THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Judge

Appellate Case No. 2015-001633
Common Pleas Case No. 2013-CP-38-01427

Newtek Small Business Finance, Inc.,...Respondent,

v.

Kiritkumar H. Mehta,..Appellant.

INITIAL REPLY BRIEF OF APPELLANT

Andrew S. Radeker
S.C. Bar No. 73743
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

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STATEMENT OF ISSUES

I. **Did the lower court err in granting summary judgment to the Respondent creditor where the court concluded it could not consider evidence of the Respondent's misrepresentation that a short sale transaction would eliminate any further liability on the subject debt?**

II. **Did the lower court err in granting summary judgment where it applied the parol evidence rule and related contractual interpretation principles to the Appellant, who was not a party to the short sale agreement?**

III. **Did the lower court err in granting summary judgment where discovery had just begun and where the Appellant had not had a full and fair opportunity to complete discovery?**

IV. **Did the lower court err in denying the Appellant's motion to amend and add parties where there would have been no prejudice to the Respondent by allowing the amendment?**

ARGUMENT

I. Newtek would have this court extend the parol evidence rule to places it has never gone before.

The Respondent (hereinafter "Newtek") leans heavily on its version of the parol evidence rule as its argument for why this court should affirm the lower court's grant of summary judgment. What Newtek fails to grasp is that the parol evidence rule is not a general rule governing admissibility of evidence but is instead a limited exception to the general rule that a court will admit and evaluate *any* relevant evidence. Newtek has elevated the parol evidence rule to a paramount status it has never occupied under South Carolina law, and virtually all of Newtek's argument depends upon this court applying the parol evidence rule in circumstances well beyond its traditional, narrow, and well-recognized boundaries. For this court to adopt Newtek's version of the parol evidence rule would result in the sweeping exclusion of much relevant evidence, not just in this case but in many future ones, skewing the probable results in cases away from reflecting the truth of the cases' facts. The implications are disturbing.

Relevant evidence is generally admissible. Rule 402, SCRE. It is various exceptions to the admissibility of relevant evidence that make otherwise admissible evidence become inadmissible. Id. Generally, "[a]ll that is required to render evidence admissible is that the facts shown legally tend to establish, or to make more or less probable, some matter in issue, and to bear directly or indirectly thereon. Relevancy of evidence means the logical relation between the proposed evidence and a fact to be established." Levy v. Outdoor Resorts of South Carolina, 304 S.C. 427, 431, 405 S.E.2d 387, 390 (1991) (internal quotation marks omitted). "Any evidence that assists

in getting at the truth is relevant and admissible unless it is incompetent because of some legal rule." Alex Sanders & John S. Nichols, Trial Handbook for S.C. Lawyers § 13:1 (5th ed. 2013) (citing State v. Petit, 144 S.C. 452, 142 S.E. 725 (1928)).

The parol evidence rule is an exception to the general rule about relevant evidence, since, when it applies, it prohibits a court from receiving certain evidence for certain purposes. E.g., McLeod v. Sandy Island Corp., 265 S.C. 1, 10-11, 216 S.E.2d 746, 750 (1976). As an exception to the general rule, it only applies in situations where our courts have recognized that it is applicable. See Rule 402, SCRE (all relevant evidence admissible unless prohibited by other law).

Newtek asks that this court apply the parol evidence rule to a dispute between Newtek and Appellant (hereinafter "Mehta"), even though the short sale contract involved is not one to which Mehta was a party, as Newtek acknowledges. (Initial Brief of Respondent p. 13.) What Newtek is doing here is trying to get this court to apply the parol evidence rule – in other words, to exclude relevant evidence from consideration – in circumstances to which the rule has been held not to apply. This is so because Newtek knows that the only way for this court to affirm the grant of summary judgment is if it decides not to consider the plainly relevant evidence in the record that Newtek told Mehta that the subject debt would not survive the short sale. (R. pp. ___; affidavit of Mehta.)

