

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

Honorable S. Jackson Kimball, Master-in-Equity

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CASE NO. 2016-CP-46-1001  
APPELLATE CASE NO. 2017-000600

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Alfred Jenkins and Mary Jenkins, Respondents

v.

Ferrara Buist Company, LLC d/b/a Custom Crafted Homes, Appellant

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**APPELLANT'S FINAL BRIEF**

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT BY ORDERING THE RELEASE OF FUNDS THAT WERE DEPOSITED WITH THE COURT DESPITE THE EXISTENCE OF MATERIAL QUESTIONS OF FACT?
  
2. DID THE TRIAL COURT ERR IN GRANTING EQUITABLE RELIEF DESPITE AN ADEQUATE REMEDY AT LAW BEING AVAILABLE?

## STATEMENT OF CASE

This case involves a breach of contract associated with a contract for the construction of a home and sale of land with a final contract price, after change orders, of \$881,868.13. The Respondents paid a total of \$643,760.70 to Appellant.

Respondents filed a complaint in the Court of Common Pleas of York County, South Carolina, alleging causes of action under both theories of equity and law for: 1) equitable lien, 2) restitution, and 3) breach of contract. Respondents claimed damages in the amount of \$665,423.23, plus attorney's fees and costs. Respondents also filed a lis pendens and mechanics lien on the subject property. Respondents requested a jury trial. The Clerk of Court transferred the case to the Master-in Equity sitting as Circuit Judge for York County.

Appellant filed an answer and counterclaim for: 1) breach of contract, 2) slander of title, and 3) cloud on title. The answer and counterclaim also included a motion for injunctive relief, seeking the release of the lis pendens to allow Appellant to sell the subject property in order to mitigate damages. Appellant sold the property for \$850,000.00 in order to mitigate its damages and received \$804,349.66 in proceeds after closing costs. Respondent and Appellant agreed, by consent, to resolve the injunctive relief/lis pendens claims by depositing \$663,395.37 of the proceeds, representing the maximum amount in dispute by either party, with the Clerk of Court pending a trial on the above claims. Opposing Counsel, Herbert Hamilton, sent Judge Kimball a letter, attached to the July 25, 2016 order, stating that the parties "agreed that the Lis Pendens would be released so that the property could be sold and that part of the proceeds of the sale which would be sufficient to cover Respondents' claim would be held in trust." See, July 25, 2016 Order. (R. p. 2). Judge Kimball entered the consent order on July 25, 2016, and Appellant

deposited \$663,395.37 of the sale proceeds with the court. See, July 25, 2016 Order. (R. p. 2).

Thereafter, Respondents filed a motion for partial summary judgment entered September 9, 2016. An affidavit of counsel, Herbert Hamilton, Esq., was filed in support of Respondents' motion for partial summary judgment. Appellant filed a response to the motion for partial summary judgment with a counter affidavit that established material questions of fact regarding the above causes. Upon hearing Respondents' motion for partial summary judgment, the master-in-equity ordered the release of funds to Respondents for the full amount of \$663,395.37 that Appellant deposited with the court. See, November 28, 2016 Order. (R. pp. 5-7). Appellant timely filed a motion to reconsider the order granting partial summary judgment and releasing funds, which was denied, and, as a result, this appeal followed.

## STANDARD OF REVIEW

On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976). However, "[a]n appellate court may decide questions of law with no particular deference to the trial court." In re Campbell, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008). If triable issues exist, those issues must go to the jury. Mulherin-Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005). Moreover, summary judgment should not be granted "where further inquiry into the facts of the case is desirable to clarify the application of the law." Middleborough Horizontal Prop. Regime Council of Co-Owners v. Motedison S.P.A., 1320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995)(citing Baugus v. Wessinger, 303 S.C. 412, 401 S.E.2d 169 (1991)).

This Honorable Court reviews questions of law de novo. N. Am. Rescue Prods., Inc. Richardson, 396 S.C.124, 720 S.E.2d 53, 58 (S.C. Ct. App. 2011). Furthermore, appellate courts owe trial courts no particular deference when reviewing legal rulings over questions of law. Moriarity v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

## ARGUMENT

I. **The trial court erred in granting summary judgment by ordering the release of funds that were deposited with the court despite the existence of disputed material questions of fact.**

A trial court may properly grant a motion for summary judgment 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; Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988). Moreover, the Supreme Court has held in the Hancock case that the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 329-30, 673 S.E.2d 801, 803 (2009).

Here, the trial court stated that it rested on its equitable powers to issue the order to release the funds held by the court. The order effectively granted summary judgment on Respondents' claims under the guise of an order granting equitable relief. All of the Respondents' claims were resolved by the order being appealed and provided Respondents with all the relief sought by their complaint. Although there was confusion about the Order and whether the Court granted summary judgment at all, Judge Kimball, at the February 16, 2017, hearing on Appellant's motion to reconsider, stated, "I granted – if you want to say it that way, I

granted the Respondents' motion for partial summary judgment that – that they had an undeniable claim to the money as a matter of law.” See “Transcript of February 16, 2017 Hearing,” Alfred and Mary Jenkins v. Ferrara-Buist Company, LLC d/b/a Custom Crafted Homes, 2016-CP-46-1001, 8:7-10. (R. p. 94, lines 7-10). At the same hearing the trial Judge also states, “I did not recite in the Order that I was granting the Respondents' motion for summary judgment, partial summary judgment, but that's effectively what I did based on the balance – of the – of the rights and equities of the parties.” Id., at 11:16-20. (R. p. 97, lines 16-20).

