

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Judge for The Fifteenth Judicial Circuit

Case No. 2012-213156

Scott Lemons and Gold Coast
Resorts.....Appellants

v.

The McNair Law Firm, P.A.....Respondent

APPELLANTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. THE COURT ERRED IN FINDING THE APPELLANT'S UNDERLYING CASE HAD NO VALUE.**
- II. THE COURT ERRED IN FINDING THAT THE APPELLANT'S CLAIMS AGAINST THE MCNAIR LAW FIRM ARE BARRED BY COLLATERAL ESTOPPEAL.**
- III. THE COURT ERRED IN FINDING THAT THE MCNAIR LAW FIRM CAN LIE TO ITS CLIENTS ABOUT A DOCUMENT, AND THEN RELY ON THAT DOCUMENT AS PROTECTION BY RELEASE OR RATIFICATION.**

STATEMENT OF THE CASE

Appellants filed a Complaint against the McNair Law Firm and its former partner Mark McAdams on September 27, 2010. (R. pp. 63) The McNair Law Firm answered on January 3, 2011.

Mr. McAdams was unable to be served and the Appellants proceeded against McNair. When the case came to trial on May 14, 2012 before the Hon. Steven John. In the middle of the Appellants' case, counsel for Appellants informed Judge Johns that Mark McAdams was not a party to the case, as he had never been served and never filed an answer. Even though McNair had never inquired about the status of Mr. McAdams, and had never included him on any notices of depositions or any other matters, claimed that they were surprised by this information and moved for a mistrial. Judge John granted a mistrial on May 15, 2012.

Subsequent to the mistrial, for the first time, McNair Law Firm moved for Summary Judgment with a shotgun motion listing four grounds. (R. pp. 21) The case was assigned to Hon. Larry B. Hyman who heard the motion on July 30, 2012 and allowed the parties to submit additional information. On September 4, 2012 Judge Hyman issued a Summary Judgment Order granting Summary Judgment on every ground raised by McNair. (R. pp. 1) The Appellant received the Order on September 18, 2012 filed a Notice of Appeal on October 12, 2012.

Facts

The Summary Judgment Order does not set forth facts in the light most favorable to Lemons. The facts in the light most favorable to the Appellants are:

McNair Law Firm, represented the Appellants, Scott Lemon and Gold Coast Resorts Inc. (hereinafter Lemons) in several matters between 2006-2008. In the fall of 2006 Mr. Lemons held an option to purchase a piece of property on the intercoastal waterway in Horry County. Mr. Lemons was approached by a buyer named Kenny Hyatt, who purchased this property from him, for a sale price of 1.5 million dollars more than Mr. Lemons' option. (R. pp. 356) The contract signed by Mr. Hyatt was a no conditions contract. (R. pp. 367)

Mr. Hyatt was introduced to Mr. Lemons by a real estate agent Mr. Naomi. Mr. Lemons was ready willing and able to close on the property and anticipated a simultaneous closing. (Sup.R.pp.1-3; 17-18) Mr. Hyatt testified in his deposition that he did not have the funds to close on the closing date, and that if Mr. Lemon's had closed on his property, Mr. Hyatt would not have

been able to close. (R. pp. 346-347; 349-351; 354-355). Mr. Hyatt failed to close on the property, and Mr. Lemons contacted the McNair Law Firm to represent him for this Breach of Contract. Before the action could be filed, Mr. Lemons was sued by the real estate agent for the commission regarding sale of the property. (R. pp. 356) Mark McAdams, a partner with the McNair Law Firm at the time, filed a Third Party Complaint against Mr. Hyatt for failure to close on the no conditions contract. (R. pp. 373) The McNair Law Firm researched Mr. Lemon's case and concluded that Mr. Lemon had a viable case against Hyatt. (R. pp. 456; 458) Mr. McAdams told Mr. Lemons that he should not settle his claims for under one million dollars. (Sup. R. pp.6)

The case proceeded to go through normal discovery, and the case was mediated in May 2008. Mr. Lemons did not know of the mediation, and it is undisputed that he did not attend. (R. pp. 214-221, Sup. R. pp. 13-14) Mark McAdams signed a settlement agreement of the 1.5 million dollar Breach of Contract case against Kenny Hyatt, on behalf of, and without the authority of, Mr. Lemons, in the amount

of five thousand dollars (\$5,000). (R. pp. 392) It's undisputed that Lemons never saw the settlement document.

