THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-1673

Yadkin Valley Bank & Trust, ... Respondent,

v.

Oaktree Homes, Inc., Dawne M. Ras and Thomas C. Ras, Daniel Simpson, Above All Services, Inc., Carter Lumber Company, Efficient Painting Contractors, Inc., Creative Concepts, and Solid As A Rock, Inc., ... Defendants,

Of whom

Oaktree Homes, Inc., is the ..... Appellant.

REPLY BRIEF

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When an appellate court reviews a grant of summary judgment, the court views all of the evidence and the inferences to be drawn from the evidence in the light most favorable to the non-moving party. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 329, 673 S.E.2d 801, 802 (2009). So long as there is a scintilla of evidence to support it, this standard asks the court to assume that Oaktree's version of events is true.

According to that version of events, not only did representatives of American Community Bank repeatedly tell Oaktree's representatives and other individuals (like attorneys and bankers) that Oaktree's 51-lot loan would close, but a representative of the bank and a representative of Oaktree executed a written agreement detailing the terms of the loan. Then, a bank vice president took custody of that writing and destroyed it. This may not be how these events happened, but there is *some* evidence that they unfolded this way.

According to the bank's view of the law, this sort of conduct is perfectly acceptable. Thus, statutes and court rules designed to prevent fraud would be used to do nothing other than perpetuate dishonesty. The Court should reject such reasoning, and it should reject the bank's invitations to view disputed facts and inferences in the bank's favor.

I. When a Party Denies That a Written Contract Ever Existed, the Law Allows Oral Evidence of the Alleged Contract.

If a plaintiff brings a claim based on a bank's promise to lend money, the Lender Statute of Frauds requires the plaintiff to have received a written agreement containing the terms of the loan. According to the bank, a plaintiff may not use oral testimony to prove the requirements of this statute because "there are no cases" saying that a party may do so.

Oaktree could only locate one published decision from a South Carolina appellate court addressing the Lender Statute of Frauds. See *Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 691 S.E.2d 158 (2010). That decision has nothing to say about whether a party may use oral evidence to satisfy the statute. The questions presented in that case were whether the statute violated the single-subject requirement of the South Carolina Constitution and whether the documents produced in that case satisfied the requirements of the statute. And the absence of case law does not prove anything — Oaktree could employ the same reasoning and argue that there are no cases holding that it is impermissible for a party to use oral testimony to meet the requirements of this statute.

The statute is silent on any distinction between oral evidence and written evidence. It describes only that a party must "ha[ve] received a writing from the [other party]." See S.C. Code Ann. § 37-10-107(1)(c) (2002). The statute never describes how the party claiming a commitment to lend must prove the receipt of that writing.

As Oaktree's principle brief described, Rule 1008 of the South Carolina Rules of Evidence speaks to this question. Although there are no published cases explaining this feature of the rules, Rule 1008 says that when an issue is raised at to whether a claimed writing ever existed, that dispute is a dispute of fact for the fact-finder. This rule is identical to the federal rule, and as the notes to the federal rule explain, the rationale for treating this as a dispute for the fact-finder is that "[i]f the judge decides that the contract was never executed and excludes the [oral] evidence, the case is at an end without ever going to the jury on a central issue." FED. R. EVID. 1008, Advisory Committee Notes, 1972 Proposed Rules. At no point does the bank's brief address this rule or the rationale behind it.

The bank quotes a Fourth Circuit decision and offers that the statute of frauds requires "every element" of a contract to be proved by a writing. See *Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Ref. Corp.*, 246 F. 375 (4th Cir. 1917). But this decision predates the South Carolina Rules of Evidence. See Rule 1103, SCRE (rules effective in 1995). The citation therefore takes a principle and applies it out of context. *Woodruff Oil* also did not involve a dispute about whether a written contract had ever been in existence. Instead, the case concerned whether the signer of the written contract possessed the authority to bind his employer. And if the statement quoted by the bank was an accurate statement of the law, oral testimony would *never* be admissible to prove the contents of a writing. This is not so. See Rule 1004, SCRE (allowing "other evidence" of contents); Rule 1007, SCRE (discussing testimony that can prove contents); *Wynn v. Coney*, 232 S.C. 346, 102 S.E.2d 209 (1958) (secondary evidence includes oral testimony).

When a party denies the existence of a written contract, the denial creates a factual dispute. Allowing the fact-finder to hear testimony and settle the dispute serves the same sense of fairness that drove courts to create exceptions to the statute of frauds — courts "[would] not permit a statute designed to prevent frauds to be used as an instrument to effect a fraud." *Aust v. Beard*, 230 S.C. 515, 522-23, 96 S.E.2d 558, 562 (1957). This is a dispute for trial, and the notion that oral evidence is categorically inadmissible is not correct.

