



The Supreme Court of South Carolina

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July 22, 2016

The Honorable David Hamilton
PO Box 649
York SC 29745-0649

REMITTITUR

Re: Yadkin Valley v. Oaktree Homes
Lower Court Case No. 2009CP4601673
Appellate Case No. 2014-002182

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.



Very truly yours,

CLERK

cc: John S. Nichols, Esquire
Blake Alexander Hewitt, Esquire
Susan Elizabeth Driscoll, Esquire
James W. Sheedy, Esquire
Chad Alan McGowan, Esquire
William Angus McKinnon, Esquire

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Yadkin Valley Bank & Trust, Respondent,

v.

Oaktree Homes, Inc., Dawne M. Ras and Thomas C. Ras,
Daniel Simpson, Above All Services, Inc., Carter
Lumber Co., Efficient Painting Contractors, Inc.,
Creative Concepts, and Solid As A Rock, Inc.,
Defendants,

of whom Oaktree Homes, Inc. is the Petitioner.

Appellate Case No. 2014-002182

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
John C. Hayes, III, Circuit Court Judge

Memorandum Opinion No. 2016-MO-023
Heard November 4, 2015 – Filed July 6, 2016

AFFIRMED

Chad A. McGowan and William A. McKinnon, both of
McGowan, Hood & Felder, L.L.C., of Rock Hill; and

Blake A. Hewitt and John S. Nichols, both of Bluestein, Nichols, Thompson & Delgado, L.L.C., of Columbia, for Petitioner.

James W. Sheedy and Susan E. Driscoll, both of Driscoll Sheedy, P.A., of Charlotte, North Carolina, for Respondent.

PER CURIAM: Petitioner Oaktree Homes, Inc. (Oaktree) petitioned this Court for a writ of certiorari to challenge the court of appeals' holding in *Yadkin Valley Bank & Trust v. Oaktree Homes, Inc.*, Op. No. 2014-UP-306 (S.C. Ct. App. filed July 30, 2014), that the trial court properly granted Respondent Yadkin Valley Bank & Trust (Yadkin Valley) summary judgment on Oaktree's counterclaims and properly denied Oaktree's request for sanctions against Yadkin Valley. We granted Oaktree's petition and now affirm for the reasons set forth by the court of appeals.

We dispose of this matter pursuant to Rule 220, SCACR, and the following brief analysis. We find Yadkin Valley demonstrated the absence of a genuine issue of material fact and its entitlement to a judgment as a matter of law. *See* Rule 56(c), SCRCR (describing when a court should grant a party's motion for summary judgment). There is no evidence that Oaktree "received a writing from the party to be charged containing the material terms and conditions of the promise . . . and the party to be charged . . . has signed the writing." S.C. Code Ann. § 37-10-107(1)(c) (2015). In this regard, Oaktree has not presented evidence that any writing *containing all of the material terms and conditions of the loan agreement* ever existed. Although Dawne Ras's affidavit claimed the parties signed a letter containing "handwritten changes," there is no mention in the Rases' testimony of the parties initialing changes to the printed commitment letter. In fact, Thomas Ras stated in his deposition that the interest rate—undoubtedly a material term¹—

¹ *E.g.*, *FDIC v. Cage*, 810 F. Supp. 745, 747 (S.D. Miss. 1993) (noting that "the rate of interest is a term which is essential to a determination of the rights and duties of the parties"); *Sanders v. Bagwell*, 32 S.C. 238, 242–43, 10 S.E. 946, 947 (1890) ("It is hardly necessary to say that an alteration as to the time of payment, the amount to be paid, or the rate of interest . . . would be material . . .").

was scratched out. Moreover, he failed to state what, if anything, replaced it, leaving to speculation whether Oaktree and American Community Bank² (the Bank) agreed to a different interest rate or any interest rate at all. He also testified it was common for Derek Franklin, the Bank's loan officer, to take marked-up copies of documents back to the Bank for approval. Although Thomas Ras testified that the Bank usually acquiesced to Oaktree's requests for changes to the drafts, nothing indicates Oaktree ever *received* a final, written agreement signed by the Bank, which section 37-10-107 expressly requires. *See generally* John L. Culhane, Jr. & Dean C. Gramlich, *Lender Liability Limitation Amendments to State Statutes of Frauds*, 45 Bus. Law. 1779, 1795 (1990) ("This 'delivery' requirement is intended to preclude lawsuits based on personal notes, confidential memoranda, or drafts . . ."). Thus, absent evidence Oaktree received a signed, written document containing all of the loan agreement's material terms, the lender statute of frauds bars Oaktree's counterclaims and we need not address what effect, if any, a document's loss or destruction has on section 37-10-107.

Furthermore, given the record before it, the trial court did not abuse its discretion in denying Oaktree's request for sanctions against Yadkin Valley, especially when Yadkin Valley's defenses depended on the lack of a signed loan agreement and Oaktree sought "an Order striking all defenses to [its] counterclaims and arguments which rely on or presume that there is not a signed or executed loan commitment." *See Davis v. Parkview Apartments*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014) ("The imposition of sanctions is generally entrusted to the sound discretion of the [trial] [c]ourt." (quoting *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987))); *id.* at 281, 762 S.E.2d at 543 ("[A]n appellate court will not interfere with 'a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters' unless the court abuses its discretion." (quoting *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997))); *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 109, 410 S.E.2d 537, 542 (1991) (noting that sanctions that amount to a "judgment by default or dismissal . . . may be made only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party" (citations omitted)).

