THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2013-CP-37-0575

Appellant Case No. 2015 - 001672

Duke Energy Carolinas, LLC..... Respondent

v.

Randall S. Hiller and Janet C. Hiller..... Appellants

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Did the Circuit Court err in granting Duke Energy's Motion to Enforce the settlement set forth in the Memorandum of Agreement?

STATEMENT OF THE CASE

Duke Energy Carolinas, LLC ("Duke Energy") filed suit against Randall S. Hiller and Janet C. Hiller ("Hiller") on August 8, 2013 arising out of the Hillers' violation of the Shoreline Management Guidelines ("SMG") for Lake Keowee. The SMG were developed pursuant to Duke Energy's FERC licensed project number 2503 for Lake Keowee. The Hillers have refused to remove an unapproved and/or unsafe structure owned by the Hillers located within the project boundary for Lake Keowee. Duke Energy further alleges that the Hillers' structure is not in an approved location and presents a continuing potential public safety and navigational hazard. Duke Energy, as a federal licensee, is charged with managing the property within the project boundary of Lake Keowee and is required to regulate the uses of the project to protect the scenic, recreational, and environmental values of the project property. The items complained of in the suit are in violation of the applicable SMG for this project developed pursuant to the FERC license for said project.

Prior to trial, a mediation was held on September 2, 2014 resulting in the settlement of this case. Thereafter, as a result of Hillers' failure to comply with the terms of the settlement, Duke Energy filed a Motion to Enforce the Settlement which was heard on May 12, 2015 before the Honorable R. Lawton McIntosh. On May 13, 2015, Judge McIntosh filed an Order granting Duke Energy's Motion to Enforce Settlement and directed the Hillers to grant Duke Energy's representatives access to their property as necessary to complete the terms of the settlement agreement. Hiller, thereafter, filed a Notice of Appeal.

STATEMENT OF FACT

The parties to this action have had a dispute that has been ongoing for years regarding a dock and/or docks that the Hillers have attached to the front of their property on Lake Keowee. These docks have periodically come loose from attachment and have drifted out into Lake Keowee creating navigational hazards as well as numerous complaints from adjoining property owners. Multiple legal actions have been filed resulting in "agreements" to correct these deficiencies only to be ignored by the Hillers.

The parties participated in a mediation on September 2, 2014. After lengthy negotiations, the parties reached a settlement agreement regarding the present action. The settlement agreement was reduced to writing and signed by the parties and their counsel.

In November, 2014, Duke Energy learned that the Hillers had failed to comply with all of the terms of the settlement agreement to which they had agreed at mediation. The Hillers' failure to comply was the subject of correspondence to the Hillers on behalf of Duke Energy dated November 25, 2014. In addition to identifying the specific items of the agreement that the Hillers had failed to complete, this correspondence also encapsulated what occurred at the meeting on the Hillers' property after the mediation on September 5, 2014. After this meeting, the Hillers instructed, via electronic mail, the Duke Energy contractor who attended the meeting not to perform the work. That correspondence also enclosed photographs showing the status of the work as of the dates referenced therein. Thereafter, correspondence back and forth between the Hillers and Duke Energy continued until shortly before the hearing on the Motion to Enforce Settlement. The Hillers continue to refuse to comply with their obligations under the Settlement Agreement.

ARGUMENT

On September 2, 2014, the parties reached a settlement agreement in this case. The settlement agreement was reduced to writing and signed by the parties and their counsel. (See Memorandum of Agreement dated September 2, 2014). The signed document set forth the clear and specific terms of the settlement agreement between the parties. *Id.* Thereafter, the mediator, Eric K. Englebardt, signed and filed a Proof of ADR Report indicating that the case was "fully settled." (See ADR Compliance Form dated September 3, 2014).

As of November 25, 2014, Hiller had failed to comply with all the terms of the settlement agreement which resulted in Duke Energy's letter to Hiller of the same date, with enclosures, specifically detailing the deficiencies in compliance with the settlement agreement. (See Letter to Hiller dated November 25, 2014 with attachments referenced therein). That letter also referenced Hiller's instructions to the contractor (hired by Duke Energy) not to do the work which, according to Hiller, would now be done by a contractor chosen by Hiller. The reason later given by Hiller was Hiller's claim that Duke Energy's contractor could not do this work within a thirty (30) day "time frame." (Transcript of Motion to Enforce Settlement Hearing held before the Honorable R. Lawton McIntosh on May 12, 2015, pp. 15-16). However, no such "time period" is referenced in the Memorandum of Agreement pertaining to this work. The correspondence of November 25, 2014 does reference a thirty-day time period but that was designated by Duke Energy after Hiller had failed to complete the work over two (2) months after the mediation.

Hiller's response of November 26, 2014 does not challenge the scope of work set forth in Duke Energy's letter of November 25, 2014 and simply bases his non-compliance on the failure of the contractor hired by Hiller to do this work. (See Letter from Hiller dated November 26, 2014). Correspondence continued by and between the parties based upon Duke Energy's

continuing to monitor the status of the work and Hiller continuing to give excuses why the work had not been performed. Hiller told Duke Energy that he would do the work when he got around to it on multiple occasions. (See Electronic mail to Hiller and Hiller's response both dated December 22, 2014; Letter to Hiller dated December 22, 2014; Electronic mail to Hiller with attachments referenced therein dated December 30, 2014; Letter from Hiller dated December 30, 2014; Letter to Hiller dated February 12, 2015; Letter from Hiller dated February 18, 2015; Letter to Hiller dated March 18, 2015; Letter to Hiller with enclosures referenced therein dated May 7, 2015; two photographs of "spud pole"). Accordingly, Duke Energy had no choice but to file a Motion to Enforce the settlement.