II. To Find That Oaktree and the Bank Never Had an Enforceable Agreement, the Court Had to Make Findings on Disputed Facts.

The existence of a contract is a question of fact, *Rhode v. Tuten*, 34 S.C. 496, 500, 13 S.E. 676, 677 (1891), and to have a valid contract, all that is required is "a meeting of the

minds" on all essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989).

There is some evidence that Oaktree's representative and the bank's representative intended for the disputed commitment letter to be a binding agreement. Tom Ras testified that he physically signed a commitment letter in May of 2008. (R.p.328, lines 15-22). Tom explained that the typed letter contained several errors, that the parties made handwritten changes to the letter, that *both* parties — Tom for Oaktree and Derek Franklin as a vice president of the bank — made the decision to sign the letter, and that Derek Franklin said that the terms of that letter "[would] hold." (R.p.328- p.330, line 10).

A fact-finder might view this evidence in a number of ways, but it would not be unreasonable for a fact-finder to conclude that although the parties contemplated re-typing and re-executing the agreement at closing, the fact that the parties executed the original document indicates that the parties possessed the mutual intent to be bound to the agreement. The fact-finder could also interpret Mr. Franklin's statement that the letter would "hold" to mean that Mr. Franklin intended to inform Tom Ras that their agreement was firm.

While it is true that parties sometimes execute written documents that are unenforceable "agreements to agree," the evidence does not compel that conclusion here. See, e.g., *Fici v. Koon*, 372 S.C. 341, 347, 642 S.E.2d 602, 604-05 (2007) (written agreement unenforceable because it called for the parties to agree to some of the terms later). The intentions of the parties is a question of fact, and because summary judgment asks the court not to find disputed facts, the Court should reject the bank's argument that as a matter of law, there was no enforceable contract.

III. In Order to Find That the 11-lot Loan Released the Bank from Any Obligation on the 51-lot Loan, the Court Had to Find Facts.

The 51-lot transaction fell apart in June of 2008, and about a month after that, American Community Bank loaned Oaktree the money to purchase 11 of the 51 lots. The bank argues (and the circuit court agreed) that one of the clauses in the mortgage for this loan released the bank from any obligation it might have had on the 51-lot transaction. That clause is a "miscellaneous provision" on the fourth page of the mortgage and reads:

> Amendments. This Mortgage, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Mortgage. No alteration of or amendment to this Mortgage shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

(R.p.356).

This is a "merger" clause. It signifies that the mortgage and the related documents contain all of the terms that are relevant to this mortgage, and it also describes the formalities necessary to execute an amendment to this mortgage.

This is not the same thing as a "novation." A novation is a mutual agreement to substitute a new obligation in place of an old one. *Moore v. Weinberg*, 373 S.C. 209, 217-18, 644 S.E.2d 740, 744 (Ct. App. 2007). This clause does not reference prior agreements on other loans — it signals that within the confines of this particular loan, the terms of this loan and mortgage are contained in the corners of the mortgage and the related documents.

The party asserting a novation has the burden of proving it, both parties must consent that the new agreement is to replace the old one, and the consent of both parties must be apparent. *Id.* at 218, 644 S.E.2d at 744.

It is difficult to see how the bank can claim that there was a novation when it adamantly denies that there was ever any original obligation with respect to the 51-lot loan. If there was no original obligation, there was no existing obligation for the second loan to discharge. See *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 262, 199 S.E.2d 719, 722 (1973) (the circumstances attending the alleged novation must show an intent to substitute a new obligation in place of an existing one). To rule in favor of the bank, the court would have to find first that the bank was obligated on the 51-lot loan (which the bank disputes), and then find that the parties intended the 11-lot loan to be a substitute for the original agreement (which Oaktree disputes). Here again, because summary judgment asks the court not to settle factual disputes, the Court should reject the bank's argument.

IV. The Term "Compulsory Counterclaim" Includes More than Claims That Defeat the Allegations of the Complaint, and Because Oaktree's Counterclaims Are Logically Related to the Bank's Foreclosure Claims, the Counterclaims Are Compulsory.

The bank says the only compulsory counterclaims in a foreclosure action are counterclaims that "impact" the notes and the mortgage at issue in the foreclosure. To support this, the bank cites the Supreme Court's decision *North Carolina Federal Savings and Loan Association v. DAV Corp.* and this Court's decision in *Wells Fargo Bank v. Smith.*

If the bank is right about this principle of law — if a counterclaim must defeat the plaintiff's claim in order to be compulsory — this Court should affirm the decision denying Oaktree's request for a jury trial. To be fair, some of the language in this Court's *Smith* decision is supportive of the bank's argument. See *Smith*, Op. No. 4988 (S.C. Ct. App. re-filed Aug.8, 2012) (Shearouse Adv. Sh. No. 46 at 33, 38).

