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SC Court of Appeals

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

**APPEAL FROM THE BEAUFORT COUNTY
Court of Common Pleas**

Marvin H. Dukes, III, Special Circuit Court Judge

Case No. 2014-001729

JAMEEL RIZK AND CRISTINA RIZK,.....Respondents,

v.

JUDY F. SIMMONS,.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

DID THE TRIAL COURT ERR BY GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THERE WAS NO ENFORCEABLE CONTRACT UNDER THE STATUTE OF FRAUDS FOR LACK OF RESPONDENTS' ACCEPTANCE WHERE APPELLANT'S AFFIDAVITS GIVE RISE TO INFERENCES OF ACCEPTANCE AND SHOW GENUINE ISSUES OF MATERIAL FACTS?

DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BY HOLDING THERE WAS NO CONTRACT WHEN THE FACTS PRESENTED BY AFFIDAVITS RAISED AN INFERENCE THAT RESPONDENTS ACCEPTED THE CONTRACT BY DELIVERING A CHECK AS THE FINAL DEPOSIT AFTER RESPONDENTS' AGENT RECEIVED THE CONTRACT IN ITS FINAL FORM?

DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BY HOLDING THERE WAS NO CONTRACT WHEN THE FACTS PRESENTED BY AFFIDAVITS RAISED AN INFERENCE THAT RESPONDENTS AND APPELLANT PARTIALLY PERFORMED THE CONTRACT?

DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BY HOLDING THERE WAS NO ENFORCEABLE CONTRACT WHEN THE FACTS PRESENTED BY AFFIDAVITS RAISED AN INFERENCE THAT APPELLANT DETRIMENTALLY RELIED UPON RESPONDENTS' ACTIONS?

DID THE TRIAL COURT ERR BY FAILING TO GRANT APPELLANT'S MOTION TO SET ASIDE SUMMARY JUDGMENT?

STATEMENT OF THE CASE

On September 13, 2013, Respondents/Respondents sued to recover their escrowed, earnest money which was delivered to Appellant's real estate agent as part consideration for a real estate sales contract. Respondents failed to close on the transaction of purchase of Appellant's property.

On October 16, 2013, Appellant served her Answer and Counterclaim, asserting affirmative defenses and counterclaiming for damages for breach of contract. Respondents filed their Reply to the Counterclaim on November 26, 2013.

On January 31, 2014, Respondents filed their Motion for Summary Judgment, essentially arguing: First, the Contract was never completed; and Second, if the contract were completed,

then Respondents satisfied the conditions of a financing contingency, which in turn excused their performance. (R. p. 18-20)

In support of their Motion Respondents provided their Affidavit, and that of their real estate purchasing agent, Eric Dollenburg. In opposition to the Motion, Appellant presented her Affidavit, as well as the Affidavit of her real estate sales agent, James Wedgeworth. Appellant's two affidavits countered many of the statements set forth by Respondents' affidavits.

On March 19, 2014, the Trial Court granted Respondents' Motion for Summary Judgment, holding that there was no contract, and ordering return of the deposit. With only the affidavits of the parties and their respective real estate agents, together with exhibits, the Trial Court made the following findings:

On June 1, 2013, Defendant executed the revised contract with two critical revisions: the financing contingency period was reduced from 25 business days to June 15; and the closing date was changed from June 14 to June 30. These issues relating to the back and forth revisions to the proposed contract are not in dispute.

The changes made by Defendant relating to the financing contingency and the closing date are essential terms, as Plaintiffs were unable to obtain the necessary purchase money mortgage. Both Plaintiffs' and their realtor's affidavits state the Plaintiffs never agreed to the proposed changes by the Defendant, nor were such changes, ever discussed with the Plaintiffs. Defendant's affidavits do not dispute this issue. Further, emails submitted with the affidavits show the parties were never in agreement as to these issues.