The only law in this state on the question of whether the parol evidence rule applies to a controversy where both parties are not also parties to the contract in question is that the rule does *not* apply in that circumstance. City of Orangeburg v. Buford, 227 S.C. 280, 284, 87 S.E.2d 822, 824 (1955); Baptist Foundation for Christian

Educ. v. Baptist College at Charleston, 282 S.C. 53, 57, 317 S.E.2d 453, 456-57 (Ct. App. 1984). That is consistent with law elsewhere. U.S. v. Krug, 967 F.2d 594 (9th Cir. 1992). Newtek goes to great lengths to try to distinguish Buford, but all Newtek really does is point out how details of that case differed from this one. (Initial Brief of Respondent pp. 12-13.) Between *any* two cases, factual details will differ. Newtek's argument does not make a *meaningful* distinction. What Newtek has failed to do is to point out how, somehow, the Supreme Court of South Carolina's holding that the parol evidence rule "does not apply to a controversy between third parties, or to a controversy between a third party and one of the parties to the instrument" is anything other than binding precedent. Buford, 227 S.C. at 284.

Newtek also tries to distinguish Keith v. River Consulting, Inc., 365 S.C. 500, 618 S.E.2d 302 (Ct. App. 2005), and argues that Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 762 S.E.2d 696 (2014), means that Mehta is wrong to say that South Carolina law is that when a contract is silent as to a particular matter, parol evidence may be admitted to show the parties intent with regard to that matter. Stevens did not involve a situation in which the writing at issue was silent as to the matter in controversy. Id. at 701. Stevens, rather, involved the application of the parol evidence rule to a situation where the document's language "clearly expresse[d] the intent" at issue. Id. Stevens does not purport to overrule Keith, and Newtek does not argue that it does. Stevens does not contradict Keith. The law is still that "[w]hen a contract is silent as to a particular matter, parol evidence is admissible to reveal the parties' true intent." Keith, 365 S.C. at 506. In fact, the quotation below from another of this court's decisions reveals that Mehta is indeed reading Keith correctly, that there

is no conflict between the principle expressed in this sentence and the Stevens decision, and that the quoted words in the previous sentence mean exactly what they say:

> Because we find this contract is clear, explicit, unambiguous, and capable of only one reasonable interpretation, the court does not look beyond the four corners to discern the parties' intentions. *See Keith v. River Consulting, Inc., 365 S.C. 500, 506, 618 S.E.2d 302, 305 (Ct.App.2005) (explaining parol evidence is admissible to discover the parties' intentions when a contract is silent regarding a particular issue).*

Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585, 658 S.E.2d 539, 543 (Ct. App. 2008) (emphasis added).

While Newtek tries to distinguish Keith, too, a look at the way Newtek does so illustrates that it has drawn what a law school professor of the undersigned used to refer to as a distinction without a difference. Newtek tries to make a meaningful distinction from the fact that what was used in Keith to supply the evidence of intention was trade usage. (Initial Brief of Respondent p. 9.) Newtek has either missed the point or is being deliberately obtuse. It is because it is true as a proposition of law that "[w]hen a contract is silent as to a particular matter, parol evidence is admissible to reveal the parties' true intent" that the court in Keith could look to evidence outside the four corners of the document to assess intent – there, trade usage. 365 S.C. at 506. Nowhere does Keith purport to limit this proposition of law to the use of evidence concerning trade usage. Id. This court's summary of Keith in the Silver case states that Keith stands for the general proposition of law that "parol evidence is admissible to discover the parties' intentions when a contract is silent regarding a particular issue." Silver, 658 S.E.2d at 543.

Newtek attempts to belittle the proposition for which Keith stands by trying to make it appear absurd; however, this backfires because of Newtek's hypothetical does not logically support the argument for which it is offered. Here is Newtek's attempt at this:

> The short sale contract in this case is "silent" on an infinite number of issues. For instance, it is "silent" on the issue of whether Newtek will bake a birthday cake for Mehta every year on his birthday. Presumably, this is because a provision about baking birthday cakes is not part of the short sale contract.

(Initial Brief of Respondent p. 10.)