But the Court should hold that the bank is not right about this principle of law. The test for a compulsory counterclaim is broader than the *Smith* decision suggests. The definition of a compulsory counterclaim is not limited to only those counterclaims that defeat the plaintiff's claims. A compulsory counterclaim is any claim that "arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim." Rule 13(a), SCRCP. South Carolina's definition of compulsory is identical to the federal definition, and in describing this standard, the Fourth Circuit has used phrases like "flexible meaning" and "realistic interpretation." *Sue & Sam Mfg. Co. v. B-L-S Const. Co.*, 538 F.2d 1048, 1051 (4th Cir. 1976). The Fourth Circuit has also described that the purpose of the rule is to force into one lawsuit all of the claims that, in fairness and in the interest of judicial economy, ought to be resolved in one lawsuit. *Id.*

It is true that a court would not have to adjudicate Oaktree's counterclaims in order to decide the claims in the bank's complaint, but it's equally true there is a logical relationship between the bank's foreclosure counterclaims and Oaktree's counterclaims. These claims have a factual and sequential connection to one another. Everyone acknowledges that although the 11-lot transaction was its own loan and mortgage, this loan happened only because the 51-lot transaction fell apart. These were separate loans, but there was a continuous course of dealing.

What is more, the bank's defenses to the counterclaims rely on the existence of a relationship between these transactions. The bank is claiming that a clause in one of the mortgages was a novation in which both the bank and Oaktree agreed to substitute a foreclosure loan for the loan discussed in the counterclaims. It is hard to see how the bank

can claim that these transactions are completely separate, but then use one of the transactions from the complaint to defeat the counterclaims.

The compulsory counterclaim rule is not a rigid rule that traps parties into relinquishing the right to a jury trial if they read the word "transaction" too broadly. Instead, it is a flexible rule that is based in judicial economy. It is more economical to adjudicate the issues between these parties in one case as opposed to two — this is a web of related disputes. Oaktree's answer to the complaint included the defense of unclean hands, see (R.p.54), and because unclean hands would be based on the parties' course of dealing, the factual basis for that defense would include facts that support Oaktree's counterclaims. The Court should hold that the circuit court erred when it held that there was no relationship between the complaint and the counterclaims. The test is broader than the bank says.

V. Arguing That There Is No Evidence of Electronic Data Being Destroyed Does Not Describe the Record Accurately.

Walter Joyce, the bank's director of information systems, explained in a deposition that when American Community Bank merged with Yadkin Valley Bank and Trust, there were only eight employees whose e-mails were retained. (Supp.R.p.5, lines 3-15). Derek Franklin was not one of those employees. (R.p.317). Mr. Joyce explained that while he has the ability to retrieve e-mails between Mr. Franklin and any of the eight retained accounts, he does not have the ability to retrieve any of Mr. Franklin's e-mails that do not involve one of those accounts. Mr. Joyce agreed that such e-mails were irretrievably gone. (Supp.R.p.6, line 24 - p.7, line 6). And while the bank has an e-mail "archive," that archive only contains e-mails generated after the bank installed the archive. (R.p.316, lines 2-17).

Here is how this played out: after the 51-lot loan fell apart in June of 2008 and after American Community Bank filed a complaint seeking to foreclose the 11-lot loan in April of 2009, American Community merged with Yadkin, fired Derek Franklin, and physically destroyed the hard-drives of most of its computers. The bank purged all e-mail accounts except for those of 8 individuals, and the bank installed an archive that would store all e-mails, but only from that moment forward. During this same general period of time, the parties were arguing over the sufficiency of the bank's discovery responses, including the bank's obligation to produced electronically stored information. Oaktree had to file a motion to compel, and the circuit court did not decide that motion until May of 2010. (R.p.23). It is difficult to see how it is possible to read this narrative and conclude that no electronic information was destroyed.

The bank's conduct may have a perfectly reasonable explanation, but at the same time, it is certainly possible that this conduct had a nefarious motivation. This Court's decision is not tied to determining the bank's motives. South Carolina does not have a well-developed body of law regarding discovery sanctions, but persuasive authority explains that the authority to police discovery conduct comes both from the court's procedural rules and from the "inherent power to regulate litigation, preserve and protect the integrity of the proceedings [], and sanction parties for abusive practices." *Shamis v. Ambassador Factors Corp.*, 34 F.Supp.2d 879, 888 (S.D.N.Y. 1999). A proper consideration of a request for sanctions would be guided by these standards and would depend on the relief requested. See *Fields v. Reg'l Med. Ctr. Orangeburg*, 354 S.C. 445, 457-58, 581 S.E.2d 489, 495 (Ct. App. 2003), aff'd in part and rev'd in part, 363 S.C. 19, 609 S.E.2d 506 (2005).

