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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEALS FROM JASPER COUNTY
From the Superior Court of
Jasper County, South Carolina

Referee Judge Benjamin CP Sapp

2015-CP-27-00524

Appellant Case No. 2017-002286

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SC Court of Appeals

Deutsche Bank National Trust Company, as Trustee for GSAA Home Equity Trust 2006-17, Asset-Backed Certificates, Series 2006-17, Respondent,

vs.

Louise Legare Gardner; One West Bank, National Association s/b/m to IndyMac Bank F.S. B., Defendants,

Of which Louise Legare Gardner is the Appellant.

APPELLANT'S INITIAL BRIEF

Louise Legare Gardner
Appellant in Propria Persona
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*Re submitted
Nov. 7, 2018*

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Cases & Citations

- Stanley Smith & Sons, Inc. v. Limestone College**, 283 S.C. 430, 322 S.E.2d 474 (Ct. App. 1984)
- Regions Bank v. Schmauch**, 354 S.C. 648, 660, 582 S.E.2d 432, 439 (Ct. App. 2003)
- Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.**, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993).
- Restatement (Second) of Contracts § 50 cmt. c** (1981); **Sauner v. Pub. Serv. Auth.**, 354 S.C. 397, 405, 581 S.E.2d 161, 166 (2003)
- Timmons v. McCutcheon**, 284 S.C. 4, 9-10, 324 S.E.2d 319, 322 (Ct. App. 1984).
- Gladden v. Keistler**, 141 S.C. 524, 140 S.E. 161
- Bulwinkle v. Cramer**, 27 S.C. 376, 3 S.E. 776, 13 Am. St. Rep. 645. In 6 R.C.L. 17 Am. Jur.2d, Contracts, section 70, at page 408.
- Hughes v. Edwards**, 265 S.C. 529, 220 S.E.2d 231 (1975).
- Barber-Paschal Lumber Co. v. Boushall**, 168 N.C. 501, 84 S.E. 800.
- McClintock v. Skelly Oil Co.**, 232 Mo. App. 1204, 114 S.W.2d 181 (Mo. Ap. 1938).
- Hudepohl Brewing Co. v. Bannister**, 45 F. Supp. 201, 203 (D.S.C. 1943)
- Edens v. Laurel Hill, Inc.**, 271 S.C. 360, 247 S.E.2d 434 (1978)
- Morgan v. Honeycutt**, 277 S.C. 150, 283 S.E.2d 444 (1981)
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- Barry v. Atlas Metals, Inc.**, 152 Ga. App. 437, 263 S.E.2d 179 (1979).
- American Oil**, 298 F. Supp. At 534
- Rural Plumbing & Heating Inc. v. Hope Dale Realty, Inc.**, 140 S.E.2d 330 (N.C. 1965)
- Northern Va. Sav. & Loan Ass'n v. J.B. Kendall Co.**, 135 S.E.2d 178 (Va. 1964).
- Tupper v. Dorchester County**, 326 S.C. 318, 487 S.E.2d 187 (1997).
- Butts v. AVX Corp.**, 292 S.C. 256, 355 S.E.2d 876 (Ct.App. 1987).
- Summer v. Carpenter**, 328 S.C. 36, 492 S.E.2d 55 (1997)
- Hamiter v. Retirement Div. of South Carolina**, 326 S.C. 93, 484 S.E.2d 586 (1997)
- City of Columbia v. American Civil Liberties Union**, 323 S.C. 384, 475 S.E.2d 747 (1996).

10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 3d § 2738 (1998).

George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)

Tharpe v. G.E. Moore Co., 254 S.C. 196, 201, 174 S.E.2d 397, 399 (1970).

Statutes & Rules

South Carolina Code Sections 15-39-650 through 15-39-660, and

South Carolina Code Sections 29-3-630 through 29-3-790

Rule 56(c), SCRCF

STANDARD OF REVIEW

The standard of review for abuse of discretion is *de novo*.

A court abuses its discretion if its decision is not reasonably supported by any competent evidence in the record, or if the court has misconstrued or misapplied applicable law.

The trial court abused its discretion because its decision to deny a trial to the appellant was not reasonably supported by an competent evidence in the record, or the court had misconstrued or misapplied applicable law, or both.

FACTUAL STATEMENT OF THE CASE

The appellee sued the appellant to foreclose on her home. The appellee obtained judgment without a trial and without meeting its burden of proof and in fact, without providing one word of evidence. The exhibits conflicted with the pleading and the jurisdictional challenge was never answered.