Several days later, Mr. Lemons was called by Mr. McAdams to come to his office to sign some paper work. At this time Mr. Lemons had never seen the release. (R. pp. 212-213, Sup. R. pp. 7-12; R. pp. 214-221) It is unconstructed that Mr. Lemons was told by Mr. McAdams that Mr. Lemons needed to sign a release of the earnest money in the case, and that Mr. Lemons would receive five thousand dollars of it. (R. pp. 395) Mr. Lemons was told that the case against Mr. Hyatt would go forward. In other words, Mr. McAdams lied to his client Mr. Lemons. (R. pp. 214-221; Sup. R. pp. 13-15; Sup. R. pp. 15-16; R. pp. 233) Mr. Lemons later learned that Mr. McAdams had settled the case without his knowledge for five thousand dollars (\$5,000), and that the paper work that he had Mr. Lemons sign was a complete release of the claims.

The case by the real estate agent Mr. Naomi proceeded to trial against Mr. Lemons, who was represented by Mark McAdams, which resulted in a judgment against Mr. Lemons in excess of two hundred thousand dollars (\$200,000). (R. pp. 400) Mark McAdams was fired by The McNair Law

Firm just after the trial of that case, and the file was transferred to attorney Tommy Brittain, who was able to have the judgment overturned. (R. pp. 419) Mr. Lemon's failure to close on his contract was not an issue at trial or on appeal.

Mr. Lemons is claiming malpractice by the McNair Law Firm, for settling a valuable claim worth 1.5 million dollars, for \$5000, without his knowledge or consent. (R. pp. 442) Mr. Lemons alleges that the reason Mr. McAdams would do such a thing is that, at the same time this was going on, Mr. McAdams secretly replaced Mr. Lemons as a partner in a business deal, that at the time, everyone involved thought was worth millions of dollars. (R. pp. 212-213; Sup. R. pp 7-12; R. pp. 231-232; Sup. R. pp 15) This "business deal", named Global Holdings, was a deal put together by the McNair Law Firm. It has since proven to have been a fraudulent scheme, and is being investigated by the SEC and the FBI.

Mr. McAdams became extremely hateful of Mr. Lemons during this time period because of this conflict of intent. (R. pp. 455) Mr. Lemons has alleged legal malpractice, claiming that the McNair Law Firm, while representing the Plaintiff, breached the standard of care, and was negligent by settling a valuable claim for less than it was worth without the

knowledge or permission of their client. Mr. Lemon's expert witness in this regard is attorney John Freeman. (R. pp. 442)

The Summary Judgment Order misrepresents the facts in several instances including: By insinuating that Lemons agreed to settle his Hyatt case, (R. pp. 2) when the uncontested facts are that Lemons was lied to by McAdams, and that Lemons never intended to settle that claim. (R. pp. 214-221; Sup. R. pp 13-14), by stating that McNair mailed the release to Lemons (R. pp. 2) when Lemons testified that he did not receive it (R. pp. 214-221; Sup. R. pp 13-14), by stating on p.3 of the Order that Lemons "claims not to have read" the release, when it is uncontested that Lemons was not allowed to read it, but was lied to by McNair as to its contents (R. pp 214-221; Sup. R. pp 13-14; R. pp. 231-233; Sup. R. pp 15-16), and by stating in a footnote on pg.5 of the Summary Judgment Order that Lemons has not complained of any other aspect of McNairs representation, when Lemons complained, and presented evidence, that McNair had a conflict of interest with him regarding the Global Holdings Business deal while they were representing him in this contract matter, which influenced their actions. (R. pp. 69, R. pp. 212-213; Sup. R. pp 7-12; R. pp. 455)

LEGAL STANDARD

Summary judgment shall only be granted “if 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), SCRCP. “In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonable be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Quail Hill, LLC v. County of Richland*, 387 S.C. 223,235,692 S.E.2d 499, 505 (2010).

