

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2014-CP-40-04661

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SC Court of Appeals

Porthemos Curry.....Respondent/Appellant

v.

Carolina Insurance Group of SC, Inc. and Maurice Derrick.....Appellants/Respondents

AMENDED RESPONDENTS' BRIEF OF APPELLANTS/RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

WHETHER THE TRIAL COURT PROPERLY GRANTED CAROLINA INSURANCE GROUP AND MAURICE DERRICK'S MOTION TO AMEND THEIR ANSWER TO ASSERT THE DEFENSE OF RELEASE WHERE THE RELEASE WAS ENTERED INTO BETWEEN CURRY AND SCOTTSDALE ON DECEMBER 10, 2015; AN EXECUTED COPY OF THE RELEASE WAS NOT PROVIDED TO CIG/DERRICK UNTIL APRIL 8, 2016, DUE TO THE INADVERTENT MISTAKE OF COUNSEL; AFTER GRANTING THE MOTION THE COURT CONTINUED THE TRIAL SO THAT THE ISSUES REGARDING THE RELEASE DEFENSE COULD BE BRIEFED AND ARGUED AT SUMMARY JUDGMENT; AND WHERE A HEARING WAS HELD ON THE DEFENSE OF RELEASE WHEREIN JUDGE HOOD DISMISSED THE DEFENSE; AND WHERE THE DISMISSAL OF THE RELEASE IS CURRENTLY BEFORE THIS COURT ON A CROSS-APPEAL?

STATEMENT OF THE CASE

Respondent/Appellant, Curry, filed this action on July 28, 2014, against Scottsdale Insurance Company (Scottsdale) and Appellants/Respondents, Carolina Insurance Group of SC, Inc. (CIG) and its agent Maurice Derrick (Derrick) (hereinafter collectively referred to as CIG/Derrick). (R. p. 15). Curry sued Scottsdale for breach of contract, statutory bad faith, and common law bad faith arising out of fire damage to a house that Curry was building, and that he alleged should have been covered by an insurance policy that he purchased from Scottsdale through CIG. (R. pp. 16-17). Curry also alleged that CIG, Derrick, and Scottsdale were negligent in procuring the Scottsdale insurance policy for Curry in that he believed that the policy should have expired at a later date. (R. pp. 18-21). Curry sought damages from all three Defendants jointly for "unpaid losses established at trial, and all incidental, punitive, and consequential damages." (R. p. 21).

Scottsdale answered on September 16, 2014, denying the allegations and asserting that the policy expired prior to the date of the loss. (R. p. 30). CIG and Derrick answered on September 22, 2014, denying the allegations and asserting the affirmative defenses of

contributory negligence, set-off, and failure to mitigate, among others. (R. pp. 26-28). Curry took Mr. Derrick's deposition on April 16, 2016, both individually and as the 30(b)(6) representative of CIG. Curry then took the deposition of Joel Sauls, the principal of CIG on June 4, 2015.

Curry amended his complaint by consent on May 28, 2015, adding a request for punitive damages in his prayer, yet still asserting that CIG and Derrick were agents of Scottsdale and still sought to hold all three defendants liable for negligence. (R. pp. 47-49). CIG and Derrick answered the Amended Complaint on June 4, 2015, and Scottsdale answered on June 8, 2015.

On October 1, 2015, Curry filed a second Amended Complaint by consent, adding a cause of action for gross negligence against all Defendants. (R. pp. 72-74). Despite having completed the depositions of all the parties, Curry still alleged that CIG and Derrick were Scottsdale's agents and sought a judgment against all of the defendants for negligence and gross negligence. Scottsdale filed its answer on October 26, 2015, and CIG and Derrick filed their answer on October 28, 2015.

Seventy days after Curry's last amended Complaint was filed, Scottsdale and Curry entered the Release that is the subject of this appeal. (R. pp. 426-27). Curry executed the Release, acknowledging payment to Curry by Scottsdale of \$85,000.00 for "full payment for all damages losses or injuries, whether known or unknown, developed or undeveloped, **for policy benefits** or consequential damages recoverable from Scottsdale Insurance Company which have resulted or may result from the loss aforesaid," in exchange for the release of Scottsdale, "its agents, servants, employees, successors and assigns . . ." (R. pp. 426-27). Scottsdale was dismissed by stipulation on December 30, 2015. (R. p. 428).

