THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullin, Circuit Court Judge

Case No. 2015-CP-07-597

Mildred Ann Kinghorn as Trustee for the Mildred Ann Kinghorn Trust, dated 28 April 2004 — Respondent,

v.

George Sakakini, — Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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I. THE RESPONDENT IS CORRECT IN NOTING CITATIONAL ERROR IN APPELANT'S FIRST ARGUMENT, AND ERRONEOULSY CONCLUDES THAT A DIFFERENT RESULT IS REACHED.

The Respondent, in her argument, was correct in her conclusion that the Appellant had inadvertently incorrectly cited the proposition at hand. However, the result does not change when the proper citation is applied. Appellant concurs that the controlling Rule of law is SCRCP 52. While Respondent is correct in stating that normally SCRCP 52 exempts motions from the findings requirements of SCRCP 52 which is the general rule; Appellant completely ignores, and invites this Honorable Court to ignore, the specific rule as set forth in SCRCP 52(a) which states in relevant part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review.

Respondent couches and styles this matter as a motion exempt under the general rule, but in reality and effect, it is a matter which the trial court tried upon the facts of the case without a jury. If there is but any question of whether or not this is the case one need only consult the Respondent in this matter.

Respondent asserts that "[t]he Court apparently looked at Appellant's behavior and decided to discount the Appellant's argument that it was always intended that Bank of America be a party and be a part of the approval process." (Respondent's Initial Brief, page 10). The Respondent openly acknowledges that the trial court was taking the evidence and analyzing it and applying the law to it. However, even Respondent is forced to conjecture what evidence the trial court considered which is precisely why in an actioned tried upon the facts; findings of fact

are required under SCRCP 52 regardless of how one styles the action for relief. Ultimately Respondent has to throw up her hands and admit that "[n]either party knows what facts, precisely, this Court based its decision on." (Respondent's Initial Brief, page 15). What is more critical and to the point, this Honorable Reviewing Court is left completely in the dark as to what facts the trial court considered or did not consider in her decision.

Moreover, it should be noted that this issue is injunctive (specific performance is an injunction to specifically act rather than to refrain from acting), and as a result would otherwise be completely interlocutory as previously briefed at the request of the Court. As a result, SCRCP 52(a) again under a separate provision mandates specific findings of fact and conclusions of law.

As stated in the Appellant's Initial Brief, while South Carolina has not specifically dissected the cause of action, its sister courts have. Citing *Pathway Financial v. Schade*, 793 S.W.2d 464, 469 (Mo.App.1990), the Missouri Court of Appeals noted that "[a]lthough there is no rule defining the process for enforcing an agreement settling a pending case, one court-approved procedural device is a motion to enforce settlement." *McKean v. St. Louis County*, 964 S.W.2d 470, 471 (Mo. App. E.D., 1998). Thus, "[a] motion to compel settlement, in effect, adds to a pending action a collateral action for specific performance of the settlement agreement." *Landmark Frederick v. Heim*, 943 S.W.2d 343, 347 (Mo.App. S.D.1997). Under South Carolina jurisprudence, settlement agreements are viewed as contracts. *Harris-Jenkins v. Nissan Car Mart, Inc.,* 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App., 2001). Thus, the "enforcement of the terms of a settlement agreement is a matter of contract law." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 672 S.E.2d 799, 802, (Ct. App., 2008).

Therefore, in an action to compel a settlement whether it is called by the name of a motion or otherwise, the party seeking compulsion adds "a collateral action for specific

performance" of the settlement agreement, which under South Carolina law is viewed as a contract, and must be enforced in accordance with contract law. Under South Carolina contract law, the trial court was required to have the Respondent prove her case which meant: to establish at a minimum that there was a contract, or a valid meeting of the minds which was supported by full fair and valuable consideration; and that the agreement was ripe for execution at that time and without contingencies. This contract action is a "collateral **action**" which the trial court "tried on the facts without a jury... ." As a result, it unambiguously falls under the mandate of SCRCP 52(a) which requires detailed findings of fact and conclusions of law. This is particularly so because of its *oyer et terminer* nature. The **rationale** as set forth in *Bowen* has not been overruled save as to the limited circumstances regarding summary judgment motions. Thus, it remains in regard to actions tried on the facts without a jury that