The circuit court did not perform this sort of inquiry. It never described that the bank was obligated to retain information as soon as litigation was reasonably foreseeable, and it never recited that although the bank filed this suit in 2009, the bank destroyed e-mails and computers later that year and did not institute a litigation hold until the end of 2010. (R.p.312, lines 14-15).[1] The circuit court paid no attention to the fact that two days before the hearing on the bank's motion for summary judgment, the bank produced copies of electronically stored information that had never been previously produced and argued that the production of those documents meant that no information had been destroyed. This was four months after the scheduling order called for discovery in this case to end. Instead of inquiring about how this conduct affected the integrity of this litigation and why the bank was waiting until May to produce documents it printed in March, the court wrote that it could not sanction the bank because Oaktree could not prove that a written loan commitment ever existed. As Oaktree's principal brief described, this is circular reasoning.

VI. The Circuit Court's Decision on Negligent Misrepresentation Was Controlled by Incorrect Interpretations of the Law.

The circuit court gave two reasons for granting the bank summary judgment on Oaktree's claim for negligent misrepresentation. The first was that Oaktree could not produce a written commitment to lend. The second was that the bank did not owe Oaktree any duty outside the alleged contract.

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[1]As with discovery sanctions, South Carolina does not have a well-developed body of law describing parties' discovery obligations and when those obligations commence. There is, however, a large body of federal law recognizing that the duty to preserve evidence begins once litigation is reasonably foreseeable. See, e.g., *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311, 1319-20 (Fed. Cir. 2011) (citing *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)).

The first part of the circuit court's ruling will be controlled by the Court's analysis on the Lender Statute of Frauds. That statute forbids a party from maintaining a negligent entrustment claim unless the party has received a writing that satisfies the statute. See § 37-10-107(2)(d). At trial, Oaktree might offer several pieces of testimony to satisfy that statute. Tom Ras might testify as to the details of the writing, see (Supp.R.p.9, line 1 - p.10, line 25), and other individuals may testify as to the writing's existence. For example, Bill Hargrove, the owner of the 51-lots, testified in a deposition "I know a commitment existed because Derek [Franklin] told me it existed[.]" (R.pp.309-310).

The second part of the circuit court's decision should be controlled by the Supreme Court's decision in *Evans v. Rite Aid Corp.*, which explains that a party has a duty to exercise reasonable care in giving information when the party has a pecuniary interest in the transaction. 324 S.C. 269, 274, 478 S.E.2d 846, 848 (1996).

In defending the grant of summary judgment, the bank says that Oaktree did not come to the bank until after it had signed the contract to buy the 51-lot subdivision. Thus, the bank says, any misrepresentation it made did not induce Oaktree to do anything. To support this, the bank cites a portion of Derek Franklin's deposition testimony. In that testimony, Franklin says he does not recall seeing Oaktree's contract to buy the lots prior to the contract having been signed. (Brief of Respondent, p.10 n.5) citing (R.p.394, lines 9-23).

As the party seeking summary judgment, the bank had the obligation of establishing that the material facts were not in dispute and that the bank was entitled to judgment as a matter of law. Rule 56(c), SCRCP. Derek Franklin's deposition testimony establishes nothing other than what his testimony at trial would be. It says nothing of Oaktree's version

of events and does not establish a timeline for the point at which Tom Ras says he began receiving formal or informal assurances that the bank would fund this loan. The Court should reject the argument that Derek Franklin's qualified denials form an independent basis for granting summary judgment on negligent misrepresentation. It should not be a surprise that Derek Franklin's version of events is favorable to the bank.

CONCLUSION

This Court should reverse the grant of summary judgment to Yadkin Valley Bank & Trust on Oaktree's counterclaims for breach of contract and negligent misrepresentation. This result does no violence to the letter or the purpose of the Lender Statute of Frauds. Instead, it honors the principle that disputes of material facts go to the fact-finder.

The Court should also reverse the grant of Yadkin's motion to deny Oaktree a jury trial on those counterclaims. There was a relationship between the loan outlined in the complaint and the loan outlined in the counterclaims.

Respectfully submitted,

March 1, 2013

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Oaktree Homes, Inc., is the ..... Appellant.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and the *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

/Signature page attached

Respectfully submitted,

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March 28, 2013

THE STATE OF SOUTH CAROLINA
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Of whom

Oaktree Homes, Inc., is the ..... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Certificate of Compliance* by mailing a copy of the same via United States Mail with first class postage prepaid to the following address:

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Oaktree Homes, Inc., is the ..... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Motion to File Supplemental Record on Appeal,* the conditionally filed *Supplemental Record on Appeal*, and the final *Brief of Appellant* and *Reply Brief* by mailing a copy of the same via United States Mail with first class postage prepaid to the following address:

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