THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2014-001733

Tidelands Bank, Respondent,

v.

J.R. Gregory Ventures, LLC, Marilyn T. Schmitt and the Meridian Owners Association, Inc., Defendants,

Of whom J.R. Gregory Ventures, LLC and Marilyn T. Schmitt are the Appellants.

BRIEF OF APPELLANTS

Peter G. McGrath, Esquire
SC Bar # 101480
McGrath Law Firm, PA
802 Johnnie Dodds Boulevard
Mount Pleasant, SC 29464
pmcgrath@mcgrathlawfirm.com
(843) 606-2755
Attorney for Appellants

TABLE OF AUTHORITIES

CASES

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STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR IN GRANTING SUMMARY JUDGMENT AGAINST MARILYN T. SCHMITT INDIVIDUALLY BASED ON A GUARANTY THAT WAS ONLY SIGNED IN HER CAPACITY AS A "MEMBER" OF J. R. GREGORY VENTURES, LLC?

STATEMENT OF THE CASE

The Respondent, Tidelands Bank ("Tidelands") commenced this action on September 11, 2013, by filing a complaint for foreclosure in the Court of Common Pleas in Charleston County. R. pp. 29–55. Tidelands named J. R. Gregory Ventures, LLC ("the LLC"), Marilyn T. Schmitt ("Schmitt") and The Meridian Owners Association, Inc. ("Meridian") as the Defendants. R. p. 29–30 Tidelands sought foreclosure and a deficiency judgment.[1] R. p. 29–36.

The LLC and Schmitt submitted their Answer on November 13, 2013 (*hereinafter* "Answer"). R. pp. 22–24. The LLC and Schmitt's Answer denied many of the allegations set forth in the Complaint including any allegation that Marilyn T. Schmitt was in any way personally liable for any debt owed Tidelands. See R. pp. 22–23. The LLC and Schmitt also asserted several affirmative defenses including failure to state a claim, failure to conform to foreclosure procedures, and that Schmitt should be dismissed as a party because she was not personally liable on the guaranty of the LLC's obligations. R. p. 23–24. No discovery was completed except a preliminary deposition of Schmitt taken before interrogatories were exchanged.

On April 17, 2014, Tidelands filed Notice of Motion and Motion for Summary Judgment to be heard at the pre-trial conference. Tidelands submitted their

[1] Appellant withdraws its appeal in Appellate Case No. 2014-001734. In that matter, the Guaranty was clearly signed by the individual. A formal motion to withdraw the appeal in that case will follow.

Memorandum in Support of Summary Judgment on April 25, 2014. R. pp. 117–166. LLC and Schmitt also submitted their Memorandum in Opposition to Summary Judgment on April 25, 2014. R. pp. 84–116. The Motion for Summary Judgment was heard on April 28, 2014, by the Honorable Mikell R. Scarborough ("the Hearing"). The court's Order was issued June 9, 2014 ("Order"). R. pp. 5–14. It was issued prior to interrogatories and when the case was in its infancy. The Order found that Schmitt was personally liable on the Guaranty. See R. p. 12.

Schmitt and LLC filed Defendants J.R. Gregory Ventures, LLC and Marilyn T. Schmitt's Notice of Motion and Motion to Reconsider and Alter and Amend the Judgment on June 17, 2014. The Form 4 Order denying the Motion to Reconsider was filed July 15, 2014. R. p. 4. LLC and Schmitt filed their Notice of Appeal by hand delivering the Notice to the Charleston County Court of Common Pleas on August 8, 2014 and on the same date sending the Note to this Court via U.S. Mail.

The Order Confirming Deficiency Judgment Against Defendants, J.R. Gregory Ventures, LLC and Marilyn T. Schmitt was filed September 10, 2014 and confirmed the LLC and Schmitt owed Tidelands a sum of $75,054.61 plus interest accruing from August 22, 2014, until the sum was paid. R. pp. 1–3.

FACTS

The LLC is a limited liability company organized and existing under the laws of the State of South Carolina. Schmitt is a member of the LLC. On or about March 22, 2006, the LLC, by and through its Member, Schmitt, executed and delivered to Tidelands a Note in the amount of $201,050.00 and a Mortgage on real property.

Schmitt, ***solely in her capacity as authorized member of the LLC and not individually***, executed a Guaranty on the same day as the Note and Mortgage were executed, March 22, 2006. See R. p. 54. Schmitt is adamant that the property was bought solely for investment purposes and that that the only "guarantor" was the LLC. See R. pp. 98–99. The Guaranty is the controlling document and the sole basis for Tidelands' claim. The LLC made payments on the Note until approximately March 15, 2013. See R. pp. 32, 34–35.

There are major factual disputes and the parties disagree regarding the legal interpretation of the Guaranty and regarding the intent of the parties. Tidelands' affidavit differs from Schmitt's and many critical facts are conflicting. In addition, no discovery was completed prior to the Hearing. Schmitt did submit to a preliminary deposition prior to any documents being exchanged and the controlling document favors Schmitt on its face.

The bank lending official that presided over the closing may be a critical witness who was not deposed. In fact, no discovery was obtained from Tidelands. For this reason and others, at the Hearing, Appellant again asked for time to conduct discovery.

The court found that Schmitt was personally liable although the plain language of the controlling document, the Guaranty, was only signed by Schmitt in her capacity as a member of the entity.

ARGUMENT

I. SUMMARY JUDGMENT WAS NOT APPROPRIATE BECAUSE THERE WERE FACTUAL ISSUES IN DISPUTE.

A motion for summary judgment shall only be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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. "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." Lord v. D & J Enterprises, Inc., 407 S.C. 544, 552–53,757 S.E.2d 695,699 (2014) (quoting Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000)).

