FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4006177

RECEIVED JUN 21 2017 SC Court of Appeals

Alexander N Gee Jr	Ernest E Yarborough
Sandy Gee	Ernest Yarborough
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: _____ | Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

RICHLAND COUNTY FILED 2017 MAY 25 PM 4:1 CLERK OF COURT

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION See Attached Order

This order ☐ ends ☑ does not end the case. Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** 2758 **Date** 5-25-17

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 26 day of May, 20 17 to attorneys of record or to parties (when appearing pro se) as follows:

Leonard R. Jordan Jr.

Ernest E Yarborough

Ernest E Yarborough

ATTORNEY(S) FOR THE PLAINTIFF(S) **ATTORNEY(S) FOR THE DEFENDANT(S)**

Court Reporter _____ **Clerk of Court** Jeanette W McBride

CERTIFIED TRUE COPY OF ORIGINAL FILED
Jeanette W McBride 1/QB
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

SCANNED
Emailed + Mailed

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
CASE NO: 2016-CP-40-6177

Alexander N. Gee, Jr., a/k/a Sandy Gee, and Karen B. Gee, a/k/a Karen Gee,

Plaintiffs,

-vs-

Ernest E. Yarborough, a/k/a Ernest Yarborough,

Defendant.

ORDER GRANTING MOTION TO STRIKE DEFENDANT'S ANSWER AND COUNTERCLAIM AND FOR WARRANT OF EJECTMENT

RECEIVED
JUN 21 2017
SC Court of Appeals

2017 MAY 25 PM 4:01
RICHLAND COUNTY
FILED

#1

This matter came for hearing on April 7, 2017, on Plaintiff's Motion to Strike Defendant's Answer and Counterclaim and for Warrant of Ejectment, which was filed on December 7, 2016. In attendance at the hearing were the Plaintiff, Alexander N. Gee, Jr., and his attorney Leonard R. Jordan, Jr., and the Defendant, Ernest E. Yarborough.

The issue raised by the Motion and the Defendant's Affidavit is whether or not Code Section 27-40-790 applies. This statute requires a tenant to pay all rent due (allegedly owed) to the landlord under the rental agreement as a condition of the tenant's raising defenses or counterclaims to the landlord's complaint for possession of the leased premises. The Plaintiffs, by their Motion, seek to strike the Defendant's Answer and Counterclaims unless he pays the rent or vacates the leased premises. The Defendant claims that this statute is not applicable because, under Code Section 27-40-120(2), the contractual relationship between the Plaintiffs and the Defendant is expressly excluded from governance by the Residential Landlord and Tenant Act.

Based upon the Plaintiffs' Memorandum in Support of Motions, the Affidavit of Ernest E. Yarborough and the arguments presented at the hearing by Mr. Jordan and Mr. Yarborough, I make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Plaintiffs and the Defendant (the "parties") entered into a Residential Rental Agreement (the "Lease") dated January 25, 2008, whereby the Plaintiffs, as Landlord, leased their property known as 117 Ashley Hall Road, Columbia, South Carolina (the "property") to the Defendant, as Tenant.

2. The parties simultaneously entered into an Option to Purchase (the "Option"), whereby the Defendant was granted an option to purchase the property on or before January 31, 2009, for a purchase price of $185,850.00.

3. By Amendment to Option to Purchase Commitment Agreement and Amendment to Residential Rental Agreement (the "Amendment") dated June 13, 2009, the parties agreed to extend the Lease to January 31, 2011, to extend the Option to February 1, 2011, and to increase the purchase price to $205,000.00.

4. By the Amendment, the Defendant was required to pay, in addition to regular monthly rent and homeowners association assessments, the 2009 and future year's real property taxes until he closed on the property. (Hereinafter, each mention of the Lease and the Option shall mean as amended by the Amendment.)

5. Also on June 13, 2009, in furtherance of the Option, the parties executed an Agreement to Buy and Sell Real Estate (the "Agreement"), whereby the Plaintiffs contracted to sell the property to the Defendant for $205,000.00, subject to a closing deadline of February 1, 2011.

6. On August 24, 2009, the Defendant made a formal application to the Richland County Assessor's Office for special taxation of the property, claiming under oath that the property was his legal residence. The Defendant's application was, from all appearances, accepted at face value by the Assessor's Office, as the real property taxes were significantly reduced in 2009

without any additional documentation being provided. The taxation of the property as "legal residence" continued until 2016, when the Plaintiffs notified the Assessor's Office to return the property to non-legal-residence status.

7. The Defendant claims that, because the Assessor's Office accepted his application for special taxation, which resulted in reduced taxes for years, the Plaintiffs, by their acquiescence in this tax reduction, agreed that the Defendant owned an equitable interest in the property (or were complicit in a representation made by the Defendant to the Assessor's Office).