(R. pp. 3-4, paragraphs 2-3)

On March 28, 2014, Appellant filed a Motion to Set Aside Summary Judgment, and for reconsideration, pursuant to Rules 52, 56, 59 and 60, South Carolina Rules of Civil Procedure. On July 3, 2014, the Trial Court denied Appellant's Motion.

On August 1, 2014, Appellant timely filed her Notice of Appeal of the Trial Court's Orders granting summary judgment, and denying Appellant's Motion. The Notice of Appeal was timely

filed with this Court of Appeals and served upon Respondents' counsel of record. Appellant's real estate agent has returned the deposit.

Appellant filed a Motion to extend the timely for filing the Initial Appellant's Brief. Respondent filed a Motion to Dismiss the Appeal.

STATEMENT OF FACTS

Appellant, Judy F. Simmons, owns property generally described as 28 Wexford Drive, Wexford Plantation, Hilton Head Island, Beaufort County, South Carolina (the "Property"). (Appellant's Affidavit, R. p. 68, paragraph 3) The Affidavit of Appellant, Judy F. Simmons, was filed in opposition to Respondents' Motion. Her Affidavit presents the following facts:

On or about August 1, 2012, Appellant entered an exclusive agency contract for marketing and sale of the Property with James Wedgeworth, a licensed real estate broker. Respondents engaged the services of Eric Dollenberg as their real estate agent. (R. p. 68, paragraphs 4-5)

Respondents and Appellant entered a Contract for Sale (the "Contract") of the Property. A copy of the Contract is annexed to the Complaint and to Appellant's Affidavit as Exhibit 1. (R. p. 72-79) The Contract called for a total earnest money deposit of \$50,000.00. The deposit was paid in installments. After an initial deposit, Respondents' agent made an additional deposit of \$45,000.00 (the "Final Deposit"). (Appellant's Affidavit, R. 68, paragraphs 6-7)

By electronic transmission dated June 4, 2013, Mr. Wedgeworth confirmed for Appellant that, "As you know, we got the check delivered by Eric Dollenberg this morning. So we now have \$50,000 of the purchaser's money." A copy of the electronic transmission is annexed to Appellant's Affidavit as Exhibit 2. (Appellant's Affidavit, R. 68, paragraph 8)

Appellant and Respondent promptly commenced to perform their respective obligations as stated by the terms and conditions of the Contract.

In accordance with the terms of paragraph 5 of the Contract, Appellants retained the services

of Atlantic Pest Control, Inc. to provide a wood infestation report known as a CL-100 Report for the Property. Agents of Atlantic Pest Control, Inc. entered the Property and inspected it on or about June 14, 2013. Atlantic Pest Control, Inc. delivered the CL-100 Report. A copy of the CL-100 Report is annexed to Appellant's Affidavit as Exhibit 3. (Appellant's Affidavit, R. p. 69, paragraph 10; Exhibit 3, R. p. 73)

In accordance with the terms and conditions of the "Addendum to Contract of Sale – Inspection", Appellants retained the service of Lynes Comprehensive Inspections to inspect the Property and provide a summary of the inspection findings (the "Inspection Report"). An agent for Lynes Comprehensive Inspections entered the Property and conducted the inspection on June 5, 2013. The Inspection Report was prepared for Respondent, Jameel Rizk. (Appellant's Affidavit, R. p. 69, paragraphs 11-13)

The Inspection Report identified several items for repair. In accordance with the terms and conditions of the "Addendum to Contract of Sale – Inspection", Appellant arranged for repairs specified by the Inspection Report. Appellant retained the following contractors to make the repairs specified by the Inspection Report, and paid them as indicated: Major Improvements - \$3,900.00; Pro Roofers, Inc. - \$650; and George Edwards - \$1,795.00. (Appellant's Affidavit, R. p. 69, paragraphs 14-16)

From the time the Contract was entered, Appellant exercised best efforts to comply with the Contract terms to timely deliver the Property for closing. Appellant initiated actions to remove all personal property from the home. Appellant performed her contractual obligations after delivery of the Final Deposit. (Appellant's Affidavit, R. p. 70, paragraph 18)