> an appellate court must determine whether the trial court's stated grounds for its decision are supported by the record. It is our duty to undertake a thorough and meaningful review of the trial court's order and the entire record on appeal. Where, as here, the trial court fails to articulate the reasons for its action on the record or enter a written order outlining its rationale, we simply cannot perform our designated function. *Bowen*, 342 S.C. at 235-36, 536 S.E.2d at 87-88.

The trial court's form 4 orders completely failed to provide this Honorable Court with facts and an accompanying legal analysis sufficient to permit meaningful appellate review. Accordingly, the Court should remand the deficient orders to the trial court for action in accordance with SCRCP 52(a).

II. THE TRIAL COURT ERRED IN ISSUING A VAGUE ORDER IN VIOLATION OF THE DUE PROCESS PROTECTIONS OF THE SOUTH CAROLINA AND UNITED STATES CONSTUTITIONS.

In reply to the Respondent's argument to this basis of appeal it is helpful to appreciate that the Respondent's whole case at the trial level and at this level is to plead for the court to consider only evidence from the Respondent's point of view, and reject anything from the

Appellant's point of view, particularly when it negates or qualifies that evidence put forth by the Respondent. This is illustrated very aptly by the Respondent's claim that "[i]t is interesting that Appellant has never claimed vagueness, ambiguity or confusion prior to this appeal." (Respondent's Initial Brief, page 4). Such is **patently** false.

This appeal was filed on 13 June 2016. The court issued its order on 22 April 2016. On 27 April, five days after the vague order was issued the Appellant, in his Motion for Reconsideration, page 8, para 8, raises to the trial judge the following basis for reconsideration or amendment: "In a like manner, the Defendant respectfully asserts that the Order in question is **too ambiguous to be enforced. If the Court is going to specifically enforce something upon a party, the Order should clearly state what is being enforced.**" (Emphasis added.) Not only was the issue raised, but it was briefed in some significant detail.[1]

How utterly disingenuous is the Respondent's proposition that this issue was not raised before the appeal. It was raised immediately after the vague and unconstitutional order was issued which was over a month and a half prior to the appeal. It was raised five days after it arose. However, what Respondent has completely failed to do is to show this Honorable Court that one can objectively examine the four corners of this order and determine what specific

[1] In a like manner, the Defendant respectfully asserts that the Order in question is too ambiguous to be enforced. If the Court is going to specifically enforce something upon a party, the Order should clearly state what is being enforced. All this Order states is that the Plaintiff's motion is granted. The only thing the motion states is that Plaintiff sought an "Order enforcing the settlement reached February 5, 2016, and further, awarding Plaintiff Attorney's Fees; and other costs associated with the enforcement of the settlement reached on February 5, 2016." The Plaintiff does not specifically say what she wants done. There was a lot of talk about quitclaims in her affidavits and at the hearing. Of course the settlement mentions nothing of quitclaims. It is not sufficient for the Court to say that the settlement will be enforced. If the Court is ordering specific performance, the Court must let the party charged with such performance know precisely what he or she is to do. Plaintiff also requested Attorney's Fees (in a grossly misrepresented amount). Did the Court's grant of her motion include such an award? Plaintiff also requested costs. Did the Court's grant of her motion include such an award? The Order is clearly ambiguous and does not specify what the Court expects Defendant to do to be in compliance with the agreement. It does not delineate whether fees and costs have been awarded and should be altered or amended to reflect the same. (Parenthetically, the Defendant notes that in addition to a misrepresentation of the time necessary to do the motion in question, the Plaintiff has submitted no affidavit in which a detailed itemization of fees has been submitted which would allow the court to review it and make an award of fees). (Motion for Reconsideration pages 8-9.)

actions Appellant must take or refrain from taking. It is facially vague, and for one to even get an idea of what it means one not only has to look at it, and at the motion, but at the settlement and it still leaves questions open such as what it means in regard to the motion prayer for attorney fees and costs.