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8. The Defendant further claims that, in June 2016, the parties agreed to resolve their dispute with regard to the repair of the chimney foundation and the delinquent rent by way of "legal documents." The Plaintiffs agree that they tentatively agreed to resolve the dispute subject to the execution of several formal agreements, and they assert that they proposed such legal documents to the Defendant, but he refused to sign them.

9. Other than the documents identified or referred to hereinabove, there were no other documents exchanged between the parties or with the Assessor's Office, which indicate or imply that the Defendant had or has any ownership interest in the property. The Lease, of course, indicates that the property is owned exclusively by the Plaintiffs subject to a right to possession in favor of the Defendant.

10. The Defendant's primary defense is that there is an "unambiguous oral agreement" between the parties, which, by the doctrine of promissory estoppel, constitutes a binding contract.

11. In the same line of thinking, the Defendant claims that the "course of dealings" between the parties between 2009 and 2016 established the Defendant's equitable ownership of the property.

12. The Plaintiffs' position is that they are the fee simple, exclusive owners of the property, that they made no representations whatsoever to the Assessor's Office, that they made

no representations to the Defendant outside the written contracts, that the Statute of Frauds (Code Section 32-3-10) applies and that any changes to the identified, formal documents or any new agreement would require a written instrument signed by the parties.

CONCLUSIONS OF LAW

1. The Lease, by its terms, is "governed by the South Carolina Residential Landlord and Tenant Act" (para. 1).

2. The term of the Lease expired on January 31, 2011.

3. The Lease, in Paragraph 9, provides for automatic extension beyond its initial term as follows: "if no notice [of termination (thirty (30) days written notice)] is given, then the agreement will be extended on a month-to-month basis on the same conditions contained in this agreement. Thirty (30) days written notice by either party is required prior to termination during such month-to-month term."

4. The Option expired on February 1, 2011.

5. The Agreement expired on February 1, 2011.

6. After February 1, 2011, the only surviving, formal agreement between the parties was the Lease; and through September 30, 2016 (the effective date of the Plaintiffs' declared termination), the Lease was "month-to-month," and the terms and conditions of the Lease were still in effect. Since October 1, 2016, the Defendant has remained in possession of the property as a "holdover tenant."

7. There is no issue about the Lease. The Defendant, in his responsive pleading, says, in paragraph 7, "the lease speaks for itself;" in paragraph 10, "the lease writing speaks for itself;" and in paragraph 13, "Plaintiff's (sic) effort to unilaterally terminate the 'Lease' are (sic) ineffective as a matter of law."

8. There has been no claim that the Lease is ambiguous in that evidence of the parties'

intention cannot be determined by the four corners of the Lease.

9. It is clear that, in 2008 and after, the Defendant was a tenant under a written Lease, and the parties had two contracts (the Option and the Agreement), whereby the Defendant had until February 1, 2011, to close on the purchase of the Plaintiffs' property. Anything to the contrary (as asserted by the Defendant) is not supported by the evidence.

10. Although the Defendant, in his Answer and Counterclaims, claims that clear, unambiguous promises were made by the Plaintiffs, whereby "Defendant enjoyed an equitable ownership interest in the property," he has not alleged therein facts demonstrating that the Plaintiffs had any interaction with the Assessor's Office or that the Plaintiffs took any steps to convert the Option "in a way to give him an equitable interest in the property" or to even affirmatively acknowledge such ownership interest.

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11. The Defendant cited Satcher v. Satcher, 351 S.C. 477, 570 S.E.2d 535 (Ct.App 2002), in support of his argument that he holds an equitable ownership interest in the property, notwithstanding the Statute of Frauds. Satcher involved an alleged oral gift of land, and the court concluded that the alleged oral gift was not proved. Satcher has a good discussion on promissory estoppel and burden of proof. A remedy under the doctrine of promissory estoppel is recognized if the claimant can prove:

> (1) The presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise. (pp. 483-4)

12. The Defendant also cited Barnes v. Johnson, 402, S.C. 458, 742 S.E.2d 6 (Ct.App 2013), which also discusses promissory estoppel and the elements quoted above. The court concluded that the plaintiff failed to prove the elements of promissory estoppel, as he "failed to demonstrate either an unambiguous promise or an injury sustained in reliance upon such a

promise." (p. 476)

13. As stated in Satcher, at 484, "the doctrine's elements represent a balancing between affording a remedy where contract law cannot, and ensuring the doctrine's application is not, itself, an inequity against the party estopped."

14. The Statute of Frauds (§32-3-10) is the first consideration when dealing with an oral contract involving an interest in real property. Its relevant provisions are as follows:

> **§32-3-10. Agreement required to be in writing and signed.**
> No action shall be brought whereby . . .
> (4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; or
> (5) To charge any person upon any agreement that is not to be performed within the space of one year from the making thereof;
> Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

This statute would, under the circumstances of this case, require a written document signed by the parties, but there are exceptions to this statute, such as promissory estoppel (pled by the Defendant), which must be considered.

