

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

JAN 25 2016

L. Casey Manning, Circuit Court Judge

SC Court of Appeals

Civil Action No. 2011-CP-40-01980
Appellate Case No. 2013-002673

Robert S. Jones,.....Plaintiff/Appellant,

v.

Builders Investment Group, LLC,
Brian D. Boone and Arden Homebuilders, LLC,.....Defendants,

Of Whom
Builders Investment Group, LLC
and Brian D. Boone are,.....Respondents.

RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING

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Attorneys for Respondents

Respondents Builders Investment Group, LLC and Brian D. Boone hereby respond to Appellant's Petition for Rehearing ("Appellant's Petition"). This Court properly affirmed the lower court's order granting the Respondents' motion for judgment notwithstanding the verdict because Appellant Jones failed to pay more than his proportionate share of the Arden Loan as required by the Arden Operating Agreement. For the reasons outlined below, the Appellant's Petition should be denied.

I. This Court properly determined that Appellant had not paid more than his proportionate share as required under the Arden Operating Agreement.

This Court properly determined that Appellant had failed to meet the requirements of the Arden Operating Agreement regarding contribution. The rights between the parties is governed by contract, the Arden Operating Agreement, which specifically requires that Appellant actually pay more than his proportionate share of a debt before he is entitled to contribution from the other members of Arden.

No matter how the Appellant tries to spin the actual transactions with Southern First Bank, it is uncontested that Appellant never actually made payments to the Bank over his proportionate share. It is undisputed from the evidence presented at trial that Appellant signed a personal promissory note, also with Southern First Bank, which was used to satisfy the Arden Loan. (R. p. 338, l. 17 – p. 339, l. 14). This personal promissory note was then written-off by Southern First Bank almost immediately. It is also undisputed that Jones has not made any payments on this personal promissory note or the confession of judgment. (R. p. 215, l. 11 – p. 216, l. 9; R. p. 324, ll. 4-16; R. p. 47-48, ¶ 5; R. p. 53, ¶ 2; R. pp. 562-564).

The plain language of the Arden Operating Agreement, the UCC, and South Carolina case law are clear that incurring a liability (i.e. taking out a promissory note) is

insufficient to trigger contribution in this case. The sequence of the promissory note transactions has no bearing on the ultimate fact that Appellant merely incurred a liability and did not make payment. This Court properly concluded that “[w]e agree with the circuit court and find Jones's signing of a personal promissory note with SFB in satisfaction of the Arden Loan was insufficient, as a matter of law, to fulfill the plain requirements of section 2.3.”

Appellant contends that taking out one promissory note to satisfy another promissory note constitutes payments. However, this Court correctly relied on South Carolina law to determine that Appellant’s personal promissory note was nothing more than an extension of the original liability and did not constitute payment. This Court cited S.C. Code Ann. § 36-9-102(65) which provides that a promissory note is only a promise to pay, not actual payment of a debt. By taking out another promissory note, Appellant was just exchanging one promise to pay for another. This Court appropriately found that this internal shuffling of promises did not constitute actual payment.

This Court also correctly gave little weight to Appellant’s foreign authority. Not only was there sufficient case law in South Carolina addressing all of the issues (and cited by this Court), but Appellant’s foreign case law all improperly relied on the equitable concept of contribution. This case was based on contract and not on any laws of equity. Because this Court did not overlook or misapprehend any issues, the Appellant’s Petition should be denied.

II. This Court properly held that Appellant abandoned his argument that the circuit court erred in the construction of the Arden Operating Agreement.

This Court found that Appellant had abandoned his argument that the circuit court erred in the construction of the Arden Operating Agreement. In his briefs, Appellant simply argues that the plain reading of Section 2.3 of the Arden Operating Agreement is enough to overturn the circuit court's determination. However, Appellant relies solely on his own opinion of the meaning behind Section 2.3. Appellant does not cite any facts or authority to support his understanding of Section 2.3. Accordingly, Appellant abandoned his arguments regarding the construction of Section 2.3. *Potter v. Spartanburg Sch. Dist.* 7, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011).

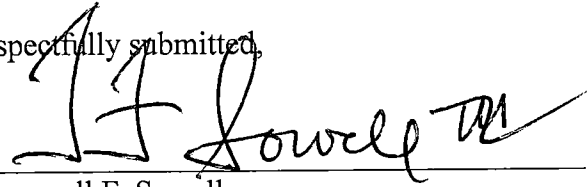
Further, this second argument raised by Appellant is moot because this Court already determined that he had not made payment entitling him to contribution under the Arden Operating Agreement. For this reason, and all of the reasons originally raised by Respondents in their brief, Appellant's Petition should be denied.

CONCLUSION

All of the arguments raised by Appellant in his Petition have been thoroughly briefed and argued before this Court. This Court has not overlooked or misapprehended any of the Appellant's arguments. For this reason, and those set forth above, Respondents respectfully request this Court deny Appellant's Petition for a Rehearing.

[Signature on following page]

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the Return to Petition for Rehearing on the following by placing a copy in the U.S. Mail, postage pre-paid, to counsel for the Appellant on January 25, 2016, at the address shown below:

D. Reece Williams, III, Esquire
Kathleen M. McDaniel, Esquire
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SC Court of Appeals

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

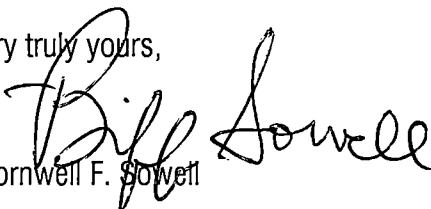
RE: Robert S. Jones v. Builders Investment Group, LLC, et al.
Civil Action No.: 2011-CP-40-1980
Appellate Case No.: 2013-002673
Our File No.: 6354/1500

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondents' Return to Petition for Rehearing in the above-referenced matter. We would appreciate your ~~filling~~ filing the original as appropriate and returning a file-stamped copy via our courier.

By copy of this letter and as evidenced by the Proof of Service, we are serving same upon counsel for the Appellant.

Very truly yours,


Thornwell F. Sowell

TFS:sec

Enclosures

cc: D. Reece Williams, III, Esquire
Kathleen M. McDaniel, Esquire