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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2016-000451

William G. Tucker ..... **Respondent**

v.

Connie Lynn Batey ..... **Appellant**

INITIAL BRIEF OF RESPONDENT

McCOY LAW FIRM. LLC

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STATEMENT OF THE CASE

On March 30, 2015, Respondent William G. Tucker filed his Complaint seeking to foreclose a mortgage given to him to secure a loan to Appellant Connie Lynn Batey. The Complaint also sought a declaratory judgment that a "Statement of Mortgage Paid in Full" (the "Statement") provided by Respondent to Appellant purporting to gratuitously forgive the debt of more than $220,000.00 was not enforceable or binding. Appellant timely answered and asserted defenses and a counterclaim.

A bench trial was held before the Master in Equity on December 16, 2015. The parties each testified and introduced exhibits into evidence. On December 30, 2015, the Master issued an Order ruling in favor of Respondent, setting forth various reasons that the Statement was not enforceable, and allowing the foreclosure case to proceed (the "December Order"). By Order dated January 14, 2016, the Master granted foreclosure and ordered the sale of the property securing the loan and mortgage. Appellant timely filed a Motion to alter or amend the December Order, which was denied by Order dated February 4, 2016. Appellant's Notice of Appeal was served by mail on February 29, 2016.

The sale of the property by public auction occurred on March 7, 2016. Respondent was the successful bidder, and received a Master's Deed, which was recorded with the York County Clerk of Court on April 11, 2016.

FACTS[1]

In approximately May of 2009, Respondent, who was then approximately 75 years old, met Appellant on an online dating website called "PlentyofFish.com"

[1] The facts set forth herein are mainly the findings of fact in the December Order with minor changes and additions based on exhibits and the transcript.

Respondent is legally blind, and lives in an independent living section of a retirement community in Charlotte. He is a retired school counselor from Charlotte-Mecklenburg school system.

Appellant is approximately twenty-two years younger than Respondent, and was working as a flight attendant at the time she met Respondent online. She had been married six times prior to 'meeting' Respondent.

In the Summer of 2009, Appellant travelled to Charlotte, and the parties met in person. Thereafter, the two began dating. During this time, Respondent purchased gifts for Appellant, including two cars. Appellant rented an apartment in Charlotte, but wanted to move from the apartment because she felt unsafe. As a result, she looked for a house, and Respondent assisted in that effort.

In April, 2011, Respondent purchased a home in Lake Wylie, South Carolina, for a price of $235,000.00. Title to the house was taken in Appellant's name, and Appellant executed and delivered to Respondent a Note and Mortgage in the amount of $225,000.00. Respondent thereby immediately conferred upon Appellant a gift of $10,000 equity in the property. Defendant made approximately seven payments toward the Note and Mortgage, the last being in January, 2012. Respondent expressly allowed Appellant to miss payments.

On May 23, 2012, Respondent executed a document titled "Statement of Mortgage Paid in Full" ("Statement"). He prepared it himself (TR. P.17). The document states that "the Mortgage on [the Property titled to Appellant] is hereby paid in full with no other monies due to satisfy this debt." A copy of the document was sent to Appellant by email. The original was never delivered to Appellant, and has never been recorded on

the public record. Both parties acknowledged at trial that no consideration or promises were given by Defendant for the document. (TR. p.17 (Tucker)); (TR. p.34 (Batey)). The debt secured by the note and mortgage remains unpaid.

At trial, Respondent testified why he prepared the statement: "In an attempt to prolong our relationship, I agreed to furnish her with a document that indicated the payment was in full, but in giving this, I believed that we would have a long-term relationship. I might even get to move into the house, which I was --- had paid for."

The impetus for Respondent giving the Statement is better understood from two email "chains" between the parties. (Trial Exhibits 4 and 6). It is obvious that their relationship had deteriorated, and that the offer to satisfy the debt was a gratuitous effort on Respondent's part to salvage the relationship. In an email just prior to the Statement, Appellant stated "I want notarized paid-in-full soon, or I will get roommates, and you will never see me again" (TR. p.16; Trial Ex. 4). Appellant began seeing other men, and stated she just wanted to be friends. Appellant pressured Respondent to make her the beneficiary of an annuity for $120,000, and then to get an attorney involved to make it irrevocable. (Tr. pp. 19-20; Trial Ex. 6). At trial, Appellant testified as follows: "He wanted a relationship. I told him all along, this is a friendship, and that's all it was." (Tr. p. 38).

