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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY

Doyet A. Early, III, Circuit Court Judge

RECEIVED
DEC 31 2015
SC Court of Appeals

Appellate Case No: 2014-000135

Moore Taylor & Thomas, P.A.Plaintiff/Appellant
v.
Marsha Banks and Mary Guynn.....Defendants
Of Whom Mary Guynn is the..... Respondent

APPELLANT'S PETITION FOR REHEARING

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December ^{31st} 2015

Pursuant to Rule 221 (a) SCACR, the Appellant respectfully submits its Petition for Rehearing as to this Court's decision of December 16, 2015 upon the grounds that the Court misapprehended or overlooked the properly pled facts establishing duty.

ARGUMENT: Appellant properly pled Respondent's duty to Appellant

The December 16, 2015, Opinion of the Court of Appeals held that Appellant did not plead facts that would support a finding that Respondent owed a duty to Appellant. Appellant pled that Respondent, in breach of her responsibilities as a closing agent, refused to recognize the disputed amount at closing and withhold the money from distribution. Complaint at ¶ 21. **ROA 11.** In addition to the above facts from the Complaint, Appellant's expert opined in his Affidavit incorporated into the Complaint that Respondent Guynn failed to follow her duties as the closing agent for the real estate transaction. **ROA 15-18.**

Here, the facts as pled by Appellant support a finding that Respondent owed a duty to the Plaintiff pursuant to Rule 1.15. Moore v. Weinberg, 373 S.C. 209, 225, 644 S.E.2d 740, 748 (Ct. App. 2007) (finding that Rule 1.15 can inform the duty of a lawyer acting as an escrow agent) aff'd, 383 S.C. 583, 681 S.E.2d 875 (2009). Rule 1.15, entitled Safekeeping Property, subsections (d) and (e) provide in pertinent part:

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer


until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(**emphasis** added). The Rule instructs an attorney to hold funds in which two or more parties claim an interest rather than to disburse those funds. The Rule also forbids an attorney from making the unilateral decision as to who should receive the disputed funds. Here it was pled that Respondent did not follow these established duties.

Taking the facts and inferences alleged in the complaint in the light most favorable to the plaintiff, Plaintiff has pled a duty and a claim has been stated. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); Spence v. Spence, 368 S.C. 106, 116-17, 628 S.E.2d 869, 874 (2006). To the extent that there are factual issues regarding whether the defendant owes a duty, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder and inappropriate for dismissal. See e.g. Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (held where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder.)

CONCLUSION

Respectfully, the Court of Appeals erred as Respondent had a recognized duty to Appellant.



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PROOF OF SERVICE

I, Jo-Elaine Boyd, a paralegal at Rikard & Protopapas, certify that I have served a true and correct copy of:

- ***Appellant's Petition for Rehearing***

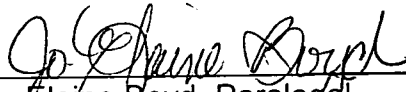
and upon all parties involved on the ^{31st} day of December 2015, by mailing same by regular US Mail to:

J. Calhoun Watson, Esq., and Tina M. Cundari, SOWELL GRAY STEPP & LAFFITTE, 1310 Gadsden Street, PO Box 11449, Columbia, SC 29211, Attorneys for Respondent, Mary Guynn

And to other counsel of record:

James D. Mosteller, III, Post Office Drawer 328 Aiken, South Carolina 29801, Attorneys for Defendant, Marsha Banks

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December ³¹~~30~~, 2015

Via Hand Delivery


Jenny Abbott Kitchings
Clerk, Court of Appeals
1205 Pendleton Street
Columbia, South Carolina 29201

Re: Moore Taylor & Thomas, P.A., Appellant v. Marsha Banks and Mary Guynn, Defendants, of whom Mary Guynn is the Respondent.
Appellate Case No: 2014-000135

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellant's Petition for Rehearing along with our firm's \$25.00 filing fee check. I would appreciate your date stamping the extra copy and returning it to our courier.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Peter D. Protopapas

/jb
Encls.

cc: J. Calhoun Watson, Esq., Attorney for Mary Guynn
James D. Mosteller, III, Esq. Attorney for Marsha Banks