

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 10-CP-26-9113
Appellate Case No. 2012-213156

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

v.

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

APPELLANTS' REPLY BRIEF

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Statement of the Issues on Appeal

I. THE RESPONDENT'S ASSERTION THAT ONLY (8) EIGHT FACTS ARE RELEVANT TO THIS APPEAL IS WRONG.

II. LEMONS' CASE AGAINST HYATT HAD VALUE, AS HYATT WAS NOT READY, WILLING AND ABLE TO CLOSE ON HIS CONTRACT WITH LEMONS AND LEMONS WAS READY, WILLING AND ABLE TO CLOSE ON HIS CONTRACT PRIOR TO THE SALE TO HYATT.

III. THE HYATT CONTRACT WAS NOT NULL AND VOID AS TO LEMONS DUE TO HYATT'S FRAUD, AND LEMONS HAD A VALUABLE FRAUD CLAIM AGAINST HYATT.

IV. THE RESPONDENT TOTALLY MISUNDERSTANDS THE RULING IN *CROWLEY V. HARVEY AND BATTEY P.A.* 327 S.C. 68, 488, S.E.2D 334 (1997).

ARGUMENT

I. THE RESPONDENT'S ASSERTION THAT ONLY (8) EIGHT FACTS ARE RELEVANT TO THIS APPEAL IS WRONG

The Respondent's claim on page (8) eight of its Brief, that there are only (8) eight facts relevant to this Appeal is ridiculous. These are just some of the additional facts, also un-contradicted, which clearly have a huge impact on the issues relevant to this Appeal.

1. Lemons was ready, willing and able to close on his contract prior to the Hyatt closing.
2. McNair Law Firm had a conflict of interest with their client Scott Lemons, because a partner with the firm was secretly involved with trying to squeeze Lemons out of a business deal.
3. Mark McAdams attended a mediation without his client, and settled the case without the knowledge or permission of the client.
4. Mark McAdams never provided Scott Lemons with the settlement agreement.
5. Mark McAdams misrepresented to Scott Lemons the contents of the release he signed, and as to what the (\$5,000) five thousand dollar payment represented.

6. Mr. Lemons believed, based on the advice of his attorney, that he was signing a release only as to the earnest money, and that the (\$5,000) five thousand dollar check he received was the return of the earnest money.
7. Judge Stroman's finding that the Hyatt contract was null and void was based on his finding that Hyatt committed fraud towards Lemons.

II. LEMON'S CASE AGAINST HYATT HAD VALUE, AS HYATT WAS NOT READY, WILLING AND ABLE TO CLOSE ON HIS CONTRACT WITH LEMONS, AND LEMONS WAS READY, WILLING AND ABLE TO CLOSE ON HIS CONTRACT PRIOR TO THE SALE TO HYATT.

A seller of real property does not have to have the actual title to a property, prior to entering into a contract to sell it. South Carolina law does require that the seller be ready, willing and able to have the title to the property prior to the actual closing, the fact scenario faced by the Court in this instance.

Scott Lemon's uncontested testimony was that he was ready, willing and able to close on his contract of sale prior to the Hyatt closing. [Sup. R. pp. 1-3; Sup. R. pp. 17-18] Mr. Hyatt clearly testified that he not only had no intention on closing on the Lemons contract, but he was unable to. [R. pp. 347-355] The Hyatt closing was never scheduled, and Hyatt made no effort to schedule the closing. The deal died on the vine.

South Carolina law does not require a seller to perform a futile act.

Dubignon v. Loud, 7 Rich. 193, S.C.L 193, 1854, WL 2797 (S.C. App.L.

1854) Mr. Lemons, therefore, was not required to close on his contract on the subject property. Once he realized that the Hyatt closing was not going to take place, he made the determination that his best course of action was to sue Mr. Hyatt for Breach of Contract or Fraud.

III. THE HYATT CONTRACT WAS NOT NULL AND VOID AS TO LEMONS DUE TO HYATT'S FRAUD, AND LEMONS HAD A VALUABLE FRAUD CLAIM AGAINST HYATT.

Judge Stroman, in the underlying case, was asked to decide whether or not Mr. Lemons owed his real estate agent Mr. Naomi money based on the Lemons-Hyatt contract. Based on that scenario, Judge Stroman found that Mr. Hyatt had no intention of closing on the property, and was actually fraudulent in entering into the contract with Mr. Lemons. Therefore, as to the Lemons- Naomi contract, the Hyatt contract should be determined null and void. Judge Stroman obviously did not, nor would have concluded that Mr. Hyatt, by fraudulently entering into the contract with Mr. Lemons, could somehow be exonerated from that contract based on his own fraud. In other words, Judge Stroman's finding was obviously that the Lemons – Hyatt contract was null and void as to being a condition precedent as to the Lemons-Naomi contract, not that the contract was null and void as between Lemons and Hyatt. Reading of the Court of Appeals opinion regarding that Order, clearly shows that the Court of Appeals came to the same conclusion.