On page 1 of the Contract, just above Respondents' signature, paragraph 3 provides as follows:

3. **FINANCING CONTINGENCY.** If referred to in Paragraph 2 above, this Contract is subject to the Purchaser obtaining a

commitment for the financing reference above **from a lender customarily making such loans in Beaufort County and the surrounding area.** Purchaser shall use best efforts to obtain such a loan and **shall supply the prospective lender(s) with all requisite information.** The timing of this financing contingency is as follows:

- a. Purchaser shall complete a loan application and must provide a prequalified letter from the lender within 10 business days.
- b. Purchaser shall obtain a loan commitment within _____ business days (“Financing Contingency Period”).

All time periods run from the effective date of this Contract as set forth on Page 6...

[Emphasis supplied]

(Appellant’s Affidavit, R. p. 70, paragraph 22)

The last 2 sentences of paragraph 3 of the Contract states: “If any requisite action called for by the Paragraph is not taken within the time periods contained in the Paragraph, the financing contingency shall be deemed waived. Purchaser acknowledges that this financing contingency is limited in time.” (Appellant’s Affidavit, R. p. 70, paragraph 23)

Prior to the Contract, Respondents provided a prequalification letter with the letterhead “Gold Coast Bank – Chicago”. The prequalification letter has the following address: 1201 North Clark Street, Chicago, Illinois. A copy of the prequalification letter is attached to Respondents’ Affidavit as Exhibit D. (R. p. 37) Exhibit F to Respondents’ Affidavit is a “Notice of Credit Denial” from Gold Coast Bank. (R. p. 47-48) The Notice of Credit Denial is directed only to Respondent, Jameel Rizk and not Respondent, Christina Rizk. The top of the first page of the Notice of Credit Denial shows: “Date Action Taken: 06/29/2013.” Exhibit H to Respondents’ Affidavit (R. p. 52-55) is a “Letter of Denial” from VanDyke Mortgage Corporation dated August 7, 2013 and directed only to Respondent, Jameel Rizk. (Appellant’s Affidavit, R. p. 71, paragraphs 24-29)

In addition to her Affidavit in Opposition to Summary Judgment, Appellant provided the

Affidavit of Mr. James Wedgeworth, the real estate listing broker for the Property. Mr. Wedgeworth's Affidavit sets forth the following facts:

Mr. Wedgeworth entered an exclusive real estate agency agreement with Judy Simmons, Appellant, to market and attempt to sell property general described as 28 Wexford Drive, Wexford Plantation, Hilton Head Island, Beaufort County, South Carolina (the "Property"). (Wedgeworth Affidavit, R. p. 87, paragraph 3)

In the course of marketing the Property, Mr. Wedgeworth was contacted by Eric Dollenberg, who was engaged as a real estate purchasing agent for Respondents, Jameel Rizk and Christina Rizk. Mr. Wedgeworth had numerous communications with Mr. Dollenberg about Mr. and Mrs. Rizk's desire to purchase the Property. (Wedgeworth Affidavit, R. p. 87, paragraphs 4, 5)

Respondents and Appellant entered a Contract for Sale (the "Contract") of the Property. (Wedgeworth Affidavit, R. p. 87, paragraph 6)

The Contract called for a total earnest money deposit of \$50,000.00. The deposit was paid in installments. After an initial deposit, Respondents' agent made an additional deposit of \$45,000.00 (the "Final Deposit"). (Wedgeworth Affidavit, R. p. 87 paragraph 7)

On May 31, 2013, Mr. Wedgeworth directed an electronic transmission to Appellant which stated: "I just got off the phone with Eric, the other agent. He just informed me that the guy is driving back to Hilton Head and will deliver the \$45,000.00 check to us today. Eric is at a wedding in California." A copy of the electronic transmission is annexed as Exhibit 1 to Mr. Wedgeworth's Affidavit. (Wedgeworth Affidavit, R. p. 88, paragraph 8; R. p. 90)