1. On July 28th, 2017 the appellant filed a Motion to Set and Certificate of Readiness for Trial. Hearing was set to be heard on August 24th, 2017.
2. The appellee subsequently filed a Notice of Supplemental Hearing.
3. The appellant filed An Objection to Supplemental Hearing unilaterally scheduled by appellee.
4. The appellant's, August 24th, Motion hearing was conveniently cancelled 2 days prior of being heard claiming a clerk error. The appellant was given no choice but to attend the September 5th, hearing in a different county for the Motion to be heard or wait 45 to 60 days for a hearing. (fraud upon the court and violations of Appellant's Right(s).)
5. The appellant filed on September 1st, 2017 an Objection to appellee's Hearing Schedule with an Affidavit In Support Of Objection and a Request for Trial Scheduling Order
6. The appellant did not willingly attend a foreclosure hearing. The appellant attended a Motion to Set and Certificate of Readiness for Trial with objection to appellee's foreclosure hearing having been set on the same day. The Appellant was told by Judge Sapp days prior to the hearing that the Motion would be heard separately, (a lie) "As per the transcript content the appellant did not consent to the foreclosure hearing or accept the offer, it was totally ignored by the Judge...
7. The appellant's motions were denied and Judge ordered appellant's private dwelling sold without a proper hearing trial. Appellee's obtained judgment.

SUMMARY OF ARGUMENT

This case involves a contested foreclosure in which the appellee obtained judgment without a trial and the appellant was unfairly denied a trial. The court should have held a trial in this case as it was contested and the appellee was unfairly allowed a judgment without proving any of its allegations. The appellant was unfairly denied her day in court. The court completely disregard existing law in denying the motion.

ARGUMENT

This case involves a contested foreclosure in which the appellee obtained judgment without a trial and appellant's request for trial was unfairly denied. Refusing to hold a trial was not proper as there were genuine issues of material fact in dispute and the appellee was not entitled to judgment as a matter of law.

The allegations in the pleadings conflicted with the exhibits for the reason that the exhibits demonstrated a completely different set of facts than those alleged in the complaint. The exhibits demonstrated that the plaintiff was not the lender and had no interest in the claims alleged, or in the title to the appellant's property, for which the foreclosure was sought to obtain.

The appellee never produced one word of evidence and no witness to authenticate any documentary evidence or make any statements that would be considered evidentiary. The appellee failed to meet its burden of proof and the pleadings failed to invoke the jurisdiction of the court.

The applicable law of this case is set forth in the case of *Stanley Smith & Sons, Inc. v. Limestone College*, 283 S.C. 430, 322 S.E.2d 474 (Ct. App. 1984); from this case we quote: A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. If the agreement is manifested by words, the contract is said to be express. If it is manifested by conduct, it is said to be implied. In either case, the parties must manifest a mutual intent to be bound. Without the actual agreement of the parties, there is no contract. [Citations omitted.] An implied contract, like an express contract, rests on an actual agreement of the parties to be bound to a particular undertaking. The parties must manifest their mutual assent to all essential terms of the contract in order for an enforceable obligation to exist. If one of the parties has not agreed, then a prerequisite to formation of the contract is lacking. [Citations omitted.] 283 S.C. at 433-434, 322 S.E.2d at 477.

"A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." *Regions Bank v. Schmauch*,

[2] shall set forth such facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), SCRPC. "Few pleadings will satisfy these requirements, even when verified." 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 3d § 2738 (1998).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Id.* at 112, 410 S.E.2d at 543.

Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is "not merely engaged in a 'fishing expedition.'" *Id.* at 112, 410 S.E.2d at 544.

Respondents are not permitted to simply rest on the allegations in their complaint, especially where, as here, the majority of the factual allegations are conclusory in nature. See Rule 56(e), SCRPC ("an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

"There exists in every contract an implied covenant of good faith and fair dealing." *Tharpe v. G.E. Moore Co.*, 254 S.C. 196, 201, 174 S.E.2d 397, 399 (1970).

from the record the person knew or should have known the operative facts upon which the note was based. *Barry v. Atlas Metals, Inc.*, 152 Ga. App. 437, 263 S.E.2d 179 (1979).

The right of a creditor to apply a debtor's payments as it chooses, however, is qualified by the rule that where the creditor knows or should know the source of the funds from which it is paid, the creditor must, irrespective of the instructions of the debtor, apply those funds so as to protect the rights of the person supplying the funds. *American Oil*, 298 F. Supp. at 534; *Rural Plumbing & Heating Inc. v. Hope Dale Realty, Inc.*, 140 S.E.2d 330 (N.C. 1965); *Northern Va. Sav. & Loan Ass'n v. J.B. Kendall Co.*, 135 S.E.2d 178 (Va. 1964).

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. See also *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997).

In addition, it must be shown that further inquiry into the facts is not needed to clarify the application of the law. *Butts v. AVX Corp.*, 292 S.C. 256, 355 S.E.2d 876 (CLApp. 1987).

In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party opposing summary judgment. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *Hamiter v. Retirement Div. of South Carolina*, 326 S.C. 93, 484 S.E.2d 586 (1997); *City of Columbia v. American Civil Liberties Union*, 323 S.C. 384, 475 S.E.2d 747 (1996).