ARGUMENT

I. THE COURT ERRED IN FINDING THAT THE APPELLANTS' UNDERLYING CASE HAD NO VALUE.

The Trial Court's first ground for Summary Judgment, was that Mr. Lemon's claims against Hyatt in the underlying matter were worthless. This very issue was researched by McNair Law Firm prior to bringing the underlying suit. The record contains a memorandum from McNair Law Firm addressing the issue as to whether or not there was liability on the behalf of Mr. Hyatt, which the answer was "probably yes".(R. pp. 456)

The case the McNair Law Firm relied on at that time was *Searles v. Alud*, 118 S.C. 430, 111, S.E. 785 (1922). That case holds that not having title to property at the time of a contract for sale, is not sufficient to indicate an impossibility of compliance.

At the time of performance, Mr. Hyatt indicated he was not able to go forward on his contract. (R. pp. 347 - 355) Both the realtor's attorneys and McNair thought Mr. Lemons breach of contract action was viable. (R. pp. 458)

Mr. Lemons did not go through with the purchase of the property once he learned that Hyatt did not intend to honor his contract. (R. pp. 151) He testified that he was ready, willing and able to, but instead, wanted to wait and see how the breach of contract law suit unfolded before making that decision. (R. pp 188-189, Sup. R. pp 4-5; R. pp. 190-191; Sup. R. pp 19)

Mr. Lemons was ready, willing and able to obtain title to the property prior to Hyatt's breach of contract. He testified that the deal was supposed to be a simultaneous closing. Mr. Hyatt testified that he was not willing or able to close on his contract. Once learning that Hyatt was going to breach the contract however, Lemons was under no duty to perform a futile act.

A repudiation of a contract before time of performance gives the adverse party the right to treat the entire contract as broken, and sue immediately for damages. There is no need to tender performance or compliance with conditions precedent. 17 Am Jur 2nd Contracts 737,740.

The contract signed by Hyatt contained no conditions or contingencies. However, the trial court created a rule of law of "dependent concurrent conditions".

This term is not found in Westlaw's (Rest. Contr.) database covering the Restatement of Contracts.

However, a South Carolina case is directly on point. *Dubignon v. Loud*, 7 Rich. 193, S.C.L. 193, 1854 WL 2797 (S.C. App.L. 1854) holds: “A vendor cannot maintain an action for the purchase-money, nor (as we have determined in this case) for damages, when his part of the agreement, unexecuted, is precedent, or concurrent, without an actual performance, on his part, or tender and refusal-without executing and offering a conveyance, where that is his duty, unless the purchaser has discharged him from so doing.” The court goes on to recognize the rule of law that: “The party must show he was ready; but if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further, and do a nugatory act”.(id.) The law is clearly settled that Mr. Lemons was under no obligation to perform the futile or “nugatory” act of closing to maintain his breach of contract action against Hyatt.

Other states recognize the same proposition. In *Angle v. Marco Builders Inc.*, 128 Ariz. 396, 626 P2d 126 (1981), the court held, “Actual tender becomes unnecessary where it would have been a futile act, as here, where appellees could not concurrently tender performance by conveying the deed since no house had yet been constructed.” This is a basic rule of contract law. Further, this was never an issue in the underlying case, at trial or at the Court of Appeals.

II. THE COURT ERRED IN FINDING THAT THE APPELLANTS' CLAIMS AGAINST THE MCNAIR LAW FIRM ARE BARRED BY COLLATERAL ESTOPPEAL.

The Summary Judgment Order found that, Mr. Lemons is somehow collateral estopped from pursuing the McNair Law Firm for their negligence in the underlying case. Judge Stroman, in rendering his order in the Motion to Reconsider, found that it would make little sense for a real estate commission to be earned on a contract of sale, in which the purchaser admits he never intended to go through with the contract he signed.(R. pp. 400) In fact Judge Stroman found that Mr. Hyatt's conduct was "fraudulent". (R. pp. 400) Clearly, reading Judge Stromans order, Scott Lemons had a very viable case against Mr. Hyatt, not only for breach of contract, but also for fraud. The South Carolina Court of Appeals, in reviewing Judge Stromans order, confirmed it as modified. The Court of Appeals never mentioned Judge Stromans use of the "null and void" terminology. The Court of Appeals based its decision on the fact that Mr. Hyatt did not fit the definition of a ready, willing and able buyer, due to his unwillingness to go through with the contract.

