THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Frank R. Addy, Jr. , Circuit Court Judge

Appellate Case No. 2017-002434

Laurens Cycle Sales, Inc. d/b/a Honda of Laurens and Cooper Motor Sales, LLC ..... Respondent,

vs.

Estate of Ruth Tumblin ..... Appellant.

REPLY BRIEF OF APPELLANT

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Argument

Question I

The Appellant is barred from arguing on appeal a ground for relief she did not argue at trial.[1]

The defense of recoupment is an affirmative defense the Defendant is required to prove. *US LIFE Credit Corp. v. James,* 276 S.C. 421, 279 S.E.2d 367 (1981). Part of proving that defense is to prove that the recoupment arose out of the same Contract as the alleged recoupment. This matter was tried non-jury. Pointing out in a Rule 59 Motion that the Defendant failed to prove an essential element of its case is not raising a new point. The Motion simply points out that the trial court erred as a mater of law in concluding that the Defendant had proven recoupment.

Question II

The Appellant is barred from arguing an affirmative defense she did not plea or argue.

In the context of this case, the Estate of Ruth Tumblin argued in her Brief that Laurens Cycle Sales, Inc. waived their right to losses that incurred. This was argued in the context of arguing that the parties entered into a new Contract which superseded the old Contract. As such, this is not a waiver under Rule 8(c). In addition, this Court liberally views pleading in a case. "To ensure substantial justice to the parties, the pleadings must be liberally construed." *Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000), aff'd

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[1] For the ease of the reader, the Estate of Ruth Tumblin uses in the Reply Brief the same wording in the questions presented as used Laurens Cycle Sales. This should not be interpreted to mean Ms Tumblin agrees with the wording of the questions.

as modified, 354 S.C. 416, 581 S.E.2d 169 (2003); *Tuloka Affiliates, Inc. v. Moore*, 275 S.C. 199, 202, 268 S.E.2d 293, 295 (1980)("Despite Appellants' use of the terms 'second defense and counterclaim', we are convinced that what was pled was not a claim for affirmative relief at all but rather was in the nature of a recoupment defense.") . The argument is setting forth that the parties simply modified the old Contract, and therefore, Laurens Cycle Sales, Inc. cannot claim a loss or recoupment arising out of a Contract that had modified to consider any alleged loss. The trial court erred in failing to recognized that the original Contract had been modified several times, and therefore, recoupment did not arise out of the last and final Contract. South Carolina has recognized the merger doctrine in deeds and mortgages. *Hughes v. Greenville Country Club*, 283 S.C. 448, 322 S.E.2d 827 (Ct. App. 1984). The same principle is applicable here. Laurens Cycle knew all they needed to know when they signed the Final Contract with Ms. Tumblin. The Final Contract was the intent of the parties and any recoupment had to come from that Contract.

Ms. Tumblin agrees that the pleadings in this case are convoluted. In the final analysis, Laurens Cycle Sales was fully aware of the claim of Ms. Tumblin and the basis for the claim. Laurens Cycle Sales could hardly contend that it was surprised by the claim asserted. Under the pleadings, all Ms. Tumblin had to do is prove her Contract and the failure to make the payment. Laurens Cycle had the obligation of proving its recoupment.

Question III

Appellant is barred from recovering on the Contract by her prior breach of it.

Were this suit solely about the June 23, 2008 Contract, the Laurens Cycle Sales may have a valid point. But, as noted in the Opening Brief, this suit is about the Contract of July 2, 2010 as modified on August 23, 2010. As such, the lower court should have looked at what the parties

knew or should have known as of August 23, 2010. In its brief, Laurens Cycle Sales has pointed to no evidence of any breach of Contract by Ms. Tumblin arising out of the August 23, 2010 Contract. Laurens Cycle Sales has not pointed out any misrepresentation Ms. Tumblin made in the final Contract. All the allegations occurred before the Final Contract was agreed upon.

Question IV

Appellant is barred from recovering on the Contract at issue because she has violated its implied covenant of good faith and fair dealing.

For the reasons stated above and in the Opening Brief, the record is devoid of any evidence to support a claim of lack of good faith and fair dealing in the August 23, 2010 Contract. Ms. Tumblin could claim it is Laurens Cycle Sales that had the lack of good faith and fair dealing when it refused to comply with its August 23, 2010 Contract and went back to alleged improper dealing long before that Contract was agreed upon.

Laurens Cycle Sales claims it was "cheated" out of $703,118.14. The record in this case hardly supports this conclusion. Laurens Cycle Sales thought enough of the business to buy out the remaining stockholder, Mr. Bagwell, for $340,000.00 in 2010. Rec. on App. at 73, ll 4 to 14. Mr. Cooper only recalled this purchase was for more than $100,000.00. Rec. on App. at 58, ll 4-11. As Laurens Cycle Sales valued this business at more than $680,000.00 when it purchased Mr. Bagwell's portion, its claim of being "cheated" rings hollow.

Question V

The Court below correctly determined the facts.

Laurens Cycle Sale, Inc. incorrectly states there was no consideration for the modification of the Contract on July 3, 2010 and again on August 23, 2010. In each case, in exchange for

Laurens Cycle Sales agreement to pay Ms. Tumblin a certain sum of money, Ms. Tumblin gave up a greater amount to which she was entitled. In the first modification, Ms. Tumblin gave up her job at Laurens Cycle Sales. Mr. Cooper described this payment as severance payment. Rec. on App. at 46, ll 16-21. Giving up an employment position is consideration for a new agreement. Whether the agreement was good or bad is not relevant to this case. It was the agreement of the parties.

Laurens Cycle Sales has also argued there were unknown facts at the time the Contract was modified. As to the suit filed by Jerry Dale Freemen, the estate agrees. As a result, the estate has not contested an offset for the expense incurred in that suit.

Laurens Cycle Sales in its brief has not pointed to a single fact that its was not aware of at the time of the two modifications, except for the Freeman suit. As noted in the Opening Brief, Laurens Cycle Sales was fully aware of all problems with the business at the time they modified the Contract. The testimony shows that the problems were one of the reasons for reducing the amount due to Ruth Tumblin.

Laurens Cycle Sales does not dispute the amount of the claim by the estate. Their only point is that they should be entitled to recoupment. The position of the estate is that the record establishes as a matter of law that the recoupment did not arise out of the modified Contract as any prior loss was specifically considered and waived in the written modification. Thus, the trial court erred as a matter of law.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Opening Brief, the decision of the lower Court should be reversed and judgement entered in favor of the Estate of Ruth Tumblin.

July 16th, 2018

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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