Respondent ended the relationship in September, 2013. As a result, the original Statement was never delivered or recorded.

By letter dated January 20, 2015, Respondent sent Appellant a "Notice of Default" accelerating the balance due on the Note of Mortgage, and demanding payment

of the balance due in the amount of $220,573.13. (Trial Ex. 7). Payment was not made, and Respondent commenced this action.

STANDARD OF REVIEW

On appeal of an action at law tried without a jury, the findings of fact of the trial court will not be disturbed unless found to be without evidence which reasonably supports the trial court's findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "This scope of review is equally applicable to the factual determinations of a master when, as in the present case, he enters final judgment." *Wigfall v. Fobbs*, 295 S.C. 59, 61, 367 S.E.2d 156, 157 (1988).

When the defendant's answer raises an issue of paramount title to land, such as would, if established, defeat plaintiff's action, the issue of title is legal. *Dargan v. Tankersley*, 380 S.C. 480, 483, 671 S.E.2d 73, 74 (2008). Therefore, in a case tried without a jury, the factual findings of a judge regarding title will not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings. *Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

On appeal from an equitable action, an appellate court may find facts in accordance with its own view of the evidence. *Id.* While this standard permits a broad scope of review, an appellate court will not disregard the findings of the trial court, which saw and heard the witnesses and was in a better position to evaluate their credibility. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1990).

ARGUMENT

In the December Order, the Court made three independent conclusions of law that the Statement did not extinguish the debt, any of which support an affirmance of the lower court's order. The conclusions are:

(1) Under the law governing forgiveness of liquidated debts, the Statement did not extinguish the debt;

(2) Under the law of contracts/gifts, the Statement did not extinguish the debt; and

(3) Under principles of equity, the Statement did not extinguish the debt.

Applicable to each argument herein is the bedrock principal of contract law that consideration is required to support a promise, and a gratuitous promise or a donative promise is not enforceable. *See e.g., Black v. Gettys*, 238 S.C. 167, 186, 119 S.E. 2d 660, 669 (1961) (plaintiff signed under seal an instrument to transfer shares of stock to a trust for the benefit of children for which she received no consideration; court held instrument was a "mere gratuitous promise," and "[g]enerally, where a contract is entirely voluntary or without consideration, or is in effect and substance a mere gift, even though one for the conveyance of land, it will not be specifically enforced, for equity will not compel a party to be generous").

The following finding of fact is not disputed or appealed: "Both parties acknowledged at trial that no consideration or promises were given by [Appellant] for the [Statement]." Thus, almost all of the authority cited in Appellant's brief is inapplicable because it relates to "contracts" or "bargains" that favor one party over the other. In this case, however, there was no contract or bargain at all because there was no consideration to support the Statement.

I. UNDER SOUTH CAROLINA LAW, FORGIVENESS OF A LIQUIDATED DEBT, EVEN IF IN WRITING, CANNOT SATISY THE DEBT UNLESS SUPPORTED BY SEPARATE CONSIDERATION. BECAUSE IT IS UNDISPUTED THAT THERE WAS NO CONSIDERATION FOR THE "STATEMENT" PURPORTING TO FORGIVE THE $220,000 DEBT, THE LOWER COURT'S RULING SHOULD BE AFFIRMED.

Purported forgiveness of a liquidated debt is a discrete area of the law. It is related to, but distinct from, the law of gifts. A close analysis of the Statement reveals that it was a purported forgiveness of a liquidated debt, and not a "thing" such as the house secured by the mortgage. Because the Statement is a purported forgiveness of debt, this area of law is controlling.

A. The Rule in *Pinnel's* Case or Rule of *Foakes v. Beer* is the law in South Carolina

The English cases *Pinnel's* case, 5 Rep. 117 (1602), and *Foakes v. Beer,* 9 App. Cas 605 (1884), hold that payment of less than the full amount of a liquidated debt cannot satisfy the full debt, even if the parties agree that such lesser payment will satisfy the debt entirely (collectively, the "Rule"). The Rule has been illustrated by Professor Farnsworth as follows: "Thus, my $1,000 debt to you cannot be discharged by the payment of a lesser sum, even if that is what we intend. ***Nor can you make a gift of my $1,000 debt simply by saying so.***" E. ALLEN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS at p. 148 (Yale Univ. Press, 1998) (emphasis added). Nor does putting the forgiveness in writing make a difference. *Id.* at 152. *See, Ludington v. Bell*, 77 N.Y. 138, 143 (1879) ("The doctrine that payment by the debtor of a less sum than the whole amount of the debt will not extinguish the debt, although the creditor expressly agrees to receive it in full and give a receipt or writing to that effect, is well established by abundant authority").