Given our resolution of this case on the grounds discussed above, we need not consider the parties' other arguments. *See Futch v. McAllister Towing of*

² American Community Bank was Yadkin Valley's predecessor in interest.

Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting the Court need not decide issues unnecessary to resolve the case before it).

The decision of the court of appeals is thus affirmed.

AFFIRMED.

PLEICONES, C.J., BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice Jean H. Toal, concur.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
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v.

Oaktree Homes, Inc., Dawne M. Ras and Thomas C. Ras,
Daniel Simpson, Above All Services, Inc., Carter
Lumber Company, Efficient Painting Contractors, Inc.,
Creative Concepts, and Solid As a Rock, Inc.,
Defendants,

Of whom Oaktree Homes, Inc., is the Appellant.

Appellate Case No. 2011-197970

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Unpublished Opinion No. 2014-UP-306
Heard September 12, 2013 – Filed July 30, 2014

AFFIRMED

John S. Nichols and Blake Alexander Hewitt, both of
Bluestein Nichols Thompson & Delgado, LLC, of
Columbia, and Chad Alan McGowan and William Angus
McKinnon, both of McGowan Hood & Felder, LLC, of
Rock Hill, for Appellant.

James W. Sheedy and Susan Elizabeth Driscoll, both of
Driscoll Sheedy, P.A., of Charlotte, N.C., for
Respondent.

PER CURIAM: Oaktree Homes, Inc. (Oaktree) appeals the trial court's order granting summary judgment to Yadkin Valley Bank & Trust (Yadkin Valley) on Oaktree's counterclaims for breach of contract, negligent misrepresentation, and breach of contract accompanied by a fraudulent act. Oaktree also argues the trial court erred in holding it waived its right to a jury trial on the counterclaims.

1. We find the trial court did not err in holding Oaktree's counterclaims against Yadkin Valley failed as a matter of law because it was unable to produce a written loan agreement. The lender statute of frauds precludes certain actions regarding loans for money where there is no writing evidencing the alleged promise or agreement. *See* S.C. Code Ann. § 37-10-107(1) (2002) (providing that no person may maintain an action or defense based upon a failure to perform an alleged commitment or agreement to lend or borrow money in excess of fifty thousand dollars unless that person "has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing"). Jurisdictions that allow a party to submit parol or extrinsic evidence to establish proof of a lost memorandum in order to "avoid" the requirements set forth in the general statute of frauds require that evidence to be clear and convincing. *See Weinsier v. Soffer*, 358 So. 2d 61, 63 (Fla. Dist. Ct. App. 1978) (stating proof of a lost document must be clear, strong and unequivocal); *Mossman v. Hawaiian Trust Co.*, 361 P.2d 374, 379 (Haw. 1961) (stating the proof to establish a lost memorandum must be clear and convincing); *Zander v. Ogihara Corp.*, 540 N.W.2d 702, 705 (Mich. Ct. App. 1995) (holding that extrinsic or parol evidence of alleged signature on a contract must be "'clear, strong, and unequivocal,' i.e., clear and convincing"); *Chakur v. Zena*, 233 S.W.2d 200, 202 (Tex. Civ. App. 1950) (stating proof of a lost memorandum must be clear and convincing); 72 Am. Jur. 2d *Statute of Frauds* § 194 (2012) ("Proof to establish the lost memorandum of a contract must be clear and convincing. The memorandum itself is, of course, the best evidence of its contents, and if its loss or destruction is not proved, secondary evidence is not admissible."). We hold that even if this court were to accept the lost memorandum exception to the general statute of frauds applied to the lender statute of frauds, Oaktree failed to provide the required clear and convincing evidence. *See Satcher v. Satcher*, 351 S.C. 477, 483, 570

S.E.2d 535, 538 (Ct. App. 2002) (defining clear and convincing evidence as the degree of proof that provides the fact finder with a "firm belief as to the allegations sought to be established"); *id.* ("Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal."); *see also Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009) ("[I]n cases requiring a heightened burden of proof or in cases applying federal law, we hold that the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment."). The evidence Oaktree submitted concerning the existence and terms of the loan commitment letter was self-serving and contradictory. *See Weinsier*, 358 So. 2d at 63 ("The very purpose of the [s]tatute of [f]rauds is defeated where the sole proof of the existence and contents of a document relied upon to avoid the [s]tatute is the testimony of the plaintiff."); *Zander*, 540 N.W.2d at 704, 706 (reversing the trial court's denial of defendant's motions for directed verdict and JNOV, and explaining it would not "permit plaintiffs to defeat the purpose and intent of this statute solely on the basis of their own self-serving testimony").

2. We need not address Oaktree's remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

AFFIRMED.

HUFF, GEATHERS, and LOCKEMY, JJ., concur.