15. As stated in Satcher, at 483, "[t]o prevail under any of these theories and avoid the application of the Statute of Frauds, [the claimant] must prove each element by clear, cogent, and convincing evidence."

16. An important element in proving promissory estoppel is to show that the promise is "unambiguous in its terms." Here, it is unclear what the alleged "unambiguous promise" actually involved or provided, and the court is left to assume that the Defendant's intention was that the Option and the Agreement spell out the unambiguous terms of such unambiguous promise. In that regard, the court, in order to accept the Defendant's argument, would have to conclude either that the Plaintiffs waived the requirement that the Defendant pay a stipulated purchase price or that they agreed that the established purchase price of $205,000.00, which according to the Option and

the Agreement must have been paid by February 1, 2011, would remain unchanged and enforceable by the Defendant six or more years later. The court is unwilling to conclude that the Plaintiffs waived the purchase price or agreed to extend the closing indefinitely. To the contrary, the existence of the Option and the Agreement make it clear that, until there is a closing pursuant to either or both of these agreements and the full purchase price was paid, the Plaintiffs would remain the sole owners of the property.

17. Another important element is that a claimant under promissory estoppel "must sustain injury in reliance on the promise." The Defendant's only argument is effectively that the Plaintiffs represented to him, and then to the Assessor's Office (directly, indirectly or by acquiescence), that he was an equitable owner of the property and that he was therefore entitled to a reduction in the property taxes. In doing so, he (the Defendant) directly benefitted, as the Lease obligated him to pay the 2009 and future years' real property taxes. In no way did the Defendant sustain injury as a consequence of representations by the Plaintiffs, even if it were believed that the Plaintiffs made such representations.

18. There is also the matter of "course of conduct" or "course of dealings." This assertion by the Defendant seems to focus primarily on the tax reduction made by the Assessor's Office in 2009, which was based upon the Defendant's application. Although argued by the Defendant that the Plaintiffs are guilty of representing that the Defendant was an equitable owner of the property, there is no evidence of the Plaintiffs' interaction with the Assessor's Office other than their acquiescence in the lower taxes resulting from the approval of the Defendant's application.

19. The Plaintiffs clearly obtained a benefit from reduction of the taxes on the property as a consequence of the Defendant's application to the Assessor's Office but only because they ended up paying taxes at a much lower amount after the Defendant defaulted on the Lease, which

obligated him to pay the real property taxes (whatever the amount) starting in 2009. If the Defendant had paid these taxes (as he was required to do), the Plaintiffs would have received no benefit whatsoever from the Defendant's actions.

20. Interestingly, the Defendant now claims that he initially contracted with the Plaintiffs and continued to occupy the property in and after 2008 because the Plaintiffs acknowledged to him that he had an equitable ownership interest in the property and agreed, in August 2009, that they would provide paperwork in that regard to the Assessor's Office, when no such paperwork was provided, and when all the formal documentation exchanged between the parties – as late as June 13, 2009 – indicate just the opposite.

21. The parties' "course of conduct" between the signing of the Lease (and the other, now expired agreements) and the filing of this lawsuit conclusively reflect the parties' relationship solely as landlord and tenant.

22. It is clear that the Defendant knew that, even if no other condition for his acquiring ownership of the property applied, he would have to tender the stipulated purchase price to be entitled to receive ownership (legal or equitable) of the property. It would be illogical (unreasonable) to believe that the Defendant relied upon an oral representation that he had an equitable interest in the property, without more, when he knew the conditions for ownership stated in the Option and the Agreement.

23. "A determining factor in deciding whether to enforce a promise under the theory of promissory estoppel is the reasonableness of the promisee's reliance." Karoue v. Blue Cross Blue Shield of S.C., 2014 U.S. Dist. LEXIS 25442 (D.S.C. 2014)

24. The statute (§27-40-120) on which the Defendant bases his argument states, in relevant part, as follows: "The following arrangements are not governed by this chapter: . . . (2) *occupancy under a contract of sale* of a dwelling unit or the property of which it is a part, if *the*

occupant is the purchaser or a person who succeeds to his interest . . . . " (emphasis supplied) The words "contract of sale" are themselves ambiguous in this situation. Sometimes, the terms "contract of sale" and "contract for sale" refer to an agreement often called a "bond for title," a "contract for deed" or an "installment contract of sale," each of which are quite different from a contract of sale whereby a seller and purchaser agree to a transaction whereby a property is sold and purchased. These other agreements typically involve something akin to a rent-to-own arrangement whereby the purchaser has rights of possession (occupancy) and typically makes payments toward a purchase price, but the seller retains title as security for the debt. See, for example, Code Section 12-43-220(c)(5). (Here, the Defendant paid a large option fee, which was to be applied against the purchase price, but no portion of the monthly rental payments would be so applied.) In the usual sense of the words "contract of sale," there is no right of occupancy until after the sale (title transfer) is consummated. This is addressed in the Agreement, which expressly states, in paragraph 6, that, "[p]ossession of said property will be given to Buyer at the time of closing." It would appear that this statute (§27-40-120(2)) may, by the words "contract of sale," coupled with "occupancy" and "occupant," intend to refer to a contract more akin to a bond for title than a purchase and sale contract like the Agreement.

