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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**Appeal from York County
Court of Common Pleas**

S. Jackson Kimball, Special Circuit Court Judge

**CASE NO. 2014-CP-46-1390
Appellate Case Tracking Number: 2015-002094**

George D. Dove,Appellant,

v.

Mary Judith O'Dell Burns,Respondant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT WITHOUT CONSIDERING APPELLANT'S CONTRACT FORMATION DEFENSES?

STATEMENT OF THE CASE

This is an action on a purported note brought by Respondent against Appellant, Respondent's former son-in-law. (Complaint) The note originated in July of 2009 when Respondent purportedly loaned Appellant and his then-spouse, Third-Party Defendant, Laurel A. Burns, the sum of \$75,000.00, (Complaint at Para. 4 and Exhibit A thereto), to be used as a down payment for the purchase of a family home in Charleston where all three were to reside. Respondent had "loaned" her daughter money in the past with no expectation of repayments. (Mary Burns Depo. pg. 41, lines 4 – 14). Nevertheless, she and her daughter drafted the note and presented it to Appellant for signature. (Depo. George Dove, pg. 11, lines 8 – 16). At the time of the execution of the note, Respondent never intended for her daughter to repay the "loan" or to be bound by the terms of the Note, (Depo. Mary Burns, pg. 22, lines 9 – 13); however, she failed to notify Appellant of this fact and did not clearly express to him her intent regarding the enforceability of the note to Appellant. (Depo. Mary Burn, pg. 23, lines 13 – 18). Appellant signed the note believing that his co-maker, his wife, Laurel Burns was to be jointly and severally liable on the Note with him. (George Dove Affidavit).

Respondent then submitted a "gift letter" to Appellant's mortgage company asserting that the full \$75,000.00 furnished to Respondent and her daughter was, in fact, a gift, and not a valid debt. (Exhibits 1 & 2 to Appellant's Memorandum in Support of his

Motion to Alter or Amend.) Respondent provided her sworn assurance that the \$75,000.00 was not a loan but rather a gift so that Appellant could procure a mortgage to purchase the property where she, her daughter, and Appellant would reside. In fact, Respondent did reside in that home, procured in part by her representation that the \$75,000.00 was a gift and not a loan, until October of 2013, just one month before she instituted collection attempts against Appellant. (Complaint Paras. 8 -- 10).

Respondent filed suit on the Note on April 30, 2014 against only Appellant. (Complaint). Appellant answered asserting that no valid contract existed because there had been no true meeting of the minds and that he should not be liable on the note because of the misrepresentations made to him to induce him to sign the note. (Answer and Appellant's Memorandum in Opposition to Summary Judgment). Respondent then moved for summary judgment and Appellant opposed the motion (Appellant's Memorandum in Opposition to Summary Judgment).

After a hearing on July 8, 2015 (July 8, 2015 Hearing Transcript), the lower court granted Respondent's Motion for Summary Judgment on her claim for breach of contract in an Order dated July 27, 2015. (July 27, 2015 Order). Appellant timely filed and served his Rule 59(e) Motion to Alter or Amend Judgment on August 6, 2015 and provided the lower court with a copy of the Motion on August 7, 2015. (Motion to Alter or Amend). Following a hearing on September 1, 2015, (Sept. 1, 2015 Transcript), Judge Kimball affirmed his grant of summary judgment and amended his order to include his reasoning on the fraud in the inducement defense. (Sept. 7, 2015 Order). This appeal follows.

ARGUMENT

Standard of Review

Appellant is before the Court challenging the lower court's grant of summary Judgment made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. S.C.R.C.P. 56(c); *Platt v. CSX Transportation Inc.*, 665 S.E.2d 631 (Ct.App. 2008). Summary judgment is only appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." In evaluating whether a genuine dispute as to a material factual issue exists, the lower court should have viewed all evidence, including all reasonable inferences flowing from that evidence, in the light most favorable to the non-moving party, in this case, Appellant Church. *Platt*, 665 S.E.2d at 634. See also *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005); *Medical Univ. of S.C. v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *Hackworth v. Greenville County*, 371 S.C. 99, 102, 637 S.E.2d 320, 322 (Ct.App.2006); *Rife v. Hitachi Constr. Mach. Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (Ct. App.2005).