III. TO THE EXTENT, *ARGUENDO,* THAT THE ALLEGED SETTLEMENT IS A VALID SETTLEMENT, THE TRIAL COURT ERRED IN CONSTRUING IT RIPE FOR ENFORCEMENT.

Respondent's focus on this assignment of error appears to hinge around her objection to Appellant stating his mental processes in regard to the formation of settlement. In fact, the argument of Respondent even appears to question whether a settlement in mediation is required to have a meeting of the minds like a contract. (Respondent's Initial Brief, p. 6). The basis for her objection is Rule 8 of the South Carolina Rules of Arbitration. Respondent fails to appreciate that this rule only prohibits the release of limited information exchanged in mediation. It does not prohibit a party from explaining their mental processes in coming to an alleged settlement if they do not release prohibited information. The information Appellant gave the court is admissible. Had Respondent wished to do so she could have given her mental impressions, but she did not. Regardless, the burden was on the Appellant to demonstrate that the conditions precedent in the alleged settlement had been satisfied and she failed to do so as explained immediately following.

IV. TO THE EXTENT, *ARGUENDO,* THAT THE ALLEGED SETTLEMENT IS A VALID SETTLEMENT, THE TRIAL COURT ERRED GRANTING SPECIFIC PERFORMANCE AS RESPONDENT, WHO BORE THE BURDEN OF PROOF, FAILED TO MEET HER BURDEN

In this argument, the problem with Respondent's arguments become manifest. Her case hinges around certain presuppositions that she expected the trial court to assume as she expects this court to assume, namely: a valid agreement which should be construed in her favor, and that

the only reason that this matter is before the court is that the Appellant does not want to honor the deal. There is a void in the twenty pages of the Respondent's Brief of any argument based on the law that would bolster her position. There are no facts which show a meeting of the minds. There is no **competent** evidence that the express conditions precedent had been satisfied.

Her appellate mantra is "**I DO NOT WANT THE HOA TO APPROVE THIS SETTLEMENT.**" (Respondent's Initial Brief, pp. 1, 7, 9, 13 [cited twice], 15 & 16.) There are two problems with this tired mantra. The first is that even if true, it does not relieve Respondent of the burden she bore at the hearing. The second problem is that the mantra is a repeated half-truth based on the complete evidence before this court.

There is no question that the Appellant had buyer's remorse after the mediation. Affidavit of Appellant, 30 March 2016, pars 3 & 5. However, Respondent fails to acknowledge that Appellant testified that "when the contingencies of the agreement to which I subscribed are met, I am prepared to fulfill my legal obligations." *Id.* at para 5. In the repetition of this half - truth the Respondent fails to candidly inform the Court that the after such email was sent to the HOA, the Appellant immediately followed up with an email to the HOA specifically telling them that

> I hope you did not misunderstand the intent of my original email I sent you that had the attached settlement agreement.... **In no way am I trying to repudiate the signed settlement.** My intent was to communicate to you and the HOA my regret of signing that document, **not to delay the HOA's** approval/disapproval process." (Email incorporated into Affidavit of Appellant, 30 March 2016.) (Emphasis added.)

Respondent further disingenuously tells this Court that the Appellant would not allow a surveyor to do a survey. Again, this representation is misleading without a complete explanation which is why our judicial oaths require the "whole truth," and not legal "mcsnippets" of the facts. The whole truth is that under the alleged settlement, the whole agreement, including Appellant

paying for a survey, is contingent upon the three matters argued in the initial brief. Every part of the alleged settlement was contingent including the survey. Appellant was under no obligation to pay the surveyor until the contingencies were met. As demonstrated in the initial brief, the contingencies **were not met** when Respondent filed her motion to compel.

