

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

JUL 13 2015

W. Jeffrey Young, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2014-002711

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

v.

Steven P. Levesque.....Appellant.

REPLY BRIEF OF APPELLANT

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## ARGUMENTS

### **I. Standard of Review**

Respondent argues that the following findings by the Circuit Court must be affirmed unless there is no evidence which would reasonably supports the findings:

1. That there exists a clear and irreconcilable conflict between the terms of the Note the Mortgage;
2. That the Agreement to Purchase and Sell Real Estate (the “Agreement”) expressed the entire agreement between the parties; and
3. that Respondent never agreed to limit its recourse under the Note to the Lot.

Brief of Respondent, p.4

The Circuit Court found, however, that the terms of the Promissory Note and the terms of the Mortgage were not ambiguous. Order of Judgment, paragraph NINE (R. p. 8). This finding has not been appealed. Because the documents are not ambiguous, their construction is a matter 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). Therefore, this Court is free to construe the Promissory Note and the Mortgage as it deems appropriate.

### **II. Randall Drew’s Testimony**

Respondent cites the testimony of Mr. Randall Drew—the attorney hired by Respondent to review the closing documents, including the Note and the Mortgage, prior to the closing. (R. pp. 47-51); Brief of Respondent, p. 2. Specifically, Respondent cites the testimony of Mr. Drew to the effect that he was “shocked” to learn that there was a

non-recourse provision in the Mortgage. Brief of Respondent, p. 2 n. 1. Mr. Drew further noted that “we had no discussions of anything dealing with limited or non-recourse on this transaction.” Id.

Mr. Drew’s testimony does not help Respondent. In fact, it illustrates the wisdom of the rule that a party may not avoid the effect of a provision in a document about which he could have learned by carefully reading the document. Mr. Drew offered no explanation as to how he missed the non-recourse provision in his review of the documents—the applicable rule is that a party has a duty to read the documents, *not* that a party has a duty only to make a  *cursory* reading of the documents.

Drew’s testimony makes clear the extraordinary nature of the relief sought by Respondent. In effect, Respondent seeks a ruling that a party could—on the grounds of surprise arising from a lack of diligence—seek relief from a provision in a document, even though the party is sophisticated and the document had been reviewed by the party’s counsel.

### **III. Evidence of Agreement as to the Non-Recourse Provision.**

Respondent argues that Appellant failed to present any evidence that Respondent had agreed that recourse under the Mortgage would be limited to the Lot. Brief of Respondent, pp. 3, 11. The acceptance of the Mortgage containing the unambiguous non-recourse provision is in compelling evidence of the agreement of Respondent in this regard, as is the acceptance of the same provision in a separate transaction with Appellant. Further, Appellant — the only surviving party to the negotiations — directly testified that the nonrecourse provision was intended to be and was an essential terms in the transaction. (R. pp. 85, 90).

#### **IV. Nothing in the Note Overrides the Nonrecourse Provision**

Respondent cites a number of provisions in the Promissory Note that, according to Respondent, establish that the Promissory Note is full recourse rather than non-recourse. None of those provisions directly address recourse, and Respondent does not explain how those provisions are in direct conflict with the Mortgage non-recourse provision, much less override the express nonrecourse provision in the Mortgage. Brief of Respondent, pp. 4-8. Even non-recourse notes have various terms and conditions of enforcement; the conditions that give rise to the right to foreclose the mortgage should not be conflated with provisions which would negate the nonrecourse provisions of the note. See, J. E. Roberts Co. v. Signature Props, LLC, 309 Conn. 307, 335, 71 A.3d 492 (2013). Terms and conditions which determine the obligation of Appellant under the Promissory Note should not be confused with terms and conditions addressing Respondent's entitlement to a deficiency judgment. Rhoden v. FDIC, 619 So.2d 480, 482 (Fla. App. 1993).

#### **V. Appellant Raised the Issue of Merger Below.**

Respondent urges that Appellant is precluded from arguing that the terms of the Agreement were merged into the Promissory Note and Mortgage at closing, such that any inconsistent provisions in the Agreement did not survive closing. According to Respondent, Appellant did not raise this issue below. In fact, this precise issue was raised in Appellant's Motion to Alter or Amend Judgment. Motion to Alter or Amend Judgment, paragraph 3 (R. p. 17).

Respondent argues that the Agreement is comprehensive and contains an integration clause, and thus evidence of the nonrecourse provision in the Mortgage should not be considered. In fact, as subsequently executed documents, the terms of the

Promissory Note and the Mortgage would prevail over the terms in the previously executed Agreement, irrespective of whether that Agreement contained an integration clause. This issue was raised below by Appellant in its Motion to Alter or Amend Judgment, paragraph 2 (R. p. 17).

#### **VI. Summary.**

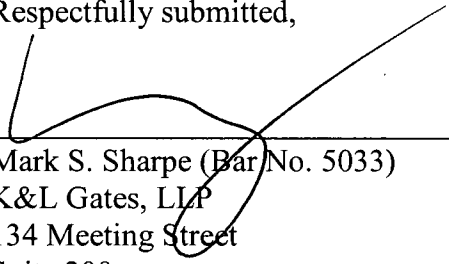
The trial court's determination that there is an irreconcilable conflict between the terms of the Promissory Note and the terms of the Mortgage was incorrect, in that none of the terms and conditions of the Promissory Note address the issue of recourse. Likewise, the Agreement did not address recourse; to the extent the Agreement would nevertheless be applicable, the terms of the Promissory Note and Mortgage—as subsequently executed documents—would control. Finally, the only direct testimony as to the parties' intentions with respect to recourse was the testimony of Appellant himself, who testified that the nonrecourse provision was intended to be part of the transaction.

#### **VII. 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.

July 8, 2015

Respectfully submitted,



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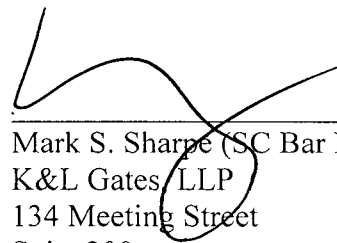
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CERTIFICATE OF COUNSEL

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

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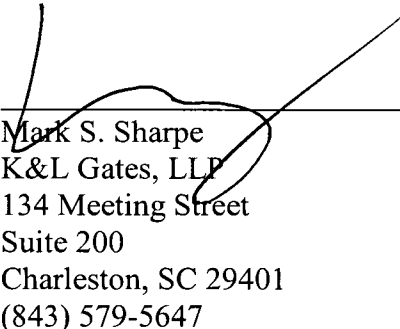
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PROOF OF SERVICE

I certify that I have served the Reply 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.

July 8, 2015

  
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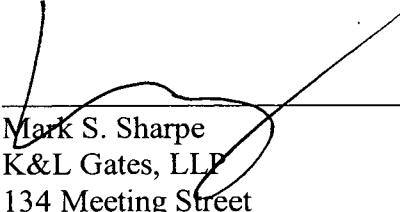
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