The reader can practically hear the chuckling. While an agreement for Newtek to bake Mehta cakes to celebrate his birthday as the years go by would certainly be very nice, it would also not be very believable. This hypothetical is indeed amusing. Newtek, however, is trying to parlay the humorous absurdity of such an agreement into a replacement for a logical argument against the rule stated in Keith. The problem with this is that the reasoning of it does not work. If Mehta had testified that Newtek's employee had told him Newtek would bake him an annual birthday cake, that would be so silly that its credibility would be laughable; however, *that statement would be admissible*. Rule 402, SCRE. It would be relevant evidence not barred by any evidentiary rule.

Also, as noted in Mehta's brief, "[n]either the parol evidence rule nor a merger clause in a contract prevents one from proceeding on tort theories of negligent misrepresentation and fraud." Frewil, LLC v. Price, Op. No. 5293 (S.C. Ct. App. filed Feb. 4, 2015) (Shearouse Adv. Sh. No. 5 at 36, 39)(quoting Slack v. James, 364 S.C. 609, 616, 614 S.E.2d 636, 640 (2005)). The parol evidence rule does not apply to

negligent misrepresentation claims. Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). Despite Newtek's desire for the contrary, parol evidence remains "freely admissible to establish allegations of fraud, mistake, or other equitable grounds for relief." Yarn Indus. v. Krupp Intl., Inc., 736 F.2d 125, 129 (4th Cir. 1984) (citing Allen-Parker Co. v. Lollis, 257 S.C. 266, 185 S.E.2d 739, 742 (1971)).

Newtek succeeded in getting the lower court to apply the parol evidence rule well beyond its boundaries. Newtek is now trying to get this court to do the same thing. Mehta, however, asks that this court apply governing precedent and well-established law in this case. When that is done, the correctness of reversal shows itself.

For this court to affirm the lower court would be for this court to change the law. Such a result would not just depart from this court's precedent but would also contradict precedent of the South Carolina Supreme Court. See Buford, 227 S.C. at 284. That would violate the South Carolina Constitution, as the decisions of the Supreme Court are binding precedent. S.C. Const. Art. V, § 9.

Mehta simply asks that this court apply the law as it is. To do so requires that the grant of summary judgment be reversed.

II. Much of Newtek's argument depends on inferences being drawn in Newtek's favor, though it was Newtek that moved for summary judgment.

Newtek was the party that moved for summary judgment below. (R. pp. ___; motion for summary judgment.) Accordingly, Newtek is not entitled to have any inferences drawn in its favor; rather, as is well-known, "[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly *against* the

moving party." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004)(emphasis added). An appellate court reviewing a grant of summary judgment must view "the evidence and all reasonable inferences . . . in the light most favorable to the non-moving party." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

Despite this standard, Newtek makes the following statements in its brief:

> In seeking Newtek's consent for this short sale, one of the explicitly negotiated terms was whether Newtek would waive its right to pursue the deficiency associated with the promissory note and guaranty.
>
> . . .
>
> . . . it would be reasonable to expect that all terms of the short sale contract be expressed, without the need to divine them from extrinsic evidence.
>
> . . .
>
> All terms were explicitly set forth in the contract . . .
>
> . . .
>
> . . . such a conspiracy [to get Mehta to have Krishna of Orangeburg, Inc. go through with the short sale by making Mehta believe that this would eliminate the debt and guaranty] does not even make sense, as it was in Newtek's best interests as the secured party, to have the real estate sell for the maximum amount possible in order to recover on its loan.
>
> . . .
>
> Mehta alleges that he was told his entire mortgage debt would be waived, but he was on notice that no such provision made it into the final version of the short-sale agreement which he reviewed and signed, and that explicit language to the contrary was contained in the mortgage satisfaction.

(Initial Brief of Respondent pp. 5, 9, 10, 15.)

For the court to agree with any of these statements would require the abandonment of the summary judgment review standard, because each one of these statements is an inference drawn in favor of Netwek, the party that moved for summary judgment.