However, the trial court was incorrect in granting summary judgment as there were disputed issues of material fact. The supporting affidavit of opposing counsel submitted with his motion for summary judgment alleged, in paragraph 10, that Appellant had been paid in full. See, Respondents' Notice and Motion for Partial Summary Judgment. (R. p. 49). Appellant filed a response, entered on November 21, 2016, as established by filed affidavit of Michael Adam Ferrara, stating that Appellant had not been paid in full and that Appellant suffered damages of at least \$304,956.30. See, Appellant's Response to Respondents' Notice and Motion for Partial Summary Judgment. (R. pp. 60-81). Additionally, there existed additional questions of material fact as to the damages claimed by each party as established by the affidavit of Michael Adam Ferrara. The record further establishes that Appellant's counsel identified that “[s]ummary judgment should be denied on a breach of contract action and that the question of the intent of the parties and who breached first . . . is a question of fact . . . .” See “Transcript of November 17, 2016 Hearing,” Alfred and Mary Jenkins v. Ferrara-Buist Company, LLC d/b/a Custom Crafted Homes, 2016-CP-46-1001, 13:10-15. (R. p. 112, lines 10-15). The Court agreed and Judge Kimball, in response to the first statement, replied “I don't – I don't have any dispute with

that.” Id., at 13:16-17. (R. p. 112, lines 16-17).

Notwithstanding the above, the trial court asserted that it did not grant summary judgment; however, it is impossible to issue an Order on these facts without deciding material questions of fact. By making the ruling that Respondents were entitled to \$663,395.37, the trial court improperly resolved material questions of fact concerning breach and damages. Further, the trial court ruled that Respondents were entitled to the entirety of the funds on deposit with the court, thereby determining that Appellant was not entitled to the money held by the Clerk of Court. These factual determinations are for the jury to decide only after a trial on the merits.

Despite the existence of numerous material factual questions for the jury, as established by the pleadings and supporting affidavit of Michael Adam Ferrara, the trial court improperly granted Respondents’ motion for partial summary judgment. The Appellant has submitted more than a mere scintilla of evidence to withstand the granting of Respondents’ motion for summary judgment and the Order at issue must be reversed.

**II. The trial court improperly granted an equitable remedy when a legal remedy at law was available.**

Equitable relief is generally only available when a party is without an adequate remedy at law. EllisDon Constr., Inc. v. Clemson Univ., 391 S.C. 552, 555, 707 S.E.2d 399, 401 (2011). In this case, the equitable relief of restitution is unavailable to Respondents as a matter of law as Respondents have an adequate breach of contract remedy at law. See Van Robinson Ins. Agency, Inc. v. Harleysville Mut. Ins. Co., 272 S.C. 127, 128-29, 249 S.E.2d 744, 745 (1978) (holding that equity will not intervene if appellant has an adequate remedy at law.)

The Respondents’ pleadings and motion for partial summary judgment establish an adequate remedy at law. Respondents’ affidavit in support of summary judgment acknowledges

this case involves the contract as referenced in paragraph 1 of motion for partial summary judgment and its termination as discussed in paragraph 7 of the motion. See, Appellant's Response to Respondents' Notice and Motion for Partial Summary Judgment. (R. pp. 48-49).

The terms of the contract at issue are not in dispute and neither are its obligations. There has been no claimed defense to deny the existence of the contract or otherwise claim the contract at issue is invalid. The parties agree there is a valid contract.

The trial court's order also acknowledges Respondents' adequate remedy at law. The Order finally determined the majority of the claims of the Respondents and in doing so acknowledged Respondents' adequate remedy at law. The Judge in the Order stated: "I find and conclude that, as a result of the sale of the house, Appellant has been paid in full the contract price based on the parties' contract, except for \$31,861.13." (footnote omitted). See November 28, 2016 Order. (R. p. 6). The language of the order not only establishes a valid contract between the parties but also evidences a remedy upon which the trial Court made its determination.

All of the above was improper considering that the Respondents' had an adequate breach of contract claim. The Order, if allowed to stand, will deny Appellant its right to litigate the breach of contract legal claim before a jury. Moreover, it is well settled that "A party failing to fulfill the requirements of its legal remedy cannot later come to the courts complaining of hardship, seeking an equitable remedy." Ellis Don Constr., Inc. at 401.

#### CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court reverse the circuit court's order dated November 28, 2016.

November 6, 2017



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**CERTIFICATION BY COUNSEL**

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I, the undersigned counsel, do hereby certify that the Appellant's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted this 6<sup>th</sup> day of November, 2017.



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