A paraphrased illustration from an English case describing the Rule, with currency converted, is as follows: A creditor of a $20 debt might take a horse or a sheep in satisfaction of the debt as accord and satisfaction, but if he agrees to accept $19.50 in full satisfaction, even if it is paid based upon such an agreement, the creditor may change his mind and recover the remaining balance of $0.50. *cf. Couldery v. Bartrum*, L.R. 19 Ch.Div. 394, 399 (1880 C.A.).

The Rule in *Pinnel's* case and *Foakes v. Beer* are binding common law of South Carolina. *See Ex Parte Zeigler*, 83 S.C. 78 (1909) (holding that the rule of Pinnel's case "is firmly established in this state"), *aff'd* 88 S.C. 168 (1911); *Riggs v. Home Mut. Fire Protection Ass'n*, 61 S.C. 448, 39 S.E. 2d 614 (1901) (regarding the Rule in *Pinnel's* case, Court held "in this state it has been expressly recognized in several cases . . . and must still be recognized by us.").

The Rule is a corollary of the law of pre-existing duty, which also is the law of South Carolina. *See, e.g., Future Group, II v. Nationsbank*, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (1996) (consideration that is wholly past is not valuable consideration.). *See also, Dougherty v. Salt,* 125 N.E. 94 (N.Y. 1919) (Cardozo, J.) (although a promise to pay a note was in writing and recited that value had been received, it was "the voluntary and unenforceable promise of an executory gift."); *Schnell v. Neil,* 17 Ind. 29 (1861) (Schnell's wife devised $200 each to three legatees, but died without assets. Schnell promised to pay the legatees the amounts that his wife had devised and signed a formal contract, but the court held that Schnell's promise was unenforceable even though it was in writing and cast in the form of a bargain).

II. UNDER SOUTH CAROLINA LAW OF GIFTS, A GIFT IS NOT COMPLETE AND REMAINS REVOCABLE IF ANYTHING REMAINS TO BE DONE. BECAUSE THE ORIGINAL "STATEMENT" WAS NEVER DELIVERED AND NEVER RECORDED, THE LOWER COURT'S RULING SHOULD BE AFFIRMED.

Separately, the Statement also is unenforceable when analyzed under the law of gifts. As the Court below held, if anything remains to be done, a gift is not complete, and may be revoked. *Lynch v. Lynch*, 201 S.C. 130, 137, 146, 21 S.E.2d 569, 572, 576 (1942) ("[A] gift to be operative must be executed and must take effect immediately and irrevocably, for the obvious reason that if anything remains to be done the title to the property does not pass . . . Thus, mere intention to give without delivery is unavailing; the intention must be executed by a complete and unconditional delivery."); *Watkins v. Hodge,* 232 S.C.245, 248, 101 S.E.2d 657, 660 (1958) ("In order to constitute an effectual delivery [to support a gift] the donor must not only have parted with the possession of the property, but he must also have relinquished to the donee all present and future dominion and control over it, beyond any power on his part to recall.").

Here, the original of the Statement was never delivered, but was only scanned and a copy sent by email. (Order p.2.). And the Statement was never recorded.[2] This is precisely the type of "anything remaining to be done" and "retaining power to recall" that under the case law makes the gift incomplete.[3] *See Lynch* and *Watkins, supra.*

A. Engagement Ring analogy.

An engagement ring is given as a gift with no consideration except the expectation of future marriage. If the marriage does not occur, the donor is entitled to a

[2] The Statement was not able to be recorded because it did not have a witness other than the notary. See S.C. Code §30-5-30.

[3] Because the gift was not completed, the presence or absence of undue influence or confidential relationship are immaterial.

return of the ring. In *Campbell v. Robinson*, 398 S.C. 12, 726 S.E. 2d 221 (Ct. App. 2012), the Court of Appeals held that an engagement ring is impliedly conditioned upon the marriage taking place. "Until the condition [of marriage] underlying the gift is fulfilled, the attempted gift is unenforceable and must be returned to the donor upon the donor's request." *Id.*at 18, 726 S.E.2d at 225. This holding controls irrespective of "fault" for the break-up. *Id.*

At trial, Respondent Mr. Tucker testified: "In an attempt to prolong the relationship, I agreed to furnish her with a document that indicated the payment was in full, but in giving this, I believed that we would have a long-term relationship. I might even get to move into the house, which was - - - I had paid for." (Tr. p. 12). When the implied condition of a long-term relationship was not fulfilled, the attempted gift in the Statement was revocable.

