

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-10-7037

South Carolina Human Affairs
Commission,
Plaintiff,

vs.

Zeyi Chen & Zhirong Yang,
Defendants.

RECEIVED ORDER

DEC 08 2016

SC Court of Appeals

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CLERK OF COURT

The above-captioned matter was filed with the Court on November 17, 2014. An evidentiary hearing on Plaintiff's motion to enforce a settlement agreement took place on July 14, 2016, before the undersigned Honorable Benjamin H. Culbertson. Plaintiff South Carolina Human Affairs Commission (hereinafter referred to as "Plaintiff"), was represented by its attorneys, R. Alexander Pate, and Lee Ann W. Rice. The Defendants Zeyi Chen and Zhirong Yang (hereinafter referred to as "Defendants"), were represented by their attorney Ian R. O'Shea.

This case involves an action to enforce the South Carolina Fair Housing Law, § 31-21-10 et seq. of the South Carolina Code of Laws, as amended, and its implementing regulations. On March 24, 2016, Plaintiff and Defendants (hereinafter referred to as the "Parties"), participated in mediation. Following mediation, the parties reached an agreement to prepare a Consent Order that would settle the dispute and would be entered into the record. Defendants thereafter withdrew their assent to the aforementioned agreement before the Consent Order was agreed upon and entered into the record. Plaintiff filed this motion on April 15, 2016 to have the original agreement considered as an enforceable settlement agreement pursuant to Rules 43(k) and 41.1, of the South Carolina Rules of Civil Procedure.

FINDINGS OF FACT

1. The Parties of this action, with their respective attorneys present, participated in mediation on March 24, 2016.
2. Following negotiations during the mediation, the Parties reached an agreement to prepare a Consent Order that would settle the dispute and would be entered into the record.

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3. A document entitled "Settlement Agreement" evidencing the aforementioned agreement was signed by plaintiff's counsel, Lee Ann W. Rice, Defendants Chen and Yang, and Aggrieved Party, Stacey Woods, on whose behalf plaintiff filed the lawsuit; however this document was not signed by the Defendants' counsel, nor entered into the record.
4. Shortly after mediation, before the Consent Order was agreed upon and entered into the record, Defendants informed their counsel, Ian R. O'Shea, that they were withdrawing their assent to the aforementioned agreement. Thereafter, Defendant's counsel informed Plaintiff and its counsel of Defendants' withdrawal of assent to the agreement.

CONCLUSIONS OF LAW

1. At the time the document entitled "Settlement Agreement" was signed, Rule 43(k) provided in relevant part: "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." Rule 43(k), SCRPC.
2. South Carolina has held in the past that Rule 43(k) applies to settlement agreements. *Ashfort Corp. v. Palmetto Constr. Grp.*, 318 S.C. 492, 493, 458 S.E.2d 533, 534 (1995).
3. Rule 43(k) is plainly worded: "No agreement ... shall be binding unless" one of the three requirements is met. "Under our general rules of construction, the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637-38, 627 S.E.2d 724, 726 (2006) (citing *State v. Muldrow*, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2003)). "In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes." *Id.*
4. In *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, supra., the Supreme Court addressed Rule 43(k) in an action in which one of the parties rescinded her agreement prior to the agreement meeting the requirements of Rule 43(k). In reversing the trial Court's order granting the motion, the Supreme Court stated: "Rule 43(k) provides that

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- '[n]o agreement . . . shall be binding unless' one of the three conditions listed [in the Rule] is met. In other words, an agreement is non-binding until a condition is satisfied. Until a party is bound, she is entitled to withdraw her assent." *Id.* at 637, 627 S.E.2d at 725.
5. Similarly, in *Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006), the Supreme Court applied Rule 43(k) to bar the enforcement of a settlement agreement that was signed by the parties. In *Buckley*, the parties engaged in mediation and signed an agreement. *Id.* at 320, 635 S.E.2d at 77. The Supreme Court concluded: "[b]ecause the purported agreement the parties reached following mediation was neither entered into the court's record nor acknowledged in open court and placed upon the record, Rule 43(k), SCRPC, plainly provides that the agreement is unenforceable." *Id.* at 322, 635 S.E.2d at 78.
 6. In this case, plaintiff's counsel, Defendants, and Aggrieved Party, signed a document entitled "Settlement Agreement" on March 24, 2016, following mediation agreeing to prepare a Consent Order that would settle the dispute and would be entered into the record. Shortly after mediation, and before the Consent Order was agreed upon and entered into the record, Defendants informed their counsel that they were revoking their assent to the aforementioned agreement. Therefore, because none of the conditions listed in Rule 43(k) were met at the time, Defendants were free to withdraw their assent to the agreement, rendering it unenforceable as a settlement agreement.
 7. Plaintiff argues that compliance with Rule 43(k) is not required in this scenario, because Rule 43(k) does not apply to a written settlement agreement that the parties admit was signed by the Parties in the presence of their counsel. However, this argument does not comport with the plain language of Rule 43(k), and is contrary to South Carolina's jurisprudence concerning settlement agreements. "[Petitioner] claims that compliance with Rule 43(k) is not required in this scenario, because Rule 43(k) does not apply to a written settlement agreement that the parties admit was duly executed. We disagree." See *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 726 (2006).
 8. Plaintiff further argues that "the purpose of rules such as Rule 43(k) is: [T]o prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements." *Ashfort Corp. v. Palmetto Constr. Grp.*, 318 S.C. 492, 493, 458

S.E.2d 533, 534 (1995). Given that settlement agreements are reviewed by the circuit court in much the same way as contracts (See *Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634, 640, 643 S.E.2d 692, 695 (Ct. App. 2007)), Plaintiff argues that 43(k) disputes should be analyzed through a lens similar to that of a Statute of Frauds issue in a contract dispute. However, *Farnsworth* suggests that 43(k) applies even to admitted settlement agreements.

9. Finally, Plaintiff argues that principles of equity exist that justify compelling adherence to the settlement agreement, noting that in order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract. *Gibson v. Hryzikos*, 293 S.C. 8, 358 S.E.2d 173 (Ct. App. 1987) (citing *Thomson v. Scott*, 6 S.C. Eq. (1 McCord Eq.) 32 (1825)). However, "[i]t is well known that equity follows the law," (*Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007)), and the plain language of Rule 43(k) will not be disregarded in fashioning an equitable remedy: "[T]he court's equitable powers must yield in the face of an unambiguously worded statute." *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). Because the purported settlement agreement was not (1) reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, (2) made in open court and noted upon the record, nor (3) reduced to writing and signed by the parties and their counsel, the document entitled "Settlement Agreement" is not an enforceable settlement agreement under Rule 43(k), SCRPC.

ORDER

The Court orders that:

The South Carolina Human Affairs Commission's Motion to Enforce Settlement Agreement is hereby DENIED. And,

IT IS SO ORDERED.

Dated at Charleston, this 3 day of ^{Nov.}~~October~~, 2016


Honorable Benjamin H. Culbertson

Charleston County

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