

EXHIBIT B

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Waverly at Hamlin Plantation)
Townhome Association, Inc.)
)
Plaintiff,)
)
v.)
)
John Wieland Homes and)
Neighborhoods of the Carolinas, Inc.)
As successor by statutory merger to)
John Wieland Homes and)
Neighborhoods of South Carolina,)
Inc., John Wieland Homes of)
Charleston, Inc., John Wieland)
Homes, Inc.,)
)
Defendants,)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2013-CP-10-03326

**SUPPLEMENTAL ORDER DENYING
DEFENDANT JOHN WIELAND
HOMES' MOTION TO ENFORCE
ENHANCED SET-OFF**

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Stephen Denby, Individually and as Class)
Representative, Marie Labarowski,)
Stephanie Adili, Marc and Brandy)
Lynn Russell Robinson, Jessica,)
Baucom, Nancy S. Coleman, Linda)
Glitz, Maryann Walsh, Patty Whitmire,)
Donald L. Tomasella and Patricia)
Kelly, Chris Leigh-Jones, Edward)
Ray and Kathy Jo Feagins,)
William and Carolyn Barone,)
William Abel, Dean and Conny)
Mason, Paul and Patricia Waters,)
R. Robinson, Jr., Lisa Roeck,)
Elizabeth Jackson, Joe and)
Anita Brittain, Gilbert J. Hager and)
Kelly Hager Holmes,)
Jessica Shipman, Arlene Conte, Carol Ann)
Dumond, Lawrence Murray, Yvonne)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-10-04335

RECEIVED

MAR 22 2017

SC Court of Appeals

JULIE J. ARMSTRONG
CLERK OF COURT

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FILED

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[Signature]

Walker, Darlene and Richard)
Gleeson, Robert and Michell Bagrie,)
Russell Johnston, Kathryn Howle,)
Dorothy Newman, Nicholas and)
Debora Yost, Helen and Bob Harmon)
Estate of Rose Minton,)
Stephen and Merifaith Perdue)

Plaintiffs,)

v.)

John Wieland Homes and)
Neighborhoods of the Carolinas, Inc.)
As successor by statutory merger to)
John Wieland Homes and)
Neighborhoods of South Carolina,)
Inc., John Wieland Homes of)
Charleston, Inc., John Wieland)
Homes, Inc.,)

Defendants,)

Presiding Judge:
Counsel for Plaintiff:

Hon. Deadra L. Jefferson
John Hayes, IV, Esq.
I. Keith McCarty, Esq.
Mary Margaret Noland, Esq.

Counsel for John Wieland Homes:

Theodore Manos, Esq.
Andrew Haselden, Esq.

Counsel for JMC Construction:
Counsel for Sanchez Brothers Painting:
Counsel for The Muhler Company:

Andrew Cole, Esq.
Sarah Fragale, Esq.
Peter Gunnar Nistad, Esq.

Date of Hearing:

January 17, 2016

Court Reporter:

Phyllis Norton

THIS MATTER came before the Court on Defendant John Wieland Homes' Motion to Enforce Setoff and Reduce Judgment, filed February 3, 2017. A hearing was held on February 9, 2017. Present at the hearing were John Hayes, Esquire and I. Keith McCarty, Esquire, representing the Plaintiff, and Theodore Manos, Esquire and Andrew Haselden, Esquire, representing Defendant John Wieland Homes. Curtis Martin, Esquire representing Defendant Benjamin Mora was not present at the hearing.

2017
JMC

"Before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury; when the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012).

After hearing from all parties present, the parties stipulated, without objection, that the Defendants were entitled to a set-off in the amount of \$2,119,000.00¹ to the combined jury verdict of \$7,200,000.00². Therefore, Judgment was entered against the Defendants in the amount of \$5,081,000.00 for the Plaintiffs Waverly at Hamlin Plantation Townhome Association and no judgment for the Plaintiffs in the class action companion suit. Accordingly, a Form 4 was signed and entered for both cases on February 9, 2017 issuing the judgment with the agreed upon set-off. This Supplemental Order addresses the gravamen of Defendant John Wieland Homes' Motion. Defendant John Wieland Homes' contends that they are entitled to an enhanced set-off in the amount of \$434,000.00.³ They maintain this is the result of an alleged settlement with Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC (hereinafter referred to as "Benjamin Mora").