The Court below appropriately made the obvious analogy in this case, i.e., Respondent prepared the Statement regarding the debt/mortgage, with an expectation of a continuing relationship, the same as the donor of an engagement ring with an expectation of marriage. (Order p. 3). When the condition is not fulfilled, the donor is entitled to the return of the item. *Campbell, supra.*

III. THE LOWER COURT PROPERLY EXERCISED ITS EQUITABLE POWERS TO DETERMINE THAT THE "STATEMENT" WAS NOT ENFORCEABLE.

Finally, the Court below concluded that under principles of equity, the Statement was not enforceable. (Order. pp. 5-6). The foreclosure case was equitable, and equitable defenses were asserted. The Court held: "It is apparent from the entire record that there was never any original intent by either party that [Appellant] not pay the debt secured by

the note and mortgage. It is also apparent that the Statement given by [Respondent] was the result of stress generated by the deterioration in the parties' relationship, and [Appellant]'s threat to end it and see other men." (Order p. 5).

The undisputed facts certainly support this conclusion. Appellant pressured Respondent into giving her two cars, and attempted to pressure him into forgiving a $220,000 debt and to make her an irrevocable beneficiary of a $120,000 annuity – despite her testimony at trial regarding her view of the arrangement: "He wanted a relationship. I told him all along, this is a friendship, and that's all it was." (Tr. p. 38).

"Courts have the inherent power to do all things reasonably necessary to insure [sic] that just results are reached to the fullest extent possible." *Jones v. Legan,* 384 S.C. 1, 19, 681 S.E.2d 6, 16 (Ct. App. 2009). The Court below held that even if the "Statement" had been otherwise enforceable to satisfy the debt, "it would be manifestly inequitable to impose such a result under the facts of this case." (Order p.6).

CONCLUSION

For the reasons set forth above, the decision of the Master in Equity should be affirmed on any of the three conclusions of law supporting his decision.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Master in Equity for York County

Appellate Case No. 2016-000451

William G. Tucker, Respondent,

v.

Connie Lynn Batey, Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Designation of Matter to Be Included in the Record on Appeal on the following counsel or person of record:

John Martin Foster
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By depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to those attorney(s) and/or persons set out above, pursuant to Rule 262, S.C.A.C.R.

March 8, 2017

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March 8, 2017

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: William G. Tucker vs. Connie Lynn Batey
Case No.: 2016-000451

Dear Ms. Kitchings:

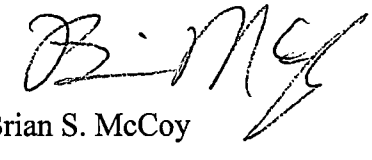
In accordance with Rule 208, S.C.A.C.R., enclosed herewith please find the original and one copy each of the Respondent's Initial Brief and Designation of Matter to Be Included the Record on Appeal, together with Proof of Service for the same above referenced case.

By copy of this letter, I am serving the attorney for the Respondent with copies of the said Initial Brief and Designation of Matter, as evidenced by the Proof of Service.

Please file the original and return file-stamped copy in the envelope provided.

Very Truly Yours,

McCOY LAW FIRM, LLC



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Enclosures

CC: John Martin Foster, Esq.

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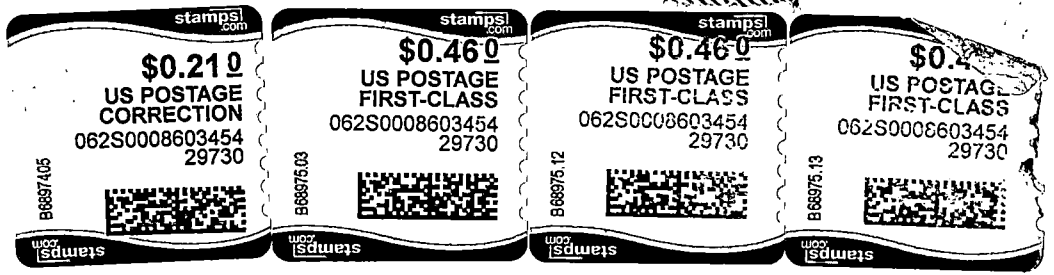

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