The executed Release was not served upon counsel for CIG/Derrick despite having continuing Requests for Production asking for communications between the parties. (R. p. 231, lines 17-23, p. 251, lines 16-21). Counsel for Curry admitted that this failure was her inadvertent error. (R. p. 252, lines 13-15). Upon request from CIG's counsel, Curry provided a copy of the executed Release on April 8, 2016, the same day that it was requested. CIG/Derrick filed a motion for summary judgment on April 15, 2016, stating that the Release of Scottsdale acted as a Release of CIG and Derrick because the Release was full compensation for Curry's losses and Curry insisted in its three complaints that CIG and Derrick were agents of Scottsdale and that the release discharged the agents of Scottsdale. (R. pp. 95-97). CIG and Derrick also filed a motion to amend their answer to assert the defense of Release on April 18, prior to the start of trial.

The parties selected a jury and pre-trial motions were heard, including CIG/Derrick's Motion to Amend their answer. Judge Newman heard arguments on the Motion to amend and granted the motion to amend finding that under SCRCP 15, amendments are freely given when justice requires, that the Release should have been provided to the Defendants earlier, and that the defense was one that could have been anticipated by the Plaintiff. (R. p. 14, pp. 240-54). Judge Newman set further arguments regarding the Release for the morning of April 19, 2016. (R. pp. 258-64). On April 19, Curry filed a cross-motion for summary judgment as to CIG/Derrick's defense of Release. (R. pp. 116-119). On the morning of April 19, Judge Newman continued the trial to a subsequent term so that the cross-motions for summary judgment as to the newly added defense of release could be heard. (R. pp. 277-78). CIG/Derrick filed and served an amended memo in support of summary judgment on April 26, 2016. (R. pp. 104-115).

Curry also filed an amended memo in opposition to the motion for summary judgment and in support of its cross motion for summary judgment on April 26, 2016.

On April 26, 2016 Judge Hood, heard oral arguments on the cross-motions for summary judgment. Judge Hood denied CIG/Derrick's motion for summary judgment from the bench and took Curry's motion under advisement. (R. p. 325, p. 335). Judge Hood later granted Curry's motion dismissing the defense of release on May 6, 2016. (R. pp. 1-13). CIG/Derrick filed and served its Notice of Appeal of Judge Hood's Order on May 11, 2016. Thereafter, Curry filed a Notice of appeal of Judge Newman's Order allowing CIG/Derrick to amend.

This appeal followed and the parties prepared and filed their final briefs and the Consolidated Record on Appeal. The Record on Appeal on was filed on November 14, 2016. On November 18, 2016, Curry filed a motion with this court for leave to Make a Motion for Relief Pursuant to Rule 60(b) in the court below. The basis for this motion was a letter addressed to Curry's counsel from the attorneys for Scottsdale, dated November 15, 2015, which was copied to CIG/Derrick's counsel and transmitted a draft settlement agreement between Curry and Scottsdale. (R. 151). As a basis of this motion, Curry represented to this court that Mr. Peel stated that he never received a copy of the Scottsdale Release. As shown below, this statement was inaccurate and misleading. Additionally, the letter complaint of was in Curry's counsel's file since late November 2016. This court allowed Curry to file his 60(b) Motion below by order dated January 12, 2017. The parties briefed the issues (Curry Memo in Support, CIG/Derrick Memo in Opposition, Curry Reply Memo,) and Judge Newman issued a Form 4 Order denying Curry's motion on August 1, 2017. (R. 458).

Arguments

- I. THE COURT BELOW PROPERLY GRANTED CIG'S MOTION TO AMEND BECAUSE CURRY SUFFERED NO PREJUDICE DUE TO THE AMENDMENT AND HAS NOT DESCRIBED ANY IN HIS BRIEF THE COURT BELOW PROPERLY GRANTED CIG'S MOTION TO AMEND BECAUSE CURRY DID NOT SUFFER ANY PREJUDICE.