In determining whether any triable issues of fact exist, "the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party." Johnston v. Bowen, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Even if there is no dispute as to evidentiary facts, summary judgment should not be granted if there is disagreement concerning the conclusion to be drawn from those facts, or if further inquiry into the facts of the case is desirable to clarify the application of the law. Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557, 561 (Ct. App. 2004).

Here, Tidelands was the moving party and prematurely requested summary judgment. The court did not abide by the required standard and did not construe the disputed facts against the moving party and did not recognize the disagreement on the facts.

The court erred when it granted summary judgment because Schmitt met the "mere scintilla of evidence" standard, but the court improperly applied the "plain language" principle of contract construction, improperly considered extraneous documents to determine the intent of the parties to an unambiguous contract, and, in the alternative, if the court found the Guaranty to be ambiguous, the intent of the parties is a question of fact that requires a hearing beyond summary judgment.

A. The court erred in granting summary judgment against Marilyn Schmitt because the plain language of the Guaranty shows she signed it solely as a "member" of J.R. Gregory Ventures, LLC and not individually.

The determination of whether a contract is ambiguous is a question of law. Duncan v. Little, 384 S.C. 420, 424, 682 S.E.2d 788, 790 (2009). When interpreting a contract, the court must first determine if the contract is clear and unambiguous. Milliken & Co. v. Morin, 399 S.C. 23, 36, 731 S.E.2d 288, 295 (2012). To do this, the contract is evaluated as a whole. McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). When the contract is unambiguous, it is construed using the plain, regular, and ordinary meaning of the terms used by the parties. Id.; Blakeley v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976). The language of the contract determines the intent of the parties. Ward v. West Oil Co., Inc., 379 S.C. 225, 239, 665 S.E.2d 618, 625 (Ct. App. 2008), *vacated on other grounds* 387 S.C. 268, 692 S.E.2d 516 (2010). "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." Blakeley, 266 S.C. at 73, 221 S.E.2d at 769.

In the present case, the fact that the Guaranty was solely signed by Schmitt in her capacity as a member of LLC is clear and unambiguous. In Paragraph A of the Guaranty,

it states in part, "the Undersigned guarantees to Lender [Tidelands] the payment and performance of the debt." R. p. 54. Schmitt signed the Guaranty:

"Marilyn T. Schmitt, Member."

(emphasis added) R. p. 54.

The LLC was specifically named in the Guaranty as the "Borrower." The naming of the LLC in combination with Schmitt signing as "Member" makes it clear and unambiguous that Schmitt signed in her capacity as a member of the LLC, not as an individual. The "member" phrase tells the reader that the contract is solely enforceable against an entity, not an individual.

Schmitt stated in her affidavit that she signed all the documents related to the loan transaction solely as a member of LLC and never as an individual. R. p. 98. The clear and plain language of the Guaranty and Schmitt's signature on the Guaranty combined with Schmitt's Affidavit meet the "mere scintilla" standard. Thus, the lower court erred in taking the drastic measure of granting summary judgment against Schmitt.

B. The lower court erred in considering the Commitment Letter in determining the parties' intent because the Guaranty is the best evidence and other documents are inadmissible parol evidence.

When a contract is unambiguous, the language of the contract alone determines the full force and effect of the contract. McGill, 381 S.C. at 185, 672 S.E.2d at 574. Consideration of other documents is improper. See id. "The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." Crafton v. Brown, 346 S.C. 347,

351, 550 S.E.2d 904, 906 (Ct. App. 2001). If a court uses parol evidence to explain the terms of or the unambiguous instrument itself, it is a reversible error. Id. at 355, 907–08.

During the hearing on the Motion for Summary Judgment, Tidelands' counsel pointed out to the court the Commitment Letter that was attached as Exhibit 4 to Tony Young's Affidavit and provided with Tidelands' Memorandum in Support of Motion for Summary Judgment. See R. p. 70, line 19– p.71, line 5; R. pp. 189–190. Schmitt's counsel objected and moved to strike the Commitment Letter from the record on several grounds including relevance, merits, and authenticity. R. p. 71, lines 6–13. The court noted the objection. R. p. 71, lines 14–17.

The Guaranty is a contract that is wholly contained within the two pages that comprise the document. See R. p. 54–55. Commitment letters are not a part of the final Guaranty and are therefore not part of the controlling document, are not the best evidence, and are often changed, renegotiated, or withdrawn. For these reasons, the commitment letters are not the basis of the obligation and are not part of the Guaranty at issue.

When announcing the ruling from the bench that found Schmitt to be personally liable despite signing the Guaranty "comma member," the court stated part of its reasoning was that this was "the understanding based on the commitment letter and based upon the reading of the document."[2] R. p. 81, lines 3–5, 11–13. The court found Schmitt was to be personally obligated. See R. p. 12.

The combination of the statements during the hearing and in the Order indicates that the court improperly considered material outside of the four corners of the Guaranty

[2] Counsel and the court engaged in a discussion on this issue and it was obvious to all that the Commitment Letter was relied upon.

when determining the intent of the parties. Therefore, the court's consideration of this improper, extraneous evidence prejudiced Schmitt and constitutes a reversible error.

C. In the alternative, the court erred in granting summary judgment because when unable to determine the intent of the parties based on the contract alone, interpreting an allegedly ambiguous contract is question to be decided by the trier of fact.

A contract is ambiguous when it is capable of more than one meaning or the meaning is unclear. Penton v. J.F. Cleckley & Co., 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997). When parties to a contract do not clearly express their intentions and create an ambiguous contract, the construction of the contract is a question for the trier of fact