Nothing in the record actually shows what the negotiations were about the contract. Whether all terms of the short sale contract were set forth in the document is a matter that is in some dispute, and to conclude that "it would be reasonable to expect that all terms of the short sale contract be expressed" in that document would be to draw an impermissible inference in favor of the party that moved for summary judgment. (Initial Brief of Respondent p. 9.) Further, the assertion that "[a]ll terms were explicitly set forth in the contract" is just a tautological statement of the very conclusion that Newtek would like this court to reach. (Initial Brief of Respondent p. 10.) To conclude that Newtek's representation to Mehta "does not make sense" is 1) an impermissible credibility determination and 2) an inference in favor of Newtek. And it may well actually make sense, too – this was an SBA-guaranteed loan, so the Newtek employee may well have believed that SBA would pay off the remaining balance, which could make Mr. Morales' misrepresentation seem a harmless one to him at the time he made it. Furthermore, nothing in the record indicates that Mehta ever even saw the mortgage satisfaction document, which he did not sign; thus, there is nothing in the record that indicates that Mehta was aware of any language in that document. (R. pp. ___; mortgage satisfaction document.) The court's acceptance of any these contentions

by Newtek would depend upon the court drawing inferences in Newtek's favor, in violation of the summary judgment standard.

Newtek makes these assertions of fact, in contravention of the standard, because it knows that it cannot win this appeal if the actual, correct summary judgment review standard is applied and the court views the record in the light most favorable to Mehta.

III. Viewed in a light favorable to Mehta, the record supports Newtek having a duty to refrain from making this misrepresentation to him.

In its brief, Newtek argues, as an additional sustaining ground, that the only reasonable inference to draw from the facts in the record is that Mehta's negligent misrepresentation claim will not lie because "Newtek owes no duty of care to Mehta." (Initial Brief of Respondent. p. 14.) It is appropriate for Mehta to address this argument in this reply brief. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418 n. 6, 526 S.E.2d 716 (2000) (appellant may address additional sustaining ground arguments in reply brief). This argument is easily addressed.

Newtek argues that because Mehta and Netwek are in privity of contract with regard to the guaranty, there can be no tort liability by Newtek for negligent misrepresentation. Newtek contends that it has no duty to Mehta not to engage in negligent misrepresentation. Per our Supreme Court, though, torts definitely can lie between parties who are in privity of contract:

> A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie. A breach of a duty arising independently of any contract duties between the parties, however, may support a tort action.

Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995).

Our Supreme Court has also said this:

> "A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction." Winburn v. Insurance Co., 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App. 1985). "The recovery of damages may be predicated upon a negligently made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation." Id. These general rules have been applied, in every case this Court has located, to support the recognition of a negligent misrepresentation claim where the misrepresented fact(s) induced the plaintiff to enter a contract or business transaction.

Gilliland v. Elmwood Properties, 301 S.C. 295, 301, 391 S.E.2d 577, 580 (1990).

Expounding upon the precepts noted in Gilliland, this court has noted the following:

> Not every statement made in the course of commercial dealings is actionable at law. A mere statement of opinion, commendation of goods or services, or expression of confidence that a bargain will be satisfactory does not give rise to liability in tort. Winburn v. Insurance Co. of North America, supra (opinion that mechanic was "good" and that adjuster had faith in him); Randall v. Smith, 136 Ga. App. 823, 222 S.E.2d 664 (1975) (assurance that vehicle was in good condition and suitable for driving). However, if the defendant has a pecuniary interest in making the statement and he possesses expertise or special knowledge that would ordinarily make it reasonable for another to rely on his judgment or ability to make careful enquiry, the law places on him a duty of care with respect to representations made to plaintiff. Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465. Proof that the statement was made in the course of the defendant's business, profession, or employment is sufficient to show he has a pecuniary interest in making it, although he receives no consideration for it.

AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 22-23, 420 S.E.2d 868, 874 (Ct. App. 1992).

Here, viewed in the light most favorable to Mehta, the record shows that there is at least the required scintilla of evidence to avoid summary judgment on the issue of whether Newtek had a duty to Mehta to refrain from making negligent misrepresentations to him. Mehta's affidavit notes the following:

> Jose Morales of Newtek Small Business Finance also told me that as a result of the short sale, there would be no more debt owed to the Plaintiff.