The standard of review for the grant of a motion to amend a pleading is an abuse of discretion standard.

"It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." Pruitt v. Bowers, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). Courts have wide latitude in amending pleadings and "while this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal." Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). "The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Id.*

Duncan v. CRS Serrine Eng'rs, Inc., 337 S.C. 537, 542, 524 S.E.2d 115, 117-18 (Ct. App. 1999).

South Carolina Rule of Civil Procedure 15(a) allows parties to amend their pleading by leave of court and states that such leave should be freely given when justice requires and the amendment does not result in prejudice to another party.

"It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." Pruitt v. Bowers, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." Duncan v. CRS Serrine Eng'rs, Inc., 337 S.C. 537, 542, 524 S.E.2d 115, 117-18 (Ct. App. 1999)(citations omitted).

Curry was on notice of the issue of the release and was given an opportunity to fully refute it. Curry was in possession of the release beginning on December 10, 2015, when he signed it. The court continued the trial so that Curry could brief and argue the issue of Release. Curry was unable to demonstrate prejudice to the trial court and cannot now. Curry, states in his brief that granting the motion to amend was error because “the shock, surprise, and prejudice to Mr. Curry was substantial,” but never specifies the purported prejudice. (Appellant’s Brief of Respondent/Appellant’s Brief p. 12, ¶ 2). Nowhere in his brief does Mr. Curry describe what prejudiced he suffered.

There is no prejudice or surprise because Judge Newman continued the trial so that the issue of Release could be fully briefed and argued pursuant to SCRCP 56. The court scheduled a motions hearing for April 25th and moved the trial to May 16, 2016. (R. p. 277, line 17 – p. 278, line 3; p. 282, line 1 – p. 284, line 16). Counsel for Curry agreed with the reasonableness of continuing the trial so that the issue related to the release could be dealt with. “[W]e don’t have objection to the trial being continued so all this issue about the release and whether the Defense – the release is valid can be determined.” (R. p. 274, lines 2-6). In fact, Curry’s counsel agreed the continuance was proper and anticipated these appeals: “And so we believe the proper thing is to continue this trial so that these motions can be heard, and then any appeal from the granting or denial of such motions can work its way through the system. Because, really, this issue is now becoming the crux of the case.” (R. p. 274, lines 14-19).

Therefore, Curry has failed to carry his burden by establishing prejudice. The trial court properly granted the amended and took the proper steps to avoid any prejudice to Curry even where Curry held the executed Release.

II. THE SUFFICIENCY OF CIG/DERRICK'S AMENDED DEFENSE OF RELEASE IS NOT APPROPRIATE TO CONSIDER WHEN GRANTING OR DENYING A MOTION TO AMEND A PLEADING.

Appellant's Initial Brief of Respondent/Appellant spends a significant portion of the brief arguing whether the defense of Release as styled is sufficient. Curry rehashes his agency arguments at length. (Appellant's Brief of Respondent/Appellant pp. 6-7, 13-14.). The strength or merits of a defense is not relevant when a court considers whether to grant a motion to amend.

A motion to amend an Answer should be contested primarily by procedural arguments, not arguments concerning the substance and merits of the counterclaims and/or defenses proposed. For example, one might argue that it is too late in the case to allow an amendment, and that prejudice would result from such an amendment. Arguments going to the legal merits of a proposed defense or counterclaim are better taken up in the context of a Rule 12(b) motion to dismiss or a Rule 56 motion for summary judgment. It follows that the trial judge should generally not consider these substantive arguments at the mere amendment stage.

City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 232-33, 599 S.E.2d 462, 465-66 (Ct. App. 2004).

Therefore, Curry's claims of abuse of discretion related to the issue of "agency" have nothing to do with the grant of the Motion to Amend and were properly argued at the Summary Judgement hearing before Judge Hood. Curry's repeated mistaken assertion that the Agency's belief as to the scope of the Release affects its enforceability against CIG also is improper for the trial court to consider when granting a motion to amend, as it goes to the merits of the defense and not to prejudice.