A trial court has inherent jurisdiction to enforce settlement agreements entered before it, and the inherent power to refuse to enforce settlements. Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 419 S.E.2d 841 (Ct. App. 1992). With regards to agreements between parties, SCRCR Rule 43(k) states that:

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

¹ The settlement funds totaling \$2,119,000.00 are as follows: Jesus Mora; \$100,000.00; Benjamin Mora Construction; \$70,000.00; Barr Construction; \$15,000.00; Latitude Construction; \$50,000.00; AC Construction; \$67,500.00; and Builders First Source; \$7,500.00. Additionally, the set-off encompasses the outstanding settlements pending class action approval. These additional settlements are as follows: JMC Construction; \$1,250,000.00; The Muhler Company; \$250,000.00; RDT; \$125,000.00; and Sanchez Brothers Painting; \$184,000.00. The combined settlements from the various Defendants totals to the applied set-off of \$2,119,000.00. Cross-claims by Defendant John Wieland Homes are still pending for the following parties: JMC Construction, The Muhler Company, and Sanchez Brothers Painting. These claims were bifurcated and will be tried separately.

² This judgment reflects the total verdict from the combined cases. In the class action suit, the jury returned a verdict in favor of the Plaintiffs in the amount of \$200,000 actual damages. The jury reached a verdict of \$7,000,000.00 actual damages for Plaintiff Waverly at Hamlin Plantation Townhome Association. By consent of counsel, the set-off was applied as follows: \$200,000.00 towards the class action suit resulting in no judgment and \$1,919,000.00 applied towards the judgment for Plaintiff Waverly at Hamlin Plantation Townhome Association resulting in a judgment of \$5,081,000.00.

³ The alleged enhanced set-off of \$434,000.00 does not include the already approved settlement of \$70,000.00 between Plaintiffs and Defendant Benjamin Mora.



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. Settlement agreements shall be handled in accordance with Rule 41.1, SCRPC.

SCRPC 43. SCRPC Rule 43(k) allows for agreements between counsel to be binding under four scenarios. However, three of the scenarios require that the agreement be noted and entered on the record. As a fourth option, SCRPC Rule 43(k) allows an agreement to be binding if an agreement is "reduced to writing and signed by the parties and their counsel." The signature of the party to the agreement is a requirement under the plain language of SCRPC Rule 43(k). Further, South Carolina courts have consistently throughout the years ruled that in order for a settlement to be enforced an agreement must strictly adhere to SCRPC Rule 43(k).

Defendant John Wieland Homes' Motion for an Enhanced Set-Off in the amount of \$434,000.00 fails for several reasons. First, Defendant John Wieland Homes' request must be denied because no documentation of the alleged set-off complies with the requirements of SCRPC Rule 43(k). Defendant John Wieland Homes urges this Court to accept a chain of e-mail correspondence as evidence of the alleged negotiated settlement. However, e-mail correspondence as evidence of a negotiated settlement do not meet any of the four scenarios mandated by SCRPC Rule 43(k). Accordingly, Defendant John Wieland Homes' motion fails on this ground.

In the alternative, Defendant John Wieland Homes argues that the alleged Benjamin Mora settlement agreement concerning the enhanced set-off was memorialized, in open court on the record, and thus complies with SCRPC Rule 43(k). In further support of their argument, Defendant John Wieland Homes contends that on Tuesday, January 17, 2017, Plaintiffs' counsel and Defendant John Wieland Homes' counsel notified the Court, on the record, that Plaintiffs and Defendant John Wieland Homes had settled with Defendant Benjamin Mora. However, after reviewing the record from both January 17, 2017 and January 23, 2017, this Court cannot discern



from the record that a settlement agreement was ever articulated between Plaintiffs, Defendant Benjamin Mora, and Defendant John Wieland Homes.

