THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable J. Cordell Maddox, Jr., Tenth Judicial Circuit

Case Number: 2014-000139

Shou Y. Martin, ... Petitioner,

vs

Wilmer (John) Rife and Barbara Ann Doomey, ... Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and ruled on by the Court of Appeals on June 22, 2015.

QUESTIONS PRESENTED

I. Did the South Carolina Court of Appeals err in affirming the trial judge granting a judgment notwithstanding the verdict on the ground that Shou Martin did not have standing to bring the action because she did not own the property when the record contained evidence that Shou Martin owned the property sold to Wilmer (John) Rife and Barbara Doomey and they both received the benefit of the bargain they sought in the contract they signed with Shou Martin?

II. Did the Court of Appeals have subject matter jurisdiction to rule on this case as the Defendant filed a second Rule 59 Motion on the same issues raised in its initial Rule 59 motion and the trial court did not have jurisdiction to rule on the second Rule 59 Motion?

Statement of the Case

Procedural History

Shou Martin filed her suit for breach of contract against Wilmer John Rife and Barbara Doomey on December 31, 2010. The Defendant filed and answer on February 3, 2011 denying the allegations of the complaint and numerous counterclaims.

The case was tried before the Honorable J. Cordell Maddox, Jr. on September 6-7 2012. The jury returned a verdict in favor of Mrs. Martin in the amount of $46, 774.21. On September 10, 2012, Mrs. Martin filed a motion to add interest at the statutory rate. On September 11, 2012, Mr. Rife and Mrs. Doomey filed a Rule 59 Motion for a new trial or judgment notwithstanding the verdict alleging that Mrs. Martin did not have the authority to sell the personal property. Rec. on App. at 246. The trial court by order of June 13, 2013 added prejudgment interest at the statutory rate in the amount of $19,172.21 and denied the Rule 59 motion of Mr. Rife and Mrs. Doomey for a new trial and JNOV. Rec. on App. at 256-258. On June 21. 2013 Mr. Rife and Mrs. Doomey then filed a second Rule 59 motion for a new trial and judgment notwithstanding the verdict.

On January 6, 2014, Judge Maddox granted the second motion filed by Mr. Rife and Mrs. Doomey without prejudice to Mrs. Martin. Rec. on App. at 250-255. Mrs. Martin filed her notice of appeal on January 17, 2014. The South Carolina Court of Appeals affirmed the ruling on May 6, 2015. A timely filed Petition for Rehearing was denied on June 22, 2015.

Factual History

Shou Martin, with her son being primarily responsible, opened a private club in Anderson, South Carlina known as Simons' of Anderson, Inc.. Rec. on App. at 26, ll 24-25 to

29, ll 1-15. Mrs. Martin bought the equipment for the business in Anderson due to the fact that her son did not have the funds to start the business. Rec. on App. at 29, ll 1-15. Her son operated the business for about three and a half to four years. Rec. on App. at 30, ll 5-6.

In June of 2007 her son was killed in a motorcycle accident. Rec. on App. at 30, ll 23-25 to 31, ll 1-2. Mrs. Martin then started running the business but soon realized that she needed to sell the business. Rec. on App. at 31, ll 3-14. She then began discussion with John Rife whom she knew from his being employed in Greenwood, South Carolina and his being a regular customer at Simons' of Anderson. Rec. on App. at 31, ll 15-25 to 31, ll 1-18. The idea of Mr. Rife buying the business originated with Mr. Rife. Rec. on App. at 32, ll 22-25 to 33, ll 1-13.

The parties ultimately signed an agreement to sell the equipment for Seventy Thousand ($70, 000) Dollars. Plaintiff's Exhibit 1. The agreement provided that in the event any third party made a claim to any of the equipment, then Mrs. Martin would hold them harmless. Mr. Rife testified that he was purchasing the equipment and he was not concerned with who actually owned the equipment as long as Mrs. Martin would hold him harmless for any claim by a third party. Rec. on App. at 93, 11 12-25. He further said he had no reason to doubt that Mrs. Martin owned the equipment and he had no dispute with her right to sell the equipment. His main concern was the condition of the equipment. Rec. on App. at 98, ll 9-25 to 99, ll 1-2.

Mr. Rife testified that shortly after he purchased the business he began to have trouble with some of the equipment. He testified he noticed some of the alleged problems within 60 days of opening the business. Rec. on App. at 110, 17-22. He made some repairs to the equipment within the first three months of owning the business. Rec. on App. at 105, ll 5-22. In

August of 2008, after he had completed the repairs, he made a payment to Mrs. Martin in the amount of $3,142.00. When making the payment he did not mention that the equipment was not satisfactory nor did he subsequently write her and complain about the equipment. Rec. on App. at 111, 9-25 to 112, 1-6.

