the non-recourse provision of a mortgage. That promissory note, however, was not delivered simultaneously with the mortgage as part of the same transaction. Rather, the note was executed in 1990—twelve years after the mortgage containing the non-recourse language. In addition, the promissory note did not state that is was subject to the terms of the mortgage, or even that it was a renewal of the promissory note originally executed in connection with the mortgage. Id. at 303, 465 S.E.2d at 100. Thus, the holding of the Court of Appeals is based on its finding that the promissory note sued upon there simply had no connection to the original note signed twelve years earlier, and therefore was as a factual matter not subject to the terms of the mortgage.

G. Burch v. Ashburn is not applicable.

The Circuit Court also relied upon Burch v. Ashburn, 295 S.C. 274, 368 S.E.2d 82 (Ct. App. 1988), in finding that the promissory note executed by Defendant was not entitled to the benefit of the non-recourse provision. According to the Circuit Court, Burch v. Ashburn stands for the proposition that a separate agreement may not be used to modify the unambiguous terms of a promissory note. (R. p. 8, line 15).

This question is controlled, however, by Section 3-117 of the Uniform Commercial Code, adopted in South Carolina as S.C. Code Ann. § 36-3-117 (Cum. Supp. 2011). That statute expressly provides that the terms of a promissory note may be supplemented by a separate agreement, if that separate agreement arises from the same transaction:

> [T]he obligation of a party to an instrument to pay the instrument may be modified, supplemented, or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument, if the instrument is issued... as part of the same transaction giving rise to the agreement. To the extent an obligation is modified, supplemented, or nullified by an agreement under this section, the agreement is a defense to the obligation.
>
> S.C. Code Ann. § 36-3-117 (Cum. Supp. 2011).

Although there is an exception to these rules for a holder in due course of a promissory note, see S.C. Code Ann. § 36-3-305 (Cum. Supp. 2011), that exception does not apply here. Respondent was the seller of the lot and the promissory note was given in payment of the purchase price. The holder in due course doctrine does not apply between a buyer and a seller. The official comments to Section 36-3-305 make this clear:

> If Buyer issues an instrument to Seller and Buyer has a defense against Seller, that defense can obviously be asserted. Buyer and Seller are the only people involved. The holder-in-due-course doctrine has no relevance. The doctrine only applies to cases in which more than two parties involved.
>
> S.C. Code Ann. § 36-3-305 (Cum. Supp. 2011) Official Comment 2.

II. The Circuit Court erred in finding that the Agreement to Purchase and Sell Real Estate and the integration clause contained therein overrode the plain and unambiguous non-recourse provision in the later executed Promissory Note.

A. The Circuit Court's Ruling.

The Circuit Court incorrectly relied upon the Agreement of Purchase and Sale in determining that the seller financing was not intended to be non-recourse. The Circuit Court first noted that the Agreement made no reference to the seller financing as non-recourse. Order of Judgment, paragraph FOUR (R. pp. 2-3). The Circuit Court then relied upon the integration clause in the Agreement, which stated, in part as follows: "This written instrument ... expresses the entire agreement and all promises, covenants, and warranties between the Buyer and Seller. Id. For the reasons noted in the following paragraphs, this reliance by the Circuit Court is error.

B. As a subsequently executed document, the Mortgage it is not affected by the integration clause in the Agreement of Purchase and Sale.

The effect of an integration clause in a contract is to preclude the introduction of prior or contemporaneous agreements to vary the terms of the contract. The rule does not apply to subsequently executed agreements, and the execution and acceptance of a later deed or mortgage at variance with the terms of the contract is conclusive evidence of the amendment of the original agreement. Wilson v. Landstrum, 281 S.C. 260, 264, 315 S.E.2d 130, 132-133 (Ct. App. 1984).

C. The Agreement of Purchase and Sale did not purport to set forth all of the terms of the seller financing.

It is true that the Agreement of Purchase and Sale made no reference to the seller financing as non-recourse. But it is equally true that the Agreement of Purchase and Sale made no reference to the seller financing as full recourse. This lack of specificity arises

because the Agreement did not purport to contain all of the terms of the seller financing; otherwise the lengthy Promissory Note setting forth the detailed payment terms and the Mortgage supplementing the Note would not have been necessary.