III. CURRY'S ARGUMENT REGARDING THE TIMING OF THE PRODUCTION OF THE EXECUTED RELEASE TO CIG ARE WITHOUT MERIT AS CURRY HAS NOT SUFFERED ANY PREJUDICE AND CURRY'S COUNSEL ADMITTED THAT IT WAS AN ERROR NOT TO PROVIDE THE EXECUTED RELEASE.

Curry asserts that because CIG's counsel did not request a copy of the release until April 8, 2015, a week before trial and four months after Curry executed it, the court abused its discretion in allowing CIG/Derrick to amend. At the hearing on the Motion to Amend, CIG's counsel noted that it was not provided with the executed Scottsdale/Curry release despite requesting copies of all correspondence between Scottsdale and Curry in a request for production. Curry now claims it was error for the court to rely on this representation by counsel without CIG handing up its discovery requests. To prove this, Curry has made the Requests part of the record herein and quoted the relevant request. The quote matches the representation to the court, which found that the Release should have been provided. (Appellant's Brief of Respondent/Appellant p. 11-12). The fact that this request was applicable was agreed with by Curry's counsel where she admitted that it was a mistake not to send it (R. 252, ll. 11-15). Counsel then goes on to argue that a Release between the parties somehow was not correspondence and apparently, she did not believe she had to provide CIG with a copy of the Release absent a specific request, despite her recognition to the trial court.

Counsel clearly understood that she needed to provide a copy of the Release as she stated during the hearing before Judge Newman: "Your Honor, my position is he was on actual notice that a settlement agreement had been executed. If I failed to provide that to him in December, that is my error, but it is not that he didn't have notice that it existed." (R. p. 252, lines 11-15). Because counsel rightfully recognized that it was a mistake not to send it, the court had no choice but find that due to the late service of the document a

motion to amend was proper. However, to the extent the motion to amend could or should have been filed earlier, any prejudice was cured by the trial being continued and motions set to address the Release issue and both parties were given equal opportunity to brief them. "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." Duncan v. CRS Serrine Eng'rs, Inc., 337 S.C. 537, 542, 524 S.E.2d 115, 117-18 (Ct. App. 1999)(citations omitted).

IV. THE COURT BELOW PROPERLY DENIED CURRY'S MOTION FOR RELIEF (SCRCP 60(b)) AS THE "EVIDENCE" CITED BY CURRY WAS A LETTER THAT WAS IN HIS COUNSEL'S POSSESSION, CURRY HAD A DUTY TO PROVIDE THE EXECUTED RELEASE, AND AN EXECUTED RELEASE IS AN IMPROPER BASIS FOR ANY MOTION

The court below properly denied Curry's Motion for Relief from its order allowing amendment of the answer and the ruling should be upheld as there is no evidence that the court abused its discretion. "The decision to deny or grant a motion made pursuant to Rule 60(b), SCRCP is within the sound discretion of the trial judge. An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support." Ware v. Ware, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013)(citations omitted).

Curry claims that the Judge Newman erred by denying his motion for Relief Pursuant to Rule (60(b)), SCRCP. Curry was granted leave by this court to file the motion for relief after the final briefs were submitted in this appeal. Curry based his motion upon a copy of a letter that Curry designated to be included in the Record on Appeal. Curry argued that counsel for Curry/CIG had denied receiving this letter. This argument is not supported by the record, is patently false, and does not matter in any event as the release received was not executed.

Curry filed his 60(b) Motion on January 31, 2017, requesting that the trial court reverse its grant of CIG/Derrick's motion to amend their answer to assert the defense of "release." (R p. 459). Although the motion is not specific on the grounds upon which Curry sought relief, it appears that the only ground for relief was accusing counsel for CIG/Derrick of "fraud, misrepresentation, or other misconduct of an adverse party." (SCRCP 60(b)((3)). Curry's motion alleged that Mr. Peel never advised the court "that he had actually received a copy of the unexecuted Scottsdale Release on November 30, 2015 – and the Court's reasoning was premised on the Agency's representation that it only first saw the Scottsdale Release on April 8, 2016. . . ." (R. p. 459).

A. The letter upon which Respondent/Appellant basis its motion was always in the Plaintiff's possession and nowhere in the record did CIG/Derrick's counsel deny receiving a copy of the letter.