Both Mr. Rife and Mrs. Doomey testified they had the opportunity to inspect the building and the equipment before they purchased the equipment. Rec. on App. at 89, ll 4-25; 90, ll 15-25 to 91, ll 1-11, Rec. on App. at 132, ll 15-25 to 134, ll 1-12.143, ll 10-25 to 144, ll 1-25. They did contend that they had to pay for the pool tables. Pursuant to the guarantee provision of the contract, the jury decided that issue in their favor and gave them a credit for the $1,500 they paid for the pool tables.

ARGUMENT

Question I

Did the trial judge err in granting a judgment notwithstanding the verdict when the record contained evidence that Shou Martin owned the property sold to Wilmer John Rife and Barbara Doomey?

The appellate courts in South Carolina have long recognized the rule that a case must be submitted to the jury if there is a scintilla of evidence to support the verdict. The same rule applies when a trial judge grants a judgment not withstanding the verdict. *See, Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 603 S.E.2d 605 (2004); *Smalls v. South Carolina Dept. of Educ.*, 339 S.C. 208, 528 S.E.2d 682 (2000); *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (1994); *Smith v. Safeco Life Ins. Co.*, 303 S.C. 131, 399 S.E.2d 427 (1990); *Copeland v. Southern Ry. Co.*, 76 S.C. 476, 57 S.E. 535 (1907).

The Court of Appeals has said "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Burns v. Universal Health Servs., Inc.*, 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004). Here the jury heard the testimony that Mrs. Martin had purchased the equipment for her son. They also heard the testimony of Mr. Rife that he had no reason to doubt Mrs. Martin owned the property. Rec. on App. at 98, , ll 9-12.

The trial judge granted a judgment not withstanding the verdict based upon his conclusion that Mrs. Martin did not prove she owned the assets she sold.[1] Mrs. Martin testified

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[1] The order of the trial court says "this matter is hereby vacated and the matter is dismissed without prejudice." He did not clarify exactly what the dismissal without prejudice entailed.

she paid for the equipment. Rec. on App. at 29, ll 2-25. She testified that she sold the equipment she owned to the defendants. Rec. on App. at 39, ll 18-25. The defendants even testified that who owned the equipment was not so much of a concern to them if Mrs. Martin would protect them from any third party claim. Mr. Rife testified as follows:

> Q. [By Mr. Wise] And did you have any concern as to whether or not Ms. Martin owned the equipment when you signed the agreement?
> A. No
> Q. All right. And one of the reasons you didn't have any concern is that she agreed, in that agreement, to hold you harmless if any third person came in and claimed that property.
> A. That's true.
> Rec. on App. at 93, ll 17-25.
> Q. All right. And, in fact, you have no reason to believe - - to not believe Ms. Martin when she says that she paid for the equipment and put it in there?
> A. I took her word for it, yes.
> Q. Correct. All right. And no one else has come in and said "No, your're wrong. It's mine."
> A. No
> Q. Okay. So, you don't dispute if or whether or not she had the right to sell it?
> A. Pardon?
> Q. Your dispute is not whether or not she had the right to sell it?
> A. My main dispute is the condition.
> Rec. on App. at 98, ll 9-21.

Thus, the trial judge granted a judgment not withstanding the verdict on an issue that was not seriously contested by the defendants. Their argument was the condition of the equipment and their claim that the business was not as profitable as they had been lead to believe. The jury resolved those issues against the defendants. The defendants have not contended that the jury erred in that determination.

While counsel for the defendant argued to the jury that Mrs. Martin did not own

the equipment, that factual issue was resolved against the defendants. The defendants now contend that the property is owned by Simons' of Anderson, Inc. Aside from some depreciation, the defendants offered no testimony that Simons' of Anderson, Inc. was the rightful owner of the equipment Mrs. Martin sold. The defendants wanted the equipment. They were not concerned who it belonged to as long as Mrs. Martin would protect them from any third party claim. The defendants have not met their burden of proving Simons' of Anderson. Inc. owned the property. They received what they bargained for - the property with any clam from Mrs. Martin being given up.

The defendants signed an agreement with Mrs. Martin that they would pay her for the equipment. They have for over six years had the use of that property to further their business. They never offered to return the property because they contended that Mrs. Martin did not have title to the property. They simply want to keep the equipment and not pay for it. They have not offered to tender the amount of the judgment to Simons' of Anderson, Inc. and Mrs. Martin so as to eliminate any question of title. They simply do not want to pay according to the contract they signed. The jury found all factual issues against them.

The Court of Appeals contended that Mrs. Martin did not have standing to bring this suit. The written contract alone is sufficient to give Mrs. Martin standing. As Mrs. Martin released any interest she had in the property as the written contract required, she was a real party in interest. Surely the written contract between the parties gave Mrs. Martin "a real, material, or substantial interest in the outcome of the litigation." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013).