"In determining whether the trial court erred in granting summary judgment, an appellate court views the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Englert, Inc. v. LeafGuard USA, Inc.*, 377 S.C. 129, 134, 659 S.E.2d 496, 498 (2008). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); see also *Ferguson v. Charleston Lincoln Mercury, Inc.*,

349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below."). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002). Moreover, summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Lanham v. Blue Cross & Blue Shield*, 349 S.C. 356, 563 S.E.2d 331 (2002); *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001). *Redwend L.P. v. Edwards*, 354 S.C. 459, 468 (Ct. App. 2003).

I. THE LOWER COURT'S GRANT OF SUMMARY JUDGMENT FAILED TO CONSIDER APPELLANT'S CONTRACT DEFENSES WHICH INCLUDED FRAUD IN THE INDUCEMENT AND MATERIAL MISREPRESENTATIONS AND SHOULD BE REVERSED.

In both its original order on summary judgment and its order following Appellant's Motion to Alter or Amend, the lower court refused to look beyond the four corners of the note to consider Appellant's affirmative defenses as well as the evidence proffered in support of those defenses. In its original order the court simply ignored the affirmative defenses. In its order on the motion to alter or amend, it found Appellant's defenses to be untimely. In fact, the gravamen of Appellant's Answer and his response to summary judgment is his argument that the contract is voidable based on Respondent's and Cross-Defendant's fraud in the inducement and misrepresentations occurring around the execution of the purported note. (Appellant's Answer and Memorandum in Opposition to Summary Judgment.) While Appellant's first counsel may not have used the proper "terms

of art” to name his defenses, the substance of his claims were clear from his Answer and Opposition memorandum and the lower court should have considered his position in full.

Under North Carolina law, an allegation of fraud or misrepresentation surrounding the contract’s formation necessarily challenges the validity of the existence of an enforceable contract.¹ See *Julian v. Wells Fargo Bank, N.A.*, 2012 NCBC 30, 24, 2012 NCBC LEXIS 32, *14-16, 2012 WL 1857611 (N.C. Super. Ct. 2012) (“There is ample precedent in our case law to suggest that an allegation of fraud or misrepresentation surrounding contract formation necessarily challenges the validity of the underlying contract”); *Byham v. Nat’l Cibo House Corp.*, 265 N.C. 50, 60, 143 S.E.2d 225, 234 (1965) (holding, where plaintiff asserted a fraud claim with respect to an underlying contract, that “[t]he validity of the contract is the matter which the complaint seeks to put at issue”), and will, if proven, render the contract voidable at the election of the non-culpable party or, alternatively, will allow the plaintiff equitable relief.”); *Freeman v. Rothrock*, 189 N.C. App. 31, 39, 657 S.E.2d 389, 394 (2008) (“[I]t has long been a part of the common law that fraud in the inducement is a good defense to an action on a contract by one of the contracting parties.”); see also RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981) (“If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”).

¹ Though the lower court did not specify the applicable law, the parties agree that the law applicable to the disputes concerning the Note is that of North Carolina, and, that agreement and understanding is supported by well-established South Carolina choice of law cases. See e.g., “[C]ontracts are to be governed as to their nature, validity and interpretation by the law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view.” *Lister v. NationsBank of Del., N.A.*, 329 S.C. 133, 144, 494 S.E.2d 449, 455 (Ct. App. 1997) (quoting *Livingston v. Atlantic Coast Line R.R.*, 176 S.C. 385, 391, 180 S.E. 343, 345 (1935)).

In North Carolina, the essential elements of fraud in the inducement are: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) resulting in damage to the injured party. *Whisnant v. Carolina Farm Credit*, 204 N.C. App. 84, 95, 693 S.E.2d 149, 157 (2010)(citing *Media Network v. Long Haymes Carr, Inc.*, 197 N.C. App. 433, 678 S.E.2d 671, 684 (2009)). Here, Appellant signed a note in July 2009 as co-obligor with his then wife, Laurel Burns. From the time of signing of the note until Respondent's deposition in this action (taken in January of 2015), Appellant **had no knowledge** that Respondent never intended to collect on the note from her daughter, Laurel Burns but, instead, would look solely to Appellant for the full amount of monies allegedly due on the Note.

