

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2013-CP-07-2251

RECEIVED

AUG 16 2016

SC Court of Appeals

Nell Barnwell Hay and Edward Barnwell,

Respondents,

v.

Chauncey N. Brown-Barnwell, Janice Barnwell, Bank of New York, Trust Under Agreement Dated 12/1/1 (EQCC Trust 2001-2) and all Persons claiming right, title, estate interest in or lien upon the real estate described, and any known heirs or persons being as a class identified as John Doe, whose true names are unknown, and any unborn infants or persons under disability being a class designated as Richard Roe, whose true names are unknown, Defendants

Of whom Chauncey N. Brown-Barnwell and Janice Barnwell are the

Appellants.

INITIAL BRIEF OF RESPONDENTS

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<i>Reed v. Assoc. Investments cf Edisto Island</i> , 339 S.C. 148, 528 S.E.2d 94 (Ct. App. 2000)	5
<i>Rock Smith Chevrolet, Inc., v. Smith</i> , 309 S.C. 91, 92, 419 S.E.2d 841, 842 (Ct.App. 1992)	6
<i>Whitewater Square v. Opening Break</i> , 319 S.C. 243, 460 S.E.2d 396 (1995)	4
<i>Young v. Cooles</i> , 347 S.C. 362, 555 S.E.2d 410 (Ct. App. 2001)	4, 5

STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN FINDING THAT A TERM IN A WRITTEN AND SIGNED SETTLEMENT AGREEMENT IS ENFORCEABLE?
2. MAY APPELLANT CHALLENGE THE VALIDITY OF THE CIRCUIT COURT'S DISMISSAL OF THE UNDERLYING CASE?

STATEMENT OF THE CASE

On September 16, 2013, Respondents Ed Barnwell and Nell Hay brought an action to quiet title to certain real property in Beaufort County, said title clouded when Appellant Chauncey N. Brown-Barnwell caused to be filed certain *soi-disant* quitclaim deeds.

On August 7, 2015, all parties attended court-ordered mediation, resulting in a mediated agreement. Said agreement provided for a second session of mediation if needed.

On December 9, 2015, the parties met for the second session of mediation. The parties executed the prior mediated agreement at this time. Appellant Chauncey N. Brown-Barnwell did not attend, but spoke to the mediator over the phone, and authorized his mother, the other Appellant, Janice Barnwell, to execute the mediated agreement and negotiate on his behalf. The parties then negotiated an addendum clarifying certain aspects of the prior mediated agreement. The mediated agreement and addendum fully settled the issues between the parties.

The mediator filed Proof of ADR on December 17, 2015, noting the matter fully settled. The Court subsequently dismissed the action on January 4, 2016.

Appellants sought no appeal or reconsideration of the Court's dismissal.

Appellant Chauncey N. Brown-Barnwell complied with some of the terms of the mediated agreement, including executing revocations of two (2) of three (3) *soi-disant* quitclaim deeds that clouded title to the real property. He refused to execute the third and final revocation.

Seeking execution of the last remaining revocation, Respondents filed a Motion for Specific Performance and Enforcement of Mediation Agreement on February 18, 2015. The Circuit Court heard said motion on March 30, 2016, resulting in the Order of April 22, 2015, from which the instant appeal is taken.

FACTS

All parties attended Court-ordered mediation on August 7, 2015 with E.W. Bennett, Jr., Esq., who is certified to mediation civil court matters. The Circuit Court Judge is familiar with the work and character of this mediator. Transcript p. 12, line 24-p. 13, line 3.

The August 7, 2015, mediation conference produced a mediation agreement, which settled issues, but also included a provision to reconvene mediation in the event that Appellant Barnwell was unable to obtain financing as contemplated in said agreement. Agreement p. 3.

The written August 7 agreement also provided for execution on certain quitclaim deeds, the precise terms being rendered thus:

The parties agree that any all prior Quit-Claim Deeds previously executed and filed of public record by and between the within Plaintiffs and the above-named Defendants will be promptly reversed by the proper execution and delivery of all necessary Quit-Claim Deeds by all appropriate parties hereto and by the prompt recording of all such executed Quit-Claim Deeds as required to do so within thirty (30) days dafter the date of their execution of the within Mediation Agreement.

Agreement p 3. See also Transcript p. 7, lines 3-10.

Despite active participation in the August 7 mediation conference, Appellants nonetheless refused the sign the mediation agreement after mediator Bennet rendered it into writing. Still, purusuant to the Agreement, the parties reconvened mediation on December 9, 2015, because Appeallant Barnwell had failed to obtaining financing.