The check was not delivered to Mr. Wedgeworth's office on May 31, 2013. (Wedgeworth Affidavit, R. p. 88, paragraph 9)

By electronic transmission dated June 4, 2013, Mr. Wedgeworth confirmed that, "As you know, we got the check delivered by Eric Dollenberg this morning. So we now have \$50,000 of the

purchaser's money." A copy of the electronic transmission is annexed as Exhibit 2 to Mr. Wedgeworth's Affidavit. Mr. Wedgeworth states that the electronic transmissions are consistent with my discussions with Mr. Dollenberg, and the events described. (Wedgeworth Affidavit, R. p. 88, paragraphs 10-11; R. p. 92)

Exhibit 3 to Mr. Wedgeworth's Affidavit is a deposit slip showing that the earnest money deposit was deposited into my fiduciary account on June 4, 2013. Mr. Wedgeworth states that it is the habit and custom of his brokerage firm to deposit earnest money on the same day as received, except at certain times when the check is received late in the day. (Wedgeworth Affidavit, R. p. 88, paragraphs 12-13; R. p. 94)

ARGUMENT

I. THE COURT ERRED BY GRANTING SUMMARY JUDGMENT BECAUSE THE COURT FAILED TO CONSTRUE ALL EVIDENCE AND INFERENCES AGAINST THE MOVANT, WHICH IF PROPERLY CONSTRUED, GIVE RISE TO GENUINE ISSUES OF MATERIAL FACTS, INCLUDING AN INFERENCE THAT BY DELIVERING THEIR FINAL DEPOSIT AFTER THEIR AGENT RECEIVED THE CONTRACT IN ITS FINAL FORM, RESPONDENTS ACCEPTED THE TERMS OF THE CONTRACT.

The Court granted Respondents' Motion for Summary Judgment by entering an Order prepared by Respondents' counsel, and presented to the Court prior to Appellant's Memorandum in Opposition to Summary Judgment. Because Respondents' counsel did not have the benefit of considering the matters presented by Appellant's Memorandum, the Order did not address those matters. The lower Court signed that proposed Order without the benefit of considering the issues raised by Appellant.

The sole evidence before the Court, below, included the affidavits of the parties and their respective real estate agents, together with exhibits to the affidavits.

In reviewing a trial court's grant of summary judgment, this Appellate Court applies the same standard required of the circuit court under Rule 56(c), SCRPC. *Bass v. Gopal, Inc.*, 395 S.C. 129,

133, 716 S.E.2d 910, 912 (2011) (citing *Edwards v. Lexington Cnty. Sheriff's Dep't*, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010)): Rule 56(c), SCRPC, provides that summary judgment is proper only when "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." "In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Bass*, 395 S.C. at 133-34, 716 S.E.2d at 912 (citing *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009)): "[T]he non-moving party is only required to submit a mere *scintilla* of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Notwithstanding the several affidavits before the Court which presented conflicting facts, the Trial Court made the following findings:

On June 1, 2013, Defendant executed the revised contract with two critical revisions: the financing contingency period was reduced from 25 business days to June 15; and the closing date was changed from June 14 to June 30. These issues relating to the back and forth revisions to the proposed contract are not in dispute.

The changes made by Defendant relating to the financing contingency and the closing date are essential terms, as **Plaintiffs were unable to obtain the necessary purchase money mortgage.** Both Plaintiffs' and their realtor's affidavits state the Plaintiffs never agreed to the proposed changes by the Defendant, nor were such changes, ever discussed with the Plaintiffs. **Defendant's affidavits do not dispute this issue. Further, emails submitted with the affidavits show the parties were never in agreement as to these issues.** [Emphasis supplied]

(Summary Judgment Order, R. p. 3-4, paragraphs 2-3)