Q. That was your intent at the time that you presented the promissory note; is that correct?

A. That he pay it.

Q. That he pay it, and that he pay it exclusively?

A. Yes, because he was the wage earner.

See also Plaintiff's deposition at page 57, lines 13-19:

Q. You didn't start collection efforts until November of 2013 after they had been divorced; is that correct?

A. Yes, and it was my understanding that I was going to sue him for the full amount.

Q. But not your daughter?

A. No.

(Burn's deposition, page 22, lines 9-13). Despite her intention never to collect on the note from her daughter, Respondent admittedly failed to communicate this information to Appellant when asking him to sign the promissory note as a co-maker with his wife.

Q. But, again, my question is, other than speaking to him -- or my question is now, other than speaking to him, did you communicate to him in any other way that Laurel's signature meant nothing on this document?

A. I don't recall that.

(Respondent's deposition, page 23, lines 13-18). Not knowing that Respondent had a secret intention to never collect from her daughter on the Note, Appellant signed the note justifiably believing that his co-maker, his wife, Laurel Burns was to be jointly and severally liable on the Note with him. Defendant relied on his quite reasonable understanding to his detriment. (Dove Affidavit).

Respondent falsely represented or concealed the material truth of the situation – that is she never intended her child to repay any portion of the Note they demanded Appellant sign as a co-maker, in an attempt calculated to deceive Appellant into signing the Note. Respondent's deception was successful in that she did induce Appellant to sign to his detriment. Under the facts as represented to Appellant by Respondent, he reasonably expected that the "debt" evidenced by the Note would be forgiven in its entirety as was the custom between Respondent Mother and Third-Party Defendant Ex-Wife, or, at the most that he might remain liable for only half of the indebtedness as a co-maker of the Note.

To further support Appellant's contract defense, he proffered a "gift letter" to his mortgage company from Respondent which asserted that the full \$75,000.00 furnished to him and to the Third-Party Defendant was, in fact, a gift, and not a valid debt. Respondent provided her sworn assurance that the \$75,000.00 was not a loan but rather a gift so that Appellant could procure a mortgage to purchase the property where Respondent, her daughter, and Appellant would reside. (In fact, Respondent did reside in that home, procured in part by her representation that the \$75,000.00 was a gift and not a loan, until October of 2013, just one month before she instituted collection attempts against Appellant.) This action on Respondent's part benefited her by allowing Appellant to secure housing for their family including Respondent and also perpetuated her fraud on

Respondent leaving him to continue believing the money had been a gift not to be repaid, or if to be repaid, that his portion would have, at most, been half of the indebtedness.

Respondent failed to disclose material facts to Appellant when inducing him to sign the Promissory Note on which Respondent is now attempting to collect and perpetuated that fraud by representing to the third parties that the funds were intended as gift when it suited her purpose. Respondent's conduct amounts to fraud in the inducement. As argued by Defendant in his Memorandum in Opposition to Motion for Summary Judgment, because there was fraud in the inducement, there was no actual meeting of the minds and therefore no enforceable contract was formed. See RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981) ("If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.").

To support Appellant's defenses, he offered both documentary and *parol* evidence which the Court's original order fails to consider at all or even mention. Respondent took the position that *parol* evidence should not be permitted in this case because the contract is unambiguous. The court found that the contract was unambiguous but did not consider Appellant's affirmative defenses or rule on whether extrinsic or *parol* evidence should be considered in support of those defenses.