The written August 7 agreement was then fully and compeletely executed by the parties on December 9, 2015. Appeallant Brown-Barnwell was not in attendance, but he made a phone call, wherein he authorized his mother, Appellant Janice Barnwell, to sign on his behalf. Agreement p. 8; Addendum p. 1; Transcript p. 8, line 11; p. 11, lines 16-20; p. 13, lines 2-3.

During the December 9 mediation session, the parties generated an addendum that

ratified the August 7 agreement, but also clarified certain terms and resolved an outstanding issue unrelated to the provision of quitclaim deeds. Addendum p. 1.

Mediator Bennett relied on Appellant Brown-Barnwell's representations to him over the phone and upon Appellant Brown-Barnwell's authorization for his mother to act on his behalf. Transcript p. 9, lines 9-11, 21-p. 10, line 1.

Mediator Benneth then filed his Proof of ADR or Exemption, wherein he noted the issues between the parties were "Fully Settled." Proof p. 2.

Appellant Brown-Barnwell went on to partially comply with the terms of the mediated agreement when he caused two of three quitclaim deeds with the Beaufort County Register of Deeds. Transcript p. 5, lines 18-19. QC Deeds.

ARGUMENT

THE CIRCUIT COURT'S DECISION TO ENFORCE A TERM IN A WRITTEN SETTLEMENT AGREEMENT HAS NO ERROR OF LAW AND IS SUPPORTED BY EVIDENCE.

This appeal revolves around the authority of a Circuit Court Judge to enforce terms of a settlement agreement, and thus the matter sounds in contract. An action to construe a contract is one at law. *See Patricia Grand Hotel, LLC, v. MacGuire Enterprises, Inc.*, 372 S.C. 634, 638, 643 S.E.2d 692, 695 (Ct. App. 2007).

In an action at law, appeal is limited merely to the correction of errors of law and the Circuit Court's factual findings will not be disturbed unless wholly unsupported by the evidence or controlled by an error of law. *Barnacle Broadcast, Inc. v. Baker Broadcast, Inc.*, 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000).

Respondents have standing to bring the motion because a party may bring a motion to enforce a settlement agreement before the Circuit Court. *E.g., Young v. Cooles*, 347 S.C. 362, 555 S.E.2d 410 (Ct. App. 2001).

Enforcement of any agreement terms is authorized by Rule 43(k), SCRPC. *Whitewater Square v. Opening Break*, 319 S.C. 243, 245, 460 S.E.2d 396, 397 (1995). Rule 43(k), SCRPC, provides in pertinent part:

No agreement between counsel affecting the proceedings in an action shall be binding unless...reduced to writing and signed by the parties and their counsel.

Rule 43(k) was held to apply to settlement agreements in *Ashfort Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533 (1995).

Here the August 7 agreement is reduced to writing and signed by the parties. Agreement pp. 7, 8. It therefore falls within the scope and purview of Rule 43(k), SCRPC.

When an agreement is clear or capable of legal construction, the Court interprets 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). Here the Circuit Court found that the terms of the agreement called for the disputed quitclaim deeds to be reversed. Transcript p. 7, line 10. The Court also found that the intent of the parties to adopt the agreement is evinced by their respective signatures, including Appellant Brown-Barnwell's signature-by-proxy. Transcript p. 11, lines 14-19. The Court was certain and convinced that Appellant Brown-Barnwell authorized his signature. Transcript p. 13, lines 1-2.

The Record also contains other evidence from which the Court could infer the intent of the parties to enter the agreement, such as the Appellant Brown-Barnwell's performance of the terms of the agreement with regard to two of the promised quitclaim deeds. See QC Deeds.

In seeking to dispute the validity of the Court seeking to enforce settlement agreement, Appellant's Brief relies on *Askfort Corp. v. Palmetto Construction*, 318 S.C. 492, 458 S.E.2d 533 (1995). Appellant's Brief p. 7. However, when relying on this 1995 case and arguing the inapplicability of Rule 43(k), Appellant fails to note the 2009 amendment to Rule 43(k), which added the provision that a settlement agreement is also binding if the agreement is reduced to writing and signed by the parties and their counsel.

Here the agreement in question is reduced to writing and signed by the parties, so Rule 43(k) applies and *Askfort* is moot.¹

It is the long-standing policy of the Court to encourage settlement in lieu of litigation, and

¹ Likewise Appellants' reliance in their Brief on *Young v. Cooler*, 347 S.C. 362, 555 S.E.2d 410 (Ct. App. 2001), *Reed v. Assoc. Investments of Edisto Island*, 339 S.C. 148, 528 S.E.2d 94 (Ct. App. 2000), and *Galloway v. Regis Corp.*, 325 S.C. 541, 481 S.E.2d 714 (Ct. App. 1996) is unwarranted because the 2009 Amendment to Rule 43(k) allows for the enforcement of written and executed settlement agreements such as the one presented in this instance.

the Court routinely enforces such agreements. *See Rock Smith Chevrolet, Inc., v. Smith*, 309 S.C. 91, 92, 419 S.E.2d 841, 842 (Ct. App. 1992). Here the Court-required mediation process worked, and the parties did generate a written agreement. When a dispute under the written agreement later arose, the Circuit Court had authority to consider the terms of the agreement under Rule 43(k), and possessed ample evidence in the form of pleadings, exhibits, and testimony--as well as first-hand impressions of the Appellants--on which to base a decision. There being supporting evidence and no error of law, this Court should uphold the judgment of the Circuit Court.