The non-comprehensive nature of the Agreement of Purchase and Sale with respect to the terms of the seller financing is shown by the number of essential financing terms omitted. For example, the Agreement of Purchase and Sale does not specify (i) whether payments are to be made on the seller financing on a monthly, quarterly, or annual basis, (ii) whether the seller financing is payable on an "interest only" basis or in the alternative whether periodic, amortizing payments of principal are to be made, (iii) what the amount of any monthly principal-amortizing payments would be, and (iv) whether those monthly principal payments, if any, would be sufficient to fully amortize the principal of the note over the seven-year term, or whether there would be a larger, "balloon" payment at maturity. These omitted items are all essential terms of the seller financing, and thus the Agreement of Purchase and Sale did not purport to be a comprehensive agreement as to the seller financing.

D. In the absence of an express agreement as to the terms of a seller-financing mortgage, the seller has the burden of showing an implied agreement that the mortgage would be on seller's terms.

Under South Carolina law, in the seller-financing context, absent an express agreement as to the specific terms of the seller-financing mortgage, the seller has the burden of showing an implied agreement that the mortgage would be on the seller's terms. Maccaro v. Andrick Development Corp., 280 S.C. 96, 311 S.E.2d 91 (Ct. App. 1984). Maccaro was an action brought by a purchaser for specific performance of a contract of sale providing for seller financing. At issue was a dispute as to the terms of a mortgage to be given by a purchaser to a seller to evidence the seller financing.

The seller insisted on receiving a mortgage with a due-on-sale clause; the purchaser was only willing to deliver a mortgage without such a clause. The Court of Appeals held that the seller could have specified the precise terms of the required mortgage in the underlying contract, but had failed to do so. As a result, the court found that the seller had the burden of showing an implied agreement that the mortgage would be on the seller's terms. Id. at 99-100, 311 S.E.2d at 94. Maccaro is directly applicable here. Whether or not the seller financing would be non-recourse is not addressed in the Agreement of Purchase and Sale, and thus Respondent as seller is required to show an implied agreement that the seller financing would be with full recourse. Respondent has introduced no competent evidence to that effect.

E. Respondent was not a party to the Purchase and Sale Agreement.

Even if the seller-financing terms of the Agreement were somehow deemed to be comprehensive, Respondent J. S. Sanders Company, L.L.C. was not a party to that Agreement; rather, the Agreement was between Nell S. Sanders and Appellant. There is no evidence in the record suggesting that this Agreement was ever assigned (or delegated) by Nell S. Sanders to Respondent J. S. Sanders Company, L.L.C. Respondent cannot enforce or otherwise use an agreement to which it was not a party to limit or govern the rights of Appellant.

F. The terms of the Purchase and Sale Agreement were merged into the Note and Mortgage delivered at closing.

Even if the Agreement were deemed to comprehensively set forth all of the terms and conditions of the seller financing, and even if the Agreement were deemed to be enforceable by Respondent even though Respondent is not a party, the terms of the Agreement were merged into the terms of the Promissory Note and Mortgage delivered at

closing. As a result, the non-recourse provision in the Mortgage would take precedence over the prior purported terms set forth in the Agreement. See, e.g., Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 260, 743 S.E.2d 868 (Ct. App. 2013). Further, the party denying merger must show that no merger was intended by clear and convincing evidence. Id. There is no evidence, much less clear and convincing evidence, to that effect here.

III. The ruling of the Circuit Court that the non-recourse provision in the Mortgage was unenforceable was effectively a reformation of the Agreement between the parties, and was error because reformation and/or mutual mistake had not been pleaded, and there was no clear and convincing evidence of a mutual mistake.

The practical result of the Circuit Court's ruling was to write out of existence the non-recourse provision in the Mortgage. Although not so labeling its action, the Circuit Court effectively granted Respondent reformation of the Note and the Mortgage. Respondent as Plaintiff below, however, did not plead a cause of action for reformation based on mutual mistake or any other grounds, and therefore the Circuit Court was not entitled to reform the document. See, e.g., Progressive Max. Ins. Co. v. Floating Caps, Inc. 405 S.C. 35, 50, 35, 747 S.E.2d 178, 186 (2013).

CONCLUSION

For the reasons set forth above, the Order for Judgment should be reversed and judgment for Appellant should be entered, or in the alternative, the Order for Judgment should be reversed, and the case remanded to the Circuit Court with instructions to enter judgment for Appellant.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2014-002711

J. S. Sanders Company LLC.....Respondent,

v.

Steven P. Levesque.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief Complies with Rule 211(b), SCACR.

July 8, 2015

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PROOF OF SERVICE

I certify that I have served the Brief of Appellant on J. S. Sanders Company LLC by depositing a copy of it in the United States Mail, postage prepaid, on July 8, 2015, addressed to its attorney of record, John Joseph Dodds, III, 858 Low Country Blvd., Suite 101, Mt. Pleasant, South Carolina 29464.

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