In making the findings emphasized in the Order, above, the Trial Court ignored the facts established by Appellant's Affidavits. Appellant's Affidavit, taken together with that of Mr. Wedgeworth, show disputes as to material facts. For example, the Order casually states, "Plaintiffs

[Respondents] were unable to obtain the necessary purchase money mortgage.” That fact would only be relevant if Respondents qualified for the contractual financing contingency as set forth at paragraph 3 of the Contract. If satisfied, the financing contingency would excuse their performance. The Order does not state that Respondents satisfied the requirements of the financing contingency. Indeed, Appellant’s Affidavit demonstrates that Respondents failed to make application for financing in accordance with the terms of the financing contingency set forth at paragraph 3 of the Contract. Among other things, Respondents failed to make application to, “...a lender customarily making such loans in Beaufort County and the surrounding area.” (Appellant’s Affidavit, R. p. 70-71, paragraphs 22-29) Given Respondents’ failure to satisfy the financing the contingency, the issue of financing is irrelevant. It would be merely speculative to conclude whether Respondents would have obtained financing if they had satisfied the terms of the financing contingency.

That portion of the Order emphasized above also states, “Defendant’s affidavits do not dispute this issue. Further, emails submitted with the affidavits show the parties were never in agreement as to these issues.” That portion of the Order misstates the facts presented by Appellant’s Affidavits. The emails upon which the Court relied were self-serving evidence created after the fact. Appellant’s Affidavits stress Respondents’ actions after receipt of the Contract in its final form. Respondents’ actions belie their reconstituted position that there was no meeting of the minds.

Appellant’s Affidavits show that Respondents delivered their Final Deposit after receipt of the Contract in its final form. (Wedgeworth’s Affidavit, R. p. 88, paragraphs 8-13; Appellant’s Affidavit, R. p. 68, paragraphs 7, 8) Delivery of the Final Deposit evidences Respondents’ acceptance of the Contract in its final form.

An enforceable contract does not require a single, integrated document in order to satisfy the Statute of Frauds, S.C. Code Ann. §32-3-10. Rather, the court may consider multiple documents together to satisfy the Statute. *Speed v. Speed*, 213 S.C. 401, 49, S.E.2d 588, 591 (1948); *Goodwin*

v. The Hilton Head Company, 273 S.C. 758, 260, 259 S.E.2d 611, 612, (1979). In this case, delivery of the check constituting the Final Deposit after receipt of the Contract gives rise to an inference that Respondents accepted the Contract. That inference precludes summary judgment.

Further, Respondents immediately set about to perform the terms of the Contract. In accordance with the provisions of paragraph 5, Respondents retained the services of Atlantic Pest Control, Inc. to provide a wood infestation report known as a CL-100 Report for the Property. In accordance with the terms and conditions of the "Addendum to Contract of Sale – Inspection", Plaintiffs retained the service of Lynes Comprehensive Inspections to inspect the Property and provide a summary of the inspection findings. In accordance with the "Addendum to Contract of Sale – Inspection", Respondents required Appellant to perform the repairs identified by Lynes Comprehensive Inspections. (Appellant's Affidavit, R. p. 68, paragraphs 9-19, inclusive) Respondents' actions demonstrate acceptance of the Contract terms. The CL-100 and Lynes Comprehensive Inspections Report are additional documents giving rise to an inference that Respondents accepted the terms of the Contract.

In the case of *SPRINGBOB v. University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384 (2014), the South Carolina Supreme Court analyzed several of the same issues presented by this appeal. In that case the Supreme Court reversed the trial court's grant of summary judgment. That case arose from an offer of special seating in anticipation of opening USC's new basketball arena. USC issued a brochure to high-level Gamecock Club members, offering a long term opportunity for premium seating. Various offerees signed-up for the opportunity. Apparently the signed contracts did not accurately reflect the brochure's promises. Several purchasers sued for enforcement of the contract as represented by the brochures. The trial court granted USC's motion for summary judgment. The Supreme Court reversed.