This Court has long recognized that when a party asserts a defense of lack of title,

the party asserting a lack of title has the burden of showing the plaintiff did not have title. This Court has held " Where a party contracts to buy land, styling the vendor trustee, he admits the vendor's character as trustee, and prima facie, his right to convey. If, therefore, the vendor has no right to convey, the onus of showing it is on the defendant." *Breithaupt v. Thurmond*, 37 S.C.L. 216 (S.C. App. L. & Eq. 1832). The Defendants in this action are simply not legally entitled to both claim the Plaintiff did not have title and also keep the goods. As matter of law, and basic fairness, the Defendants have no right to continue to claim possession of the personal property while refusing to pay for it because they claim the Plaintiff did not own the property. In a similar situation this Court has said "The authorities are overwhelming upon the proposition that the buyer is not entitled to a rescission of the contract and a return of his money, unless he is able to and does return or tender the goods to the seller in substantially the same condition as he received them." *Ebner v. Haverty Furniture Co.*, 128 S.C. 151, 122 S.E. 578, 579 (1924). In essence the Defendants have claimed the contract should be rescinded because of the lack of title, but have failed to tender the personal property purchased from the Plaintiff.

To have standing in this case all the Plaintiff needs to prove is that the written contract was supported by good and adequate consideration. The Plaintiff agreed to guarantee the title against any third party. That alone is good and sufficient consideration to support the contract. A basic principle of contract law as to consideration says "promises are generally held to be sufficient consideration for each other; a promise by one party to an agreement is sufficient consideration for a promise by the other party. This rule applies in cases of plainly expressed promises, of promises implied from conduct, and of promises ascertained only by a proper interpretation of the contract. It is the promise, and not the performance of the promise, that

constitutes the consideration for the promise." 17A AM. JUR. 2d *Contracts* § 128 (2015). Here the Defendants promised to pay and the Plaintiff promised to transfer any and all title she held and to hold the Defendant harmless in the event a third party made a claim for the property. The testimony established that this was satisfactory to the Defendants. Rec. on App. at 93, 11 12-25. Thus the contract was support by adequate consideration, the Court of Appeals erred in finding that the Plaintiff did not have standing to prosecute her claim.

Quitclaim deeds are frequently given for more than a mere nominal consideration. No court has ever held that simply because the grantor of a quitclaim deed was later determined not to actually own the property, the buyer may sue for a refund. As the Court of Appeals has said "A quitclaim deed does not guarantee the quality of title, but only conveys that which the grantor may lawfully convey." *Mulherin-Howell v. Cobb*, 362 S.C. 588, 594, 608 S.E.2d 587, 601 (Ct. App. 2005). Thus an agreement to convey whatever title one may have is sufficient consideration to support a contract. The Court of Appeals erred in finding that Shou Martin did not have standing to prosecute this case.

Question II

Did the Court of Appeals have subject matter jurisdiction to rule on this case as the Defendant filed a second Rule 59 Motion on the same issues raised in its initial Rule 59 motion and the trial court did not have jurisdiction to rule on the second Rule 59 Motion?

"The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court." *Town of Hilton Head Island v. Godwin*, 370 S.C. 221, 223, 634 S.E.2d 59, 60-61 (Ct. App. 2006). "The requirement

of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue"the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). "An appeal may be barred due to untimely service of the notice of appeal when a party-instead of serving a notice of appeal-files a successive Rule 59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment." *Id.* at 20, 602 S.E.2d at 778.

The Petitioner contends that neither the lower court had jurisdiction to hear this matter because the Respondent was permitted to file a second Rule 59 and was required to file a notice of appeal from the June 13, 2014 order denying its first Rule 59 Motion filed on September 11, 2012. The Rule 59 Motion filed by Respondent on June 21, 2013, rasing the identical issue of the ownership of the property, was not effective to either give the trial court jurisdiction or permit it to rule on the second motion. As the time for appeal had expired by time of the second ruling by the trial court on January 6, 2014, the trial court was also without jurisdiction to hear the motion. Simply because the trial judge changed its ruling on the facts is not a sufficient basis for jurisdiction to be restored. A party who lost one Rule 59 motion is simply not permitted to file a second motion in the hopes that the judge would change his mind. As the trial court did not have jurisdiction to hear the motion and the Defendant did not file an appeal within ten days, the decision of the lower court should be reversed on the ground it did not have jurisdiction to rule on the motion.

CONCLUSION

The issue of the ownership of the property was resolved against the defendants as the testimony at trial created a jury issue as to ownership. In addition the contract between the parties was supported by good consideration. The Court of Appeals erred in affirming the granting a judgment notwithstanding the verdict in favor of the defendants by the trial judge. This Court should further find the trial court was without jurisdiction to issue a second ruling upon a Rule 59 motion and re-instate the judgment rendered by the jury in this matter.

July 20, 2015

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on July 20, 2015, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Writ of Certiorari and Appendix in the above case addressed to Michael F. Mullinax, P.O. Box 2665, Anderson, South Carolina, 29622, and to the SC Court of Appeals, P.O. Box 11629, Columbia, South Carolina.

Sandy Traynham

SWORN to and Subscribed
before me this 20 day
of July, 2014.

Mary Jane Harter (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22