Plaintiff was in possession of the Scottsdale letter transmitting the unexecuted Release throughout all the motions hearings below; therefore, the Rule 60(b) motion was properly denied. "[A] party may not prevail on a Rule 60(b)(3) motion on the basis of fraud where he or she has access to disputed information or has knowledge of inaccuracies in an opponent's representations at the time of the alleged misconduct." Raby Constr. V. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004) Here, Curry's motion was based upon evidence (however misstated) that was in the Plaintiff's hands since November 2015. Confirmation of receipt by CIG/Derrick's counsel was easily available at the motion hearing or at any time prior to filing the notice of appeal. CIG/Derrick's counsel was plainly copied in the postscript. (R. 445). The court was correct in finding that there was no basis for relief under Rule 60(b) because the Plaintiff was in possession of the evidence upon which this Motion is based.

CIG/Derrick's counsel admitted that they were aware that Scottsdale and Curry had settled, but did not know that final terms of the release between Scottsdale and Curry because the Defendants were not given the executed release. (R. p. 87 lines. 1-13; R. p. 634, lines 17-23; R. p. 635 lines 7-10; and R. p. 684, lines 8-14.). Curry's argument below was that CIG/Derrick should have anticipated that the Release had been executed, (despite not being served with the dismissal or final settlement) and that Curry should be given relief from the Order to amend because the CIG/Derrick should have filed their motion earlier despite not having received the document that the motion was based upon. CIG/Derrick never denied receiving the letter.

In the 60(b) motion, Curry's counsel, in a footnote, represented that the Release included with the November 20, 2015 letter was identical to the executed Release finally provided to CIG/Derrick on April 8, 2016. Curry's counsel fails to mention that the November 20, 2015, "release" was unsigned and was sent under a cover letter from Scottsdale to be executed and returned to Scottsdale's counsel. (R. 151). Counsel for Scottsdale and Curry never provided executed copies of the Release or the executed Stipulation of Dismissal of Scottsdale to counsel for CIG/Derrick, nor did they copy CIG/Derrick's counsel when they filed the Stipulation of Dismissal. This was clearly an innocent oversight by counsel, but nevertheless, until preparing for trial, Counsel for CIG/Derrick did not notice that the dismissal of Scottsdale had been finalized and that the parties had not copied him with the documents. CIG/Derrick needed the executed settlement documents to present them to the court for setoff against any potential verdict.

Curry argues that because CIG/Derrick's counsel received an unexecuted copy of a Release he somehow made a misrepresentation to the court regarding the basis for

requesting that the court allow an amendment to the answer to assert a defense based upon the executed Scottsdale Release. CIG/Derrick could not make any motion based upon an unexecuted document, nor was under any duty to take note the unexecuted document to which they were not a party. The trial court, in granting Defendants' Motion to Amend Answer and analyzing its timeline, considered that Curry's counsel did not provide a copy of the final and executed release until it was requested, just prior to trial. (R. 258-264). Counsel for CIG/Derrick continuously made it clear that he did not receive the executed Scottsdale Release until April 8, 2016. (R. 231, 250).

Curry asserts that the Order allowing amendment was premised on the CIG/Derrick's representation that they only first saw the "Scottsdale Release" on April 8, 2016. This is not supported by the record and is a gross distortion of the facts. CIG/Derrick's counsel only referred to the executed release in his arguments and made it clear that he was relying only on the executed document for his motion. CIG/Derrick's counsel made informed the court that he was aware of the settlement, but was never served with a copy of the executed release. (R. 271:8-9. "I know the case was settled. I was aware. They asked me to sign the stipulation and I sent it back"; see also, R. 231:17-18 ("I did not see the executed releases until April 8th"); p.252:5-11 (the court referencing the executed copy of the release); R. 231:7-10 ("we filed a motion this morning to amend to add a defense of release based upon the information we got from April 8th").