On appeal, the appellants argued that USC's official logo on the brochure constituted the

equivalent of a signature, and was therefore an enforceable contract. The Court did not reject that argument outright, but rather gave the issue due consideration. After consideration of that argument, the Supreme Court concluded that the logo in that case was not the equivalent of a signature. That particular finding is distinguishable from this case. In this case, Appellant asks this Court to recognize an inference that delivery of Respondents' deposit check, signed by the Respondents, constituted acceptance of the Contract terms. The balance of the Supreme Court's holding is discussed, *infra*.

In considering Respondents' Motion for Summary Judgment, Appellant was entitled to the benefit of favorable construction of all evidence and inferences. Respondents' delivery of their check as the Final Deposit gives rise to an inference that they accepted the Contract. Their subsequent performance of the Contract terms further demonstrates their acceptance. The Trial Court's grant of summary judgment was error.

II. THE COURT ERRED BY FAILING TO CONSIDER FACTS GIVING RISE TO AN INFERENCE THAT RESPONDENTS AND APPELLANT PARTIALLY PERFORMED THE CONTRACT.

Partial performance of a contract evidences acceptance. *Scurry v. Edwards*, 232 S.C. 53, 100 S.E.2d 812 (1957). A court of equity may find a contract from partial performance upon a showing of: (1) clear evidence of an agreement; (2) that the agreement has been partly carried into execution on one side with the approbation of the other; and (3) that the party asserting the contract has been and remains able and willing to perform his part of the contract. *Stackhouse v. Cook*, 271 S.C. 518, 521, 248 S.E.2d 482, 483 (1978); *Scurry v. Edwards*, 232 S.C. 53, 60-61, 100 S.E.2d 812, 816 (1957); *Settlemyer v. McCluney*, 359 S.C. 317, 320, 596 S.E.2d 514, 516 (Ct. App. 2004).

As shown by the facts recited under the *Facts, supra*, and the first argument, above, Respondents and Appellant performed their respective obligations of the Contract.

In accordance with the terms of paragraph 5 of the Contract, Appellants retained the services

of Atlantic Pest Control, Inc. to provide a wood infestation report known as a CL-100 Report for the Property. Agents of Atlantic Pest Control, Inc. entered the Property and inspected it on or about June 14, 2013. Atlantic Pest Control, Inc. delivered the CL-100 Report. A copy of the CL-100 Report is annexed to Appellant's Affidavit as Exhibit 3. (R. p.69, paragraph 10; R. p. 83)

In accordance with the terms and conditions of the "Addendum to Contract of Sale – Inspection", Appellants retained the service of Lynes Comprehensive Inspections to inspect the Property and provide a summary of the inspection findings (the "Inspection Report"). An agent for Lynes Comprehensive Inspections entered the Property and conducted the inspection on June 5, 2013. The Inspection Report was prepared for Respondent, Jameel Rizk. (R. p. 69, paragraphs 11-16)

The Inspection Report identified several items for repair. In accordance with the terms and conditions of the "Addendum to Contract of Sale – Inspection", Appellant arranged for repairs specified by the Inspection Report. Appellant retained the following contractors to make the repairs specified by the Inspection Report, and paid them as indicated: Major Improvements - \$3,900.00; Pro Roofers, Inc. - \$650; and George Edwards - \$1,795.00. (R. p. 69, paragraphs 11-16)

From the time the Contract was entered, Respondents and Appellant exercised best efforts to comply with the Contract terms. By their actions, the parties partially performed the Contract.

In the case of *SPRINGBOB v. University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384 (2014), the appellants argued partial performance. The Supreme Court did not reject that argument. Rather, by footnote 2 the Supreme Court merely stated that it need not reach that issue because it had reversed summary judgment on other grounds, *eg.* estoppel. That issue is discussed, *infra*.

The Affidavits in this case establish an inference that the Contract was partially performed. The Trial Court erred by failing to consider that inference in granting summary judgment.