(R. pp. ___; affidavit of Mehta.) The record, viewed in the light most favorable to Mehta and with all reasonable inferences drawn in his favor, supports that Morales' statement:

a) was made on behalf of Newtek;

b) was made to induce Mehta to get Krishna of Orangeburg to go through with the short sale transaction;

c) was made under circumstances in which Newtek had a pecuniary interest in the transaction, including in receiving the hundreds of thousands of dollars in sales proceeds from the short sale; and

d) was a statement of specific fact, not one of opinion or mere prediction;

e) was made by someone who, in relation to Mehta, possessed special knowledge of whether the statement was true, because the speaker was a Newtek employee, privy to whether Newtek was actually going to treat the debt and guaranty as satisfied by the short sale, and Mehta was not in position to know whether Mr. Morales was lying to him.

That the record supports this view takes the wind out of the sails of Newtek's no-duty argument.

If the existence of a contract between the parties always and necessarily prevented liability for negligent misrepresentation, instances in which liability for negligent misrepresentation even *could* arise would be as rare as the proverbial hen's tooth. To adopt Newtek's argument would not just contravene existing law, it would also mean that a party could shield himself totally from liability for negligent misrepresentation – no matter what he said – simply by being in privity of contract with the party to whom he lied. The law does not countenance such a result, and there is no reason that it should.

IV. Newtek's argument about discovery falls flat.

Newtek argues that Mehta waited too long to start discovery. First, the reason Mehta waited until he did is because, as Newtek acknowledges, "settlement negotiations had been underway during the entirety of the action" and the parties had actually settled the case, subject to the approval of SBA. (Initial Brief of respondent p. 17.) The news that SBA did not approve the settlement came just over a month before the hearing on the summary judgment motion. (R. pp. ___; October 30, 2014 email from Caskey.) In Baughman v. American Telephone and Telegraph Co., 306 S.C. 101, 113, 410 S.E.2d 537, 544 (1991), our Supreme Court, in determining that a grant of summary judgment should be reversed because the plaintiffs had not had a full and fair opportunity to complete discovery, "acknowledge[d] that more than three years elapsed between the filing of these actions and the final granting of partial summary judgment as to personal injury. The delays in completing discovery, however, may not fairly be attributed solely to Plaintiffs' inaction." Here, as there, the delay in discovery cannot be attributed solely to inaction by Mehta, and the amount of time between when Newtek

advised that SBA had not approved the settlement and when discovery began was quite short.

Newtek makes a conclusory argument that "the discovery sought would not create a genuine issue of material fact[,]" but, as discussed in Mehta's appellant's brief, the discovery sought went right to the heart of the matters in issue. Mehta's discovery requests sought information about the involvement of SBA, the negotiations leading up to the short sale, the communications between Newtek and Mehta, and the communications between Newtek and SBA. (R. pp. ___; interrogatories; requests to produce.) The lower court granted summary judgment where Mehta had not had a full and fair opportunity to conduct discovery.

The rest of Newtek's arguments on this point are about failure to prosecute a case (which we do not have here), extension of the statute of limitations (which we also do not have here), and when Mehta served his affidavit (which he indisputably did in compliance with the time limit of Rule 56, SCRCP) in relation to when he heard Newtek's employee tell him that the short sale would wipe away the debt and guaranty. Those things have nothing to do with discovery at all.

CONCLUSION

The law is against Newtek's arguments in this appeal. Newtek just does not have the horses for this race. The lower court erred prejudicially in granting Newtek's summary judgment motion and in denying Mehta's motion to amend and add parties. The court should reverse these rulings and remand for trial.

Respectfully submitted,

Andrew S. Radeker
S.C. Bar No. 73743
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

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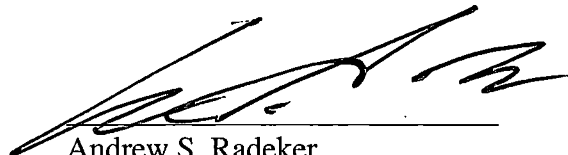
PROOF OF SERVICE

I certify that I served the foregoing initial reply brief of appellant by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Bryan D. Caskey, Esq.
Foster Law Office, LLC
3100 Devine Street
Columbia, SC 29205

March 7, 2016



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorneys for Appellant