The rule governing summary judgment provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), SCRPC (emphasis added).

Rule 56(e) requires that affidavits: "[1] shall be made on personal knowledge,

commitment about the same thing, binding on the parties at law or in equity. It is true that where there had been no meeting of the minds on the essentials of the treaty, no contract results. *Barber-Paschal Lumber Co. v. Boushall*, 168 N.C. 501, 84 S.E. 800.

This "meeting of minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. *McClintock v. Skelly Oil Co.*, 232 Mo. App. 1204, 114 S.W.2d 181 (Mo. Ap. 1938).

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement is contemporaneous with the guaranty, . . . the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract." *Hudepohl Brewing Co. v. Bannister*, 45 F. Supp. 201, 203 (D.S.C. 1943) (emphasis added).

Mutual assent to all the essential terms of the agreement is necessary to the formation of a contract. *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 247 S.E.2d 434 (1978)

See *Stanley Smith & Sons v. Limestone College*, 283 S.C. 430, 322 S.E.2d 474 (Cl.App. 1984) (express contract is manifested by words, written or oral; implied contract is manifested by conduct but, as with an express contract, the conduct must demonstrate the parties' mutual assent to all essential terms of the contract); see also *Morgan v. Honeycutt*, 277 S.C. 150, 283 S.E.2d 444 (1981) (silence alone is not conduct constituting acceptance of an offer to contract).

The essential elements of an account stated are (1) that the account is actually stated; and (2) that the parties either expressly or impliedly agreed that it is a true statement and is due to be paid then or at some other specified time. *Wakefield v. Spoon*, 100 S.C. 100, 84 S.E. 418 (1915).

The execution of a note in payment of an open account operates to cut off all defenses to the account to which the maker then had knowledge where it is clear

354 S.C. 648, 660, 582 S.E.2d 432, 439 (Ct. App. 2003) (citations omitted).

The necessary elements of a contract are offer, acceptance, and valuable consideration. *Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993).

A typical contract contains mutual promises and is created by an acceptance constituting a return promise by the offeree. See *Restatement (Second) of Contracts* § 50 cmt. c (1981); *Sauner v. Pub. Serv. Auth.*, 354 S.C. 397, 405, 581 S.E.2d 161, 166 (2003) ("A bilateral contract... exists when both parties exchange mutual promises.").

Moreover, a contract only arises when there is an actual agreement by the parties in which the parties demonstrate a mutual intent to be bound. *Timmons v. McCutcheon*, 284 S.C. 4, 9-10, 324 S.E.2d 319, 322 (Ct. App. 1984).

The rule stated in *Gladden v. Keistler*, 141 S.C. 524, 140 S.E. 161, is here applicable. We quote therefrom the following: "It is not always necessary, in order to give validity to a contract, that it should be signed by both parties; it may be sufficient if it be signed by one party and accepted, held, and acted upon by the other. See *Bulwinkle v. Cramer*, 27 S.C. 376, 3 S.E. 776, 13 Am. St. Rep. 645. In 6 R.C.L. at page 641, it is said: "But the fact that one of the parties has signed the contract does not require that the other party should do likewise. A written contract, not required to be in writing, is valid if one of the parties signs it and the other acquiesces therein. Acceptance of a contract by assenting to its terms, holding it and acting upon it, may be equivalent to a formal execution by one who did not sign it. . . . If a person accepts and adopts a written contract, even though it is not signed by him, he is deemed to have assented to its terms and conditions and to be bound by them." See also 17 Am. Jur.2d, *Contracts*, section 70, at page 408.


South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975).

"A contract is the product of two or more consenting minds making a

CONCLUSION

The trial court, at least abused its discretion in unfairly denying the appellant a trial and the appellant requests that the order reversing the trial court's order and remanding for further proceedings so that the matter can properly be set for trial.

Resubmitted
November 7, 2018



Louis Legare Gardner, Appellant

APPELLANT'S INITIAL BRIEF PROOF OF SERVICE

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEALS FROM JASPER COUNTY
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Referee Judge Benjamin CP Sapp

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**Deutsche Bank National Trust Company, as Trustee for GSAA Home equity Trust 2006-17,
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vs.

**Louise Legare Gardner; One West Bank, National Association s/b/m to IndyMac Bank F.S.
B.; is the Appellant**

Of Whom Louise Legare Gardner is the Appellant

PROOF OF SERVICE


**I, Louise Legare Gardner hereby certify that a copy of the foregoing APPELLANT'S
INITIAL BRIEF was sent via first - class U.S. Mail, postage prepaid and addressed
with proof of mailing as follows:**

Party(is) Served

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**Michael C. Griffin
c/o BRADLEY ARANT BOULT CUMMINGS**

This 25th day of January, 2018



**Louise Legare Gardner
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*Resubmitted
November 7, 2018*