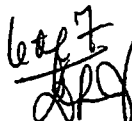
Further, even if a conversation mentioning the alleged settlement agreement were made on the record, it still would not comply with SCRCP 43(k) because all parties needed for the agreement to be enforceable were not present. In order for the alleged settlement agreement to have been made enforceable on the record, all parties would have had to be present, indicate their intention to enter into the alleged settlement agreement, and meet one of the scenarios contemplated by SCRCP Rule 43(k). This would require Defendant Benjamin Mora and/or its counsel, Curtis B. Martin, Esquire, to be present as it was to be a party to this alleged settlement agreement. Accordingly, on January 17, 2017 and January 23, 2017, neither Defendant Benjamin Mora nor his counsel were present. In fact, Defendant Benjamin Mora did not make an appearance at any time throughout the proceedings even though his counsel received notice of the proceedings. As such, there is no way the alleged settlement agreement could have been binding and enforceable based upon SCRCP Rule 43(k). Accordingly, Defendant John Wieland Homes' motion fails on this ground.

Finally, Defendant John Wieland Homes' cites Byrd v. Livingston, as being analogous to the present situation. See Byrd v. Livingston, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012). In Byrd, the plaintiff entered into a contract with the defendant to purchase property after winning the bid at a live auction. Id. at 240, 727 S.E.2d at 621. Litigation ensued over the purchase property, and following pretrial discovery, the parties attended a mediation and signed an "Agreement in Principle" which stated that the agreement will be supplemented by a more formal and detailed written agreement. Id. However, the subsequent agreement was never signed. Id. The trial court found the agreement enforceable against the parties and ordered the parties to prepare and execute

a formal settlement document. Id. On appeal, the Court of Appeals affirmed the trial court's decision stating, "[w]e find no error with the court's determination that the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds and intended to be bound by the Agreement." Id. at 243, 727 S.E.2d at 624.

The present case is not analogous to Byrd v. Livingston, as Defendant John Wieland Homes suggests. In Byrd, there was a clear meeting of the minds that was formalized in a writing. In the present case, there is no written agreement in the record that complies with SCRCP Rule 43(k). The alleged written agreement at issue is a proposed settlement agreement releasing the claims against Defendant Benjamin Mora. Defendant John Wieland Homes' Attorney Theodore Manos presented this release for Plaintiff's Attorney I. Keith McCarty's review and signature. Even after Attorney McCarty received the proposed written settlement agreement, he refused to sign it because he did not believe it was meant for his client. At the hearing, Attorney McCarty indicated to the Court that although he had received the release, he thought the release concerned only Defendant John Wieland Homes and Defendant Benjamin Mora. This is made evident by Attorney McCarty's refusal to sign the release. As such, because there is no written agreement by counsel, there is no evidence in the record to indicate that there was a meeting of the minds between the parties. If anything, Attorney McCarty's confusion surrounding the proposed release agreement as well as his refusal to sign the release evidences a lack of a meeting of the minds and distinguishes the present case from that of Byrd v. Livingston. Accordingly, Defendant John Wieland Homes' motion fails on this ground.

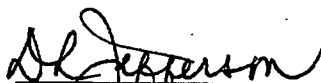
Finally, it is of importance to note that on January 23, 2017, counsel for JMC Construction, Andrew Cole, Esq., indicated to the Court that his client, JMC Construction, had settled with the Plaintiffs. He indicated to the Court that this settlement agreement was memorialized in writing

Handwritten signature and initials, possibly "A. Cole" and "JMC", written in black ink.

and noted on the record, thus complying with SCRPC Rule 43(k). At that time, this Court stressed to all parties the importance of SCRPC Rule 43(k) and made clear that unless there was strict compliance, agreements would not be binding. This Court read the rule verbatim into the record to assure that the parties had fully complied with the requirements of SCRPC Rule 43(k) concerning the settlement.

Accordingly, it is hereby ordered, adjudged, and decreed, that Defendant John Wieland Homes' Motion to Enforce Setoff and Reduce Judgment is denied as to the enhanced setoff of \$434,000.00.

IT IS SO ORDERED.



Hon. Debra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

March 1, 2017
Charleston, South Carolina
At Chambers