Appellant never intended, as he testified, to prevent a survey, but only intended to make the expenditure when the agreement's contingencies had been removed. (Affidavit of Appellant, 30 March 2016, para 4.)

In summary, the Respondent failed to demonstrate her burden at trial, and has likewise failed to do so here on appeal. Her approach to the matter has been to present a slanted view of the matter through the narrow view of one isolated statement that implies a course of action contrary to the entire record. Even when such advocacy is eloquent and flourished with the wording of the late great Oliver Wendell Holmes, it is not an excuse for a complete failure to meet the burden of proof.

V. THERE WAS NO REPUDIATION

With the same patchwork of isolated statements addressed above, the Respondent has suggested that the failures to meet the contingencies should be excused when the Appellant prevented the contingencies from occurring. The evidence does not show that Appellant prevented anything from occurring. In fact, it shows the contrary. Appellant went out of his way to clarify to the HOA that he was not attempting to repudiate the state nor delay approval.

> I hope you did not misunderstand the intent of my original email I sent you that had the attached settlement agreement.... **In no way am I trying to repudiate the signed settlement.** My intent was to communicate to you and the HOA my regret of signing that document, **not to delay the HOA's** approval/disapproval process." Email incorporated into Affidavit of Appellant, 30 March 2016. (Emphasis added.)

This email itself unambiguously demonstrates his intent to carry out of the agreement **if** the contingencies occurred, which is all the law required of him. Despite the deceptive mantra repeated throughout the Respondent's Initial Brief, it is Respondent herself who conclusively demonstrates a lack of bad faith on the Appellant's part. She denies that Bank of America is a necessary approval party. Appellant maintained that it was. In her brief she concedes that he was working with Bank of America on the matter. (Respondent's Initial Brief, p. 12). Whether it came to fruition or not, whether or not Bank of America was a necessary party, it shows that Appellant took steps toward getting the contingencies approved which even Respondent did not think was necessary.[2] That certainly negates bad faith.

Of course, ultimately neither we nor this Honorable Court will ever know what the trial court was thinking in the ruling as there are no specific findings for this court to review which returns us to the beginning of this appeal.

CONCLUSION

For the reasons stated herein and in the Initial Brief of Appellant, the trial court should be reversed.

Respectfully Submitted

7 December 2016

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[2] This action also demonstrated that it was contemplated by Appellant prior to the motion that Bank of America approval was necessary under the alleged settlement.

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Mildred Ann Kinghorn as
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PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of the Appellant on Mildred Ann Kinghorn, Trustee as specified above, by depositing a copy of it in the United States Mail, postage prepaid, on 7 December 2016, addressed to her attorney of record, G. Scott Graber, 605 Carteret Street, Beaufort, South Carolina 29902.

December 7, 2016

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December 7, 2007

The Honorable Jenny Abbott Kitchings
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Post Office Box 11629
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RE: Mildred Ann Kinghorn as Trustee for the Mildred Ann Kinghorn Trust, dated 28 April 2004, Respondent, v. George Sakakini, Appellant
2015-CP-07-597

Dear Ms. Kitchings:

Please find enclosed for filing, the Initial Reply Brief of the Appellant and the proof of service thereof.

Sincerely,

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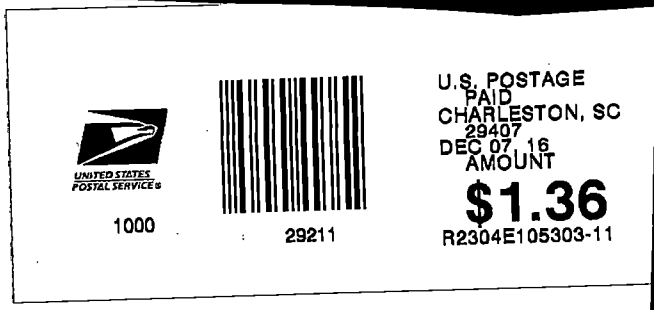

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