III. THE COURT ERRED BY FAILING TO CONSIDER FACTS GIVING RISE TO AN INFERENCE THAT APPELLANT DETRIMENTALLY RELIED UPON RESPONDENTS' ACTIONS.

The doctrine of estoppel may be invoked to prevent a party from asserting the statute of frauds as a defense to a contract. In order to overcome the statutory requirement of a writing, the party asserting the estoppel must show that he has suffered a detrimental change of position in reliance on the contract. *Florence Printing Co. v. Parnell*, 178 S.C. 119, 182 S.E. 313 (1935); *Collins Music Co., Inc. v. Cook*, 281 S.C. 580, 316 S.E.2d 418 (S.C. App. 1984).

In this case, as shown by her Affidavit, Appellant relied upon Respondents' actions and changed her position to her detriment. The property was taken off the market. She expended monies for repairs specified by Respondents' Inspection Report. She made arrangements to move personal property from the home. She has yet to sell the Property. Respondents should be estopped from denying the existence of the Contract. (R. p. 70, paragraph 21)

In *SPRINGOB v. University of South Carolina*, 407 S.C. 490, 757 S.E.2d 384 (2014), the Supreme Court considered the appellants' argument that they detrimentally relied upon the representations in the brochures delivered by USC. The Supreme Court reverses summary judgment on the grounds that the appellants created an inference that USC should be estopped from denying the relief on the grounds of detrimental reliance. The Court cited other decisions: "[T]he doctrine of estoppel may be invoked to prevent a party from asserting the statute of frauds." *Collins Music Co. v. Cook*, 281 S.C. 580, 583, 316 S.E.2d 418, 420 (Ct. App. 1984) (citing *Florence Printing Co. v. Parnell*, 178 S.C. 119, 127, 182 S.E. 313, 316 (1935)).

On this inference of detrimental reliance, the Supreme Court reversed summary judgment. In this case, Appellant has provided evidence that she changed her position to her detriment in reliance upon Respondents' actions. As in *SPRINGOB v. University of South Carolina*, summary judgment should be reversed.

IV. THE COURT ERRED BY FAILING TO CONSIDER ANY ON THE MATTERS PRESENTED BY APPELLANT'S MOTION TO SET ASIDE SUMMARY JUDGMENT.

The Order drafted by Respondents' counsel prior to the hearing on Respondents' Motion fails address the any matters raised by Appellant's Return and Memorandum in Opposition to Summary Judgment and supporting Affidavits. Appellant timely filed a Motion to Set Aside Summary Judgment and requested the Court to review the matters which were not addressed by the Order. The Court failed to consider any of the matters in entering the Order denying Appellant's Motion.

For the reasons discussed, supra, the Court erred by failing to set aside its Summary Judgment Order.

Conclusion

Summary Judgment is appropriate only when it is perfectly clear that no genuine issue of material facts exists and further inquiry into the facts is not desirable to clarify the application of law. In determining whether triable issues of fact exist all inferences from the facts in the record must be viewed in the light most favorable to the party opposing the summary judgment motion. All ambiguities, conclusions and inferences arising from the evidence must be construed most strongly against the party moving for summary judgment.

In this case, the Affidavits show disputes as to material facts. Respondents were not entitled to summary judgment.

For the reasons stated, this Court should reverse the summary judgment of the circuit court.

Respectfully submitted,



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February 3, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

FEB 05 2015

APPEAL FROM THE BEAUFORT COUNTY **SC Court of Appeals**
Court of Common Pleas

Case No. 2014-CP-07-01729

JAMEEL RIZK AND CRISTINA RIZK,.....Respondents,

v.

JUDY F. SIMMONS,.....Appellant.

PROOF OF SERVICE

This is to certify that I, the undersigned, have on this day delivered a true and correct copy of Appellant's Final Brief and Certificate of Service in the above-captioned case by depositing a copy of same in the United States Mail with correct postage to ensure delivery to:

George E. Mullen , Esq.
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Hilton Head Island, SC 29938

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February 3, 2015