Neither the unexecuted release nor the letter from Scottsdale's counsel form sufficient grounds for Rule 60(b) relief because neither are newly discovered evidence. Both are Plaintiff's documents, or documents sent to the Plaintiff and in Plaintiff's possession. Even if the unexecuted release and letter from Scottsdale's lawyer mattered

here, the Plaintiff was in possession of both documents and, like the movant in Raby Constr., could have discovered the basis of its Motion during the litigation. Id., 358 S.C. at 14, 594 S.E.2d at 480; See also, Bowman v. Bowman, 357 S.C. at 152, 591 S.E.2d at 657 (relief not available under Rule 60(b)(2) or (3) where a party could have discovered the "new" evidence prior to trial). Therefore, what Plaintiff describes as "newly discovered" evidence is insufficient to establish a basis for relief under 60(b)(2) and Plaintiff's Motion should be denied in its entirety.

Curry claims that because the defendants did not tell the court that they had received an unexecuted copy of the Scottsdale Release that they committed fraud upon the court or made a misrepresentation. Of course, the November transmittal letter was in Curry's counsel's possession the entire time and Curry's counsel could have made this argument before the court prior to the order being granted and had time to file a motion to reconsider. Additionally, Counsel for CIG/Derrick candidly informed the court that he was aware that the matter had been settled between the parties, that he just did not receive a copy of the executed Scottsdale Release until he requested it for trial preparation on April 8, 2016, (R. 271).

Curry alleges that CIG/Derrick's counsel: "represented to the trial court and to opposing counsel that he did not see the Scottsdale Release (and therefore never had a chance to review the terms and conditions therein) until he requested it from Mr. Curry's counsel on April 8, 2016. . ." This is a mischaracterization of counsel's statement to the trial court, and a disingenuous attempt at summarizing Defendants' counsel's argument to the trial court.

Of course, the entire point is this: to be able to move to amend to assert the release, at some point CIG/Derrick must receive the final, executed Release. Whether counsel for CIG/Derrick should have recognized in January, February, or March that they did not have the Release is a moot point. The trial court recognized that the document was in Curry's possession the entire time. Clearly, after reviewing all of Curry's information, characterizations, and accusations against counsel, the court below found it of no import and correctly refused to provide relief from its order allowing the amendment.

Curry's counsel admitted that they made a mistake in not providing a copy of the executed Scottsdale Release. (R. 252, ll. 11-15). It is also undisputed that counsel failed to serve CIG/Derrick with the Stipulation of Dismissal when it was filed with court as required by SCRCP 5(a).

In granting the Agency Defendants' Motion to Amend Answer, the trial court found that: "[a]mendments are freely given when justice so requires and the opposing party is not significantly prejudiced. I find that is the case here, particularly in light of the fact that you [Curry] had a copy and you [Curry] knew what it said...and you were under a continuing duty to disclose anyway." (R. 253:18-25)(R. p. 656:18-25,). The court had multiple bases for granting the amendment including: 1) possession of the document; 2) knowledge of the documents contents, and 3) a duty to provide a copy of the document (Id.).

The court was made aware and counsel for Curry continually argued that CIG/Derrick was aware of the settlement and its proposed terms in December 2015. Putting aside that an unsigned Release and an executed Release are two separate and distinct documents in discovery and as a matter of law, Mr. Peel consistently told the court that the issue was not receiving the "executed" release, because it was the only document

that mattered and which Curry's counsel admittedly failed to provide in error. (R. 252 11-17) (R. p. 634:17-19; R. p. 635:16-19). The only basis to amend to assert the release defense was the executed release. A draft copy of the release would not support such a motion.

B. An unexecuted release could not have been relied upon as the basis for adding the defense to the Answer.

CIG/Derrick could not have made the motion to amend based upon the document transmitted by Mr. Murphy in November 2015. An unexecuted release was not enforceable and could have been changed to avoid the properly plead defense. *See Paul Davis Sys. v. Deepwater of Hilton Head, LLC*, 362 S.C. 220, 607 S.E.2d 358 (Ct. App. 2004) (noting that reliance on both unexecuted and filed¹ documents enclosed in a letter not addressed to the party was unreasonable and relief is unwarranted under Rule 60(b)); *See also, Parsons Bros. Slate Co. v. Commonwealth*, 418 Pa. 389, 390, 211 A.2d 423, 423 (1965) (reasoning that in order to constitute a contract there must be an offer on one side and an unconditional acceptance on the other, and so long as any condition is not acceded to by both parties to the contract, the dealings are mere negotiations and may be terminated at any time by either party while they are pending).