Further, the Summary Judgment Order fails to recognize that Mr.

Lemon's cause of action against Mr. Hyatt, was lost prior to any of the activities mentioned in the Summary Judgment Order regarding the appeal. These issues would be non-existent, had McNair Law Firm not settled their client's case without his knowledge, lied to him about the meaning of the release he signed, all to protect their interest in an unrelated business deal in which they had a conflict with Mr. Lemons at the time.

The Summary Judgment Order claiming that Lemons is collateral estopped from pursuing a legal malpractice action against the McNair Law Firm based on a misinterpretation of the ruling on the Motion to Reconsider in the underlying case, which was not adopted by the South Carolina Court of Appeals, is clearly in error. Both the Order of Reconsideration, and the Court of Appeals opinion regarding that Order, shows that both Courts felt that there was actionable behavior on behalf of Mr. Hyatt as towards Scott Lemons, in both contract and fraud. The Summary Judgment ruling misinterpreted the law of Collateral Estoppel, as well as the underlying Orders.

III. THE COURT ERRED IN FINDING THAT THE MCNAIR LAW FIRM CAN LIE TO ITS CLIENTS ABOUT A DOCUMENT, AND THEN RELY ON THAT DOCUMENT AS PROTECTION BY RELEASE OR RATIFICATION.

The Summary Judgment Order also finds that Mr. Lemon's claims fail based on Mr. Lemon's signing a mutual release and accepting money in the underlying case, and finds that signing of the release and accepting the money was a ratification of that claim. Ratification has three elements: 1) acceptance of benefits 2) full knowledge of facts 3) affirmative election. *Lincoln v. Aetna Cas. & Surety Co.* 300 S.C. 88,386 S.E.2d 801 (Ct App.1989). It is clear from facts, taken in the light most favorable to Lemons, that he did not have full knowledge of the facts of the Release. Mr. Lemons testified that his lawyer from McNair Law Firm lied to him about the contents of the release.

The Summary Judgment Order found that Lemons did not challenge findings that the case against Hyatt settled for \$5,000. In fact, as to Hyatt; It had settled. *Crowley v. Harvey & Battey* 237 S.C. 68, 488, S.E.2d 334(1997) sets out that if a client signs a release based on negligent advice from his attorney, although he cannot collaterally attack the Release as to the third party, he can maintain a malpractice against his attorney, and is

allowed to keep the proceeds from that underlying matter in an effort to mitigate his damages.

In this case, Mr. Lemons claims the McNair Law Firm, lied to him, by advising him that the Mutual Release was only releasing the earnest money in this matter, and that it did not stop his lawsuit against Mr. Hyatt for damages from moving forward. Based on that advice, Mr. Lemons signed the Release.

The Summary Judgment Order finding that Lemon's claims are barred by Judicial Estoppel is in error, because at the time Lemons took the position in Court filings, that his case against Hyatt had been settled, they in fact were settled as to Hyatt. Mr. Lemon's sole remedy at that time was against his attorney. Crowley Id.

CONCLUSION

The Order of Hon. Larry B. Hyman granting Summary Judgment is in error, and should be overturned, for the reasons stated above. This case should be remanded for trial

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark W. Hardee', written over a horizontal line.

October 10, 2013

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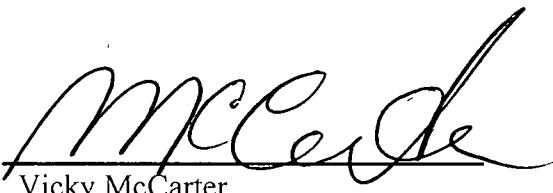
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Respondents.)
_____)

IN THE COURT OF APPEALS
IN THE FIFTEEN JUDICIAL CIRCUIT
Case No. 2012-213156

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 2013, I served, via first class mail, at the address below, a copy of the Appellant's Final Brief pertaining to the above-referenced action.

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Date: 10-15-13

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The McNair Law Firm, P.A.Respondents

CERTIFICATE OF COUNSEL

The undersigned certified that this Appellant's Final Brief complies with Rule 211(b),
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