Under North Carolina law, *parol* evidence is not permitted in a contract construction question **unless** the evidence pertains to fraud in the inducement. *See Media Network, Inc. v. Mullen Adver., Inc.*, 2007 NCBC 1, 95, 2007 NCBC LEXIS 1, *39-40 (N.C. Super. Ct. 2007). Because this case is really not about the construction of terms in an admittedly valid contract, but is about whether a valid, enforceable contract exists at all,

extrinsic and *parol* evidence should most certainly be considered especially in light of Appellant's assertion of the affirmative defenses of fraud in the inducement and material misrepresentation by Respondent. Therefore, the Court should reverse the lower court's grant of summary judgment order because summary judgment is not appropriate because the allegations of fraud and misrepresentation are disputed and require resolution by the trier of fact. "Allegations of fraud do not readily lend themselves to resolution by way of summary judgment because a cause of action based on fraud usually requires the determination of a litigant's state of mind." *Whitman v. Forbes*, 55 N.C. App. 706, 713, 286 S.E.2d 889, 893 (1982) (citations and quotations omitted). *See also, e.g., Fogarty v. Security Trust Co.*, 532 F. 2d 1029 (5th Cir. 1976); *Weiss v. Kay Jewelry Stores, Inc.*, 470 F. 2d 1259 (D.C. Cir. 1972); *American Nat. Bank & Trust Co. of Chicago v. Certain Underwriters at Lloyd's of London*, 444 F. 2d 640 (7th Cir. 1971). A litigant's state of mind is seldom provable by direct evidence but must ordinarily be proven by circumstances from which it may be inferred. This renders summary judgment inappropriate in a fraud case where the court is called upon to draw a factual inference in favor of the moving party, or where the court is called upon to resolve a genuine issue of credibility. *Kubik v. Goldfield*, 479 F. 2d 472 (3d Cir. 1973); *Associated Hardware Supply Co. v. Big Wheel Distributing Co.*, 355 F. 2d 114 (3d Cir. 1966); *see generally* 6 Moore's Federal Practice para. 56.17[27] (1980). *See also Johnson v. Phx. Mut. Life Ins. Co.*, 300 N.C. 247, 260, 266 S.E.2d 610, 619 (1980) (overruled in part on other grounds).

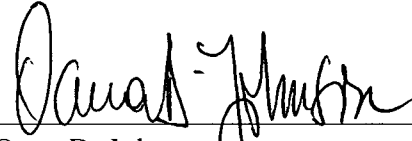
Here, the evidence brought to the Court's attention by Appellant, if viewed in the light most favorable to Defendant as this Court is required to do, calls into question the validity of the Note. Whether an enforceable contract exists or whether the Note is voidable

based on Plaintiff's fraud in the inducement and material misrepresentations is a material question of fact which must be resolved by the jury. Therefore, this Court should reverse the lower court's grant of summary judgment.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Appellant respectfully requests that this Court **REVERSE** the lower court's grant of summary judgment and remand this action for trial.

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APPEAL FROM YORK COUNTY
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The Honorable S. Jackson Kimball

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Mary Judith O'Dell Burns.....Respondent

George Dove.....Appellant

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing Appellant's Initial Brief and Designation of Matter to be Included with the Record on Appeal has been served upon Counsel of Record by depositing a copy of the same postage prepaid, by Overnight Mail, on this 5th day of December, 2015 to the address shown below:

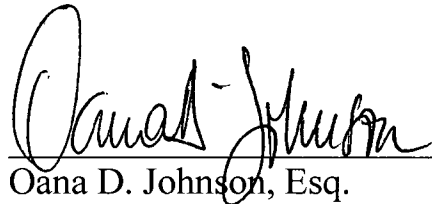
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SC Court of Appeals

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Re: Burns vs Dove vs Burns
Case No: 14-CP-46-1390
Appellate Case Number: 2015-002094

Dear Ms. Kitchens:

Enclosed for filing is an original and one copy of Appellant's Initial Brief and Designation of Matter to be Included with the Record on Appeal in the above-referenced case. Also enclosed are the following:

1. Proof of Service of the Appellant's Initial Brief on counsel of record; and
2. Original and one copy designation of matter to be included with the record on appeal

Please file the original notice and return a clocked copy in the enclosed self-addressed stamped envelope.

Very truly yours,

Oana D. Johnson

Oana D. Johnson

cc: Ted Mitchell, Esq
George Dove
George Kefalos, Esq

ODJ/wrt