C. CIG/Derrick's counsel did not make any misrepresentations to the court.

The supposed misrepresentations that are the subject of Plaintiff's Motion, are nonexistent, as no such representation was ever made by CIG/Derrick's counsel. CIG/Derrick's counsel never represented in any argument, brief, or otherwise to anyone

¹ A mechanic's lien bond the court later struck because it failed to meet the statutory requirements for surety bonds under S.C. Code Ann., Section 29-5-110.

that he did not receive this letter or its attachments. Mr. Peel, as shown above, told the court that he knew that a settlement had taken place. The exact statement regarding the attachments to the November 25, 2016 letter not being received by the Defendants was never made by Mr. Peel, but were made by Curry's counsel, presumably and hopefully due to a fundamental misunderstanding of the facts and issues before the court. Of course, CIG/Derrick's counsel would not have mentioned the draft Release, because it did not matter and they were not seeking to amend based on anything other than the enforceable, executed Scottsdale Release.

Even prior to the hearing, counsel for Curry was aware that Mr. Peel was asserting that he never received the executed release. In an email to the Chief Administrative Judge on April 15, 2016, Mr. Peel informed Judge Lee's clerk as follows: "Dear Mr. Devlin: Please let the judge know that I was supplied with an executed copy of the release on April 8, 2016 by email." (R. pp. 500; 715-716). Later, in correspondence to Judge Lee dated April 25, 2016, counsel for the agency informed Judge Lee: "The basis for the motion was that as a matter of law, the release operated as a release of all parties. I had never been served with the executed release o[r] the filed Stipulation of Dismissal until I requested it on April 8, 2016." (Id.)

Curry's counsel argued to the trial court prior to the grant of the amendment that CIG/Derrick had been on notice of the settlement terms since December 2015:

Your Honor, we would oppose their motion to amend at this late date. And the reason for that is that they were on notice that we settled with Scottsdale in December. And they signed off on the stipulation of dismissal as to Scottsdale They never signed any release. They were never dismissed on this case. We're here to try the case....And now they are trying to say that, oh, they were released from it at this late date when they have known that Scottsdale has been out presumably because we settled with Scottsdale since December. (R. 56:21-57)

Therefore, the argument was made to the trial court during the hearing on the motion to amend, so no new information was before the court under the Rule 60(b) motion. The court was aware that Plaintiff was arguing that the Defendants were aware of a settlement terms and took that into consideration: (*See* R 252:19-20) - "I know, but it seems to me that you are seeking to benefit from your failure to provide him with a copy of the document.") (the executed release). The court made it very clear that it was only considering the executed release: "If it was something that he previously requested, you came into possession of it in December and did not provide a copy to him in December, January, February, or March, and he seeks to enforce it in April, I don't know if you should benefit from your delay. . . . Or your failure to do that." (R. 252:24-253:5).

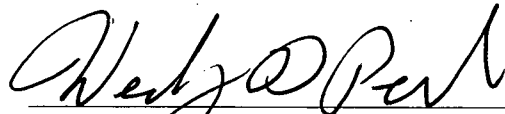
CIG/Derrick's counsel made sure the court was aware that CIG/Derrick was aware of the settlement: "In addition to not receiving the release, I never even got the stipulation. Now, I know the case was settled. I was aware. They asked me to sign the stipulation and I sent it back." (R. p. 271:6-10; R p. 684:6-10.) The court ruled "[a]nd he has just received a copy of it on April 8th. I am inclined to - -yes, I am going to grant the motion." (R 253:13-15.) "It" being the executed release. Therefore it was proper to uphold the ruling against the Rule 60(b) motion.

CONCLUSION

Therefore, because Curry is unable to demonstrate any prejudice or surprise regarding the court allowing the amendment of the Answer to assert the defense of release, and there was not fraud or misrepresentation to the court below, this Court should uphold the ruling of the Circuit Court allowing the amendment of the answer to assert the defense of Release.

Respectfully submitted,

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