APPELLANTS MAY NOT SEEK TO APPEAL A MATTER NOT DESIGNATED ON APPEAL AND NEVER BEFORE THE CIRCUIT COURT.

Appellants' Notice of Appeal specifies appeal from Judge Carrmen T. Mullen's Order signed April 18 and filed April 22, 2016. However, Appellants' Brief is repleat with references to the "December 30, 2015 order." Appellants Brief, pp. 2, 4, 6, 7.

Respondents believe Appellants are referring to the Order dismissing the case, signed December 30, 2015, and filed January 4, 2016.

Respondents respectfully note that the validity of the Order dismissing the underlying case (in reliance on the settlment agreement) was not n issue before the Circuit Court when Respondents' motion was argued, and is nowhere referenced in the motion hearing pleadings. See Motion and Response.

Respondents note that Appeallants, in their Designation of Matter to be Included in Appeal Record, cite the Dismissal Order. However, "the Record shall not...include matter which was not presented to the lower court." Rule 210(c), SCRAP.

Appellants have taken no steps before the Circuit Court to challenge the validity of said

Order, nor are they now able to as any reasonable time to challenge the Order has passed.

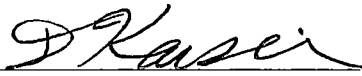
Appellant may not use this Appeal as a “back door” wherein to challenge the validity of this case’s resolution.

CONCLUSION

For the reasons stated, this Court should uphold the judgment of the circuit court.

Respectfully submitted,

August 17 2016


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Attorney for Respondents

STATE OF SOUTH CAROLINA)
)
Nell Barnwell Hay and Edward Barnwell, Jr.)
Plaintiffs,)
vs.)
)
Chauncey N. Brown-Barnwell and)
Janice Barnwell)
Defendant.)
_____)

IN THE COURT OF APPEALS

CERTIFICATE OF SERVICE

Appellate Case No. 2016-001010

I, Drake H. Kaiser, Esq., an attorney of the law firm of Kaiser Reddick, LLC, do hereby certify that one copy of the below mentioned document(s) was/were duly served upon the person(s) listed below by depositing said paper(s) in the United States Mail, Columbia, South Carolina on the **August 13, 2016**, with the first class postage duly affixed and a return address clearly indicated on the envelope.

DOCUMENTS SERVED:

Initial Brief of Respondents
Designation of Matter to be Included in the Record on Appeal

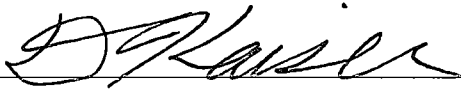
PERSON(S) SERVED:

Chauncey and Janice Barnwell
98 Union Cemetery Road
Hilton Head, SC 29926

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SC Court of Appeals



Drake H. Kaiser, Esq.

Columbia, South Carolina



KAISER REDDICK, llc

August 13, 2016

Sent via USPS to:

South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

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RE: ***Hay v. Brown-Barnwell, 2016-001010***

Sir/Madam:

In response to the Clerk's letter of July 28, 2016 (attached), please find an original and one (1) copy of a Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal on behalf of the Respondents. I would appreciate your office filing the original and returning the certified copy to me. Please do not hesitate to call if you need anything further. I appreciate your assistance.

Also, by copy of this letter, I am serving Appellants with the same.

Regards,

Drake Kaiser *c/s*

Drake H. Kaiser, Esq.

Enclosures: *as above*

CC: Chauncey & Janice Barnwell



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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July 28, 2016

Mr. Drake Hunter Kaiser, Esquire
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Columbia SC 29221

Re: Nell Barnwell Hay v. Chauncey N. Brown-Barnwell
Appellate Case No. 2016-001010

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SC Court of Appeals

Dear Counsel:

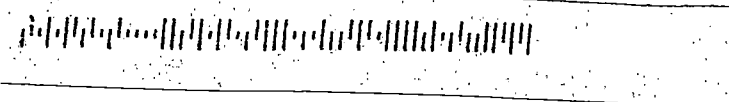
Enclosed is an Order of the Court regarding appealability. The respondent's initial brief and designation of matter are due 30 days from the date of this letter.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Chauncey N. Brown-Barnwell
Janice Barnwell



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