25. Notwithstanding the foregoing, as the Option and the Agreement expired in 2011, these agreements would not be a cause of the Lease being excluded from governance by the Residential Landlord and Tenant Act. In addition, the Lease specifically indicated that it would be governed by this Act, and the Act expressly provides, in Code Section 27-40-20, that, "[t]his chapter must be liberally construed and applied to promote its underlying purposes and policies," which are "to simplify, clarify, modernize, and revise the law governing rental of dwelling units and the rights and obligations of landlords and tenants."

26. The Statute of Frauds is controlling here, and the Defendant has failed to prove

each element of the promissory estoppel exception to the Statute of Frauds by clear, cogent and convincing evidence. In the absence of written agreements, signed by the parties, which support the Defendant's claims, the Defendant's claims are effectively barred.

27. Based upon the foregoing Conclusions of Law, the court concludes that the Lease is governed by the Residential Landlord and Tenant Act and that Code Section 27-40-790 is applicable.

WHEREFORE, it is

ORDERED that, in accordance with Code Section 27-40-790, the Defendant shall, within thirty (30) days of the date of this Order, pay into the court the aggregate of the rent accrued (and unpaid) for the months of June 2016 through May 2017, in the monthly amount of $1,250.00, and the aggregate of the late charges accrued for the same months, in the monthly amount of $125.00, or "in lieu of payments the tenant may . . . submit to the court a receipt and cancelled check, or both, indicating the payment has been made to the landlord," (quoted from §27-40-790(b)).

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AND IT IS FURTHER ORDERED that the court shall hold the Defendant's remittance of the aforesaid rent and late charges until further Order of this court.

AND IT IS FURTHER ORDERED that, if the Defendant fails to timely pay into the court the accrued rent and late charges specified above (or provide proof of payment), the court shall, without further notice or hearing, issue a warrant of ejectment to the Sheriff for Richland County, who shall, without delay, take all steps necessary to place the Plaintiffs in full possession of the property, in accordance with Code Section 27-40-790(c).

AND IT IS FURTHER ORDERED that the Defendant shall, in addition, for so long as he remains in possession of the property, remit to the Plaintiffs all accruing rent, in accordance with the Lease, commencing June 1, 2017, for so long as this case is pending.

AND IT IS FURTHER ORDERED that the foregoing requirements of the payment of rent

shall not be construed to limit the Defendant's obligations under the Lease.

AND IT IS FURTHER ORDERED that, should the Defendant make the required deposit into the court of the said accrued rent and late charges (through May 2017), and should he thereafter default in the payment of rent, by more than 15 days (Lease, para. 23), the court, upon application of the Plaintiffs, may, with or without a hearing, issue a warrant of ejectment, in accordance with Code Section 27-40-790(c).

AND IT IS FURTHER ORDERED that that Defendant's Answer and Counterclaims be, and it is hereby, stricken; provided, however, that, should the Defendant either timely pay the said accrued rent and late charges (through May 2017) or, by the same deadline imposed above, vacate the property (allowing the Plaintiffs to resume full possession), the Defendant shall, for a period of 15 days thereafter, have the opportunity to serve a new pleading in response to the Plaintiffs' Complaint and to raise therein such defenses and/or counterclaims as he desires.

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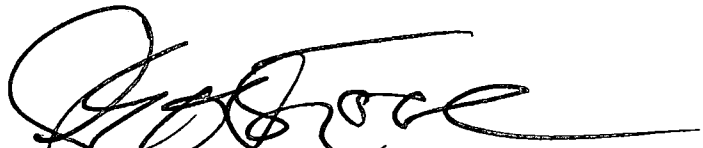
AND IT IS FURTHER ORDERED that the Plaintiffs' pending MOTION TO STRIKE (Pursuant to Rule 12, SCRCP) and MOTION TO COMPEL AND MOTION FOR SANCTIONS be, and they are hereby, held in abeyance. Should the Defendant file a new Answer and Counterclaims, as permitted by this Order, these motions shall be placed on a motions roster for hearing.

AND IT IS SO ORDERED.



Jean H. Toal
Senior Judge, Court of Common Pleas for
Fifth Judicial Court

Columbia, South Carolina
~~April~~ May 25, 2017