SCRCP 43 (k) states:

> (k) Agreements of Counsel. No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, *or reduced to writing and signed by the parties and their counsel*. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP. (emphasis added).

The purpose of Rule 43(k) is "to prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes, which it has been said are often more perplexing than the case itself. The time of the court should not be taken up in controversial matters of this character." (This is certainly true in this case). *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 495, 458 S.E.2d 533, 535 (1995) (quoting 83 C.J.S. Stipulation § 4 (1953)); *see also, Motley v. Williams*, 374 S.C. 107, 111, 647 S.E 2d. 244, 246 (Ct. App. 2007) (stating the application of Rule 43(k) will help avoid disputes regarding the terms of settlement); Ex Parte *Person*, 79 SC 302, 60 S.E. 706 (1908) (stating Rule 43(k) is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation). Settlement agreements are reviewed by the circuit court

in much the same way as contracts. *Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 SC 634, 640, 643 S.E.2d 692, 695 (Ct. App. 2007). When "an agreement is clear and capable of legal construction, the courts [sic] only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *Messer v. Messer*, 359 S.C. 614, 628, 598 S.E. 2d 310, 317 (Ct. App. 2004). When an agreement is plain and unambiguous, the court does not have the authority to modify its terms. *Patricia Grand Hotel*, 372 S.C. at 640, 643 S.E.2d at 695.

Applying the law to the facts and current procedural posture of the case, it is clear that SCRCP 43 (k) applies to the binding nature of this settlement agreement. It is further clear that of the three options available in SCRCP 43 (k), the parties hereto have an agreement that affects the proceedings in this action and which has been reduced to writing and signed by the parties and their counsel. The Court should view this settlement agreement in the same way and under the same scrutiny that it would afford a contract. Hiller seeks to nullify what Duke Energy considers a binding contract under both the Rules of Civil Procedure and legal precedent.

As previously stated, the parties to this action have had an ongoing dispute for years regarding a dock and/or docks that have been attached to the Hiller property on Lake Keowee. The Hillers' docks have periodically come loose from attachment, drifted out into Lake Keowee and created a navigational hazard as well as numerous resulting complaints from adjoining property owners. Multiple legal actions have been filed resulting in "agreements" to correct these deficiencies only to be ignored by Hiller.

Following the mediation, a representative of Duke Energy and a contractor chosen by the Duke Energy to do the work necessary to properly locate and anchor the existing dock at Hiller's property met with Randall Hiller on site on September 5, 2014. Shortly after that meeting, Randall Hiller, contrary to the Memorandum of Agreement, instructed the contractor chosen by Duke

Energy not to do the work insisting that he would have the work done by a contractor he would select. His excuse offered to the Lower Court, but interestingly not referenced in the Hiller brief, was that the contractor chosen by Duke Energy could not do the work within the "time frame" of thirty days. Accordingly, Hiller said that he would hire the contractor and have the work done, presumably within that time period. This is a blatant misrepresentation. As the Circuit Court immediately recognized, there is no such "time frame" for the performance of this portion of the work contained in the Memorandum of Agreement. Further, when Duke Energy representatives checked the status of the work over two (2) months later, no such "time frame" for doing the work had been met by Hiller as this work was incomplete. This status of the work is reflected in the Letter to Hiller dated November 25, 2014 with attachments referenced therein. Accordingly, not only had the work NOT been done within this imaginary "time frame", it had not been completed at all. As previously referenced, further communication between Hiller and Duke Energy continued without a resolution. Another site visit occurred on February 6, 2015 resulting in the communication contained in Letter to Hiller dated February 12, 2015, Letter from Hiller dated February 18, 2015, Letter to Hiller dated March 18, 2015, Letter to Hiller with enclosures referenced therein dated May 7, 2015, and, two photographs of "spud pole".

As referenced above, Hiller has now completely abandoned the argument advanced to the Circuit Court based upon an imaginary "time frame." In addition, Hiller has failed to offer any real substantive disagreement with the terms of the settlement agreement. Hiller now simply argues that Duke Energy presented no witnesses that testified at the hearing and, therefore, the Circuit Court Order should be reversed. This is nonsensical. The facts set forth in the documentary evidence referenced above that were attached to the filed Motion to Enforce Settlement and presented to the Court, without objection, by Duke Energy at the hearing were part of the record

before the Court and are "facts appearing of record." The Circuit Court heard the Hillers' testimony and carefully reviewed the documentary evidence in the record submitted by Duke Energy, without objection, and rendered its decision.

CONCLUSION

The conduct of Hiller which is now on full display before this Court represents only a small sample of the lengths to which Hiller has gone to resist the efforts of Duke Energy to simply enforce the duties and responsibilities imposed on it, as the owner of Lake Keowee, by FERC. Duke Energy has clear obligations to enforce compliance with Duke Energy's Shoreline Management Guidelines. It is far past the time for this conduct on their part to end. Accordingly, Duke Energy respectfully requests that this Court affirm the Order of the Circuit Court compelling the enforcement of the settlement agreement.

Respectfully submitted,

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