Further, Judge Stroman and everyone else looking at the case recognized that a fraud cause of action would exist against Mr. Hyatt under that fact scenario. Therefore, Mr. Lemons had a valuable claim against Mr. Hyatt either for Breach of Contract or Fraud.

IV. THE RESPONDENT TOTALLY MISUNDERSTANDS THE RULING IN *CROWLEY V. HARVEY AND BATTEY P.A.* 327 S.C. 68, 488, S.E.2D 334 (1997).

The Respondent totally miscomprehends the legal conclusions of *Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 386, S.E.2d 801 (Ct. App 1989), *L.F.S Corp v. Kennedy* 287 S.C 162, 337 S.E.2d 209 (1985) and *Crowley v. Harvey & Battey, P.A.*, 327 S.C. 68, 488 S.E.2d 33 (1997) as applied to the facts of this case. The undisputed facts of this case are that Mr. Lemons was given incorrect advice as to the contents of a Release, and the purpose of a (\$5,000) five thousand dollar payment by his attorney, Mr. McAdams of the McNair Law Firm. It is undisputed that Mr. Lemons was told by his attorney that the Release was only for earnest money that was to be returned, and had no effect on the claims against Mr. Hyatt. Lemons had the same understanding when he cashed the (\$5,000) five thousand dollar check.

In *Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 386 S.E.2d 801 (Ct. App. 1989) the client knew the attorney acted without his authority prior to him accepting the benefits. That is not the facts in this case. In fact, the opposite is true. This was the same situation in *L.F.S Corp. Kennedy*, 287 S.C. 162, 337, S.E.2d 209 (1985). Had Lemons found out that McNair had

settled his lawsuit without his permission or knowledge, prior to his signing the release, he could have challenged the settlement at that time since he had not signed off on it, or had not accepted the proceeds ratifying the agreement. In this case, McNair, in an effort to keep Lemons in the dark regarding the agreement, misrepresented the terms of the release, told him the release would not end the claims against Hyatt, but that it would merely release the earnest money.

Relying on his own attorney's advice, as he is allowed to under the law, Mr. Lemons signed the release, and cashed the (\$5,000) five thousand dollar check. It was after the case against Hyatt had been settled by McNair without his knowledge, and he had signed the release and cashed the check, that Mr. Lemons found out that he had fully released Mr. Hyatt. At that point, Mr. Lemons was bound by that contract as to Hyatt, and just like in *Crowley v. Harvey & Battey P.A.*, 327 S.C. 68, 488 S.E.2d 334 (1997) his only option was to file a claim against his attorney for the damages caused by his wrong advice.

As far as the agreement between Lemons and Hyatt, that agreement could not be attacked based on Mr. Lemons' assertions that his own attorney gave him the wrong advice. The case is on point with *Crowley v. Harvey & Battey P.A.*, 327 S.C. 68, 488 S.E.2d 334 (1997), and it is the opposite of *L.F.S Corp. Kennedy*, 287 S.C. 162,337, S.E.2d 209 (1985) and *Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 386 S.E.2d 801 (CT. App. 1989).

Upon Lemon's signing the release upon his attorney's advice, and accepting payment, Hyatt was released as a matter of law. Mr. Hyatt had no part in the wrongful dealing by The McNair Law Firm. Mr. Lemon's sole remedy was against his attorney. (See *Crowley*)

CONCLUSION

Based on the above, the Summary Judgment Order of the Honorable Larry B. Hyman should be reversed, and this case should be remanded for trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark W. Hardee', with a long horizontal line extending to the right.

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October 10, 2013

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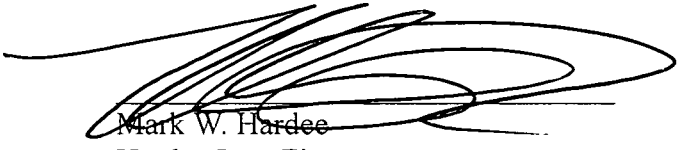
v.

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CERTIFICATE OF COUNSEL

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

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Firm, P.A.,)
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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 Reply Brief pertaining to the above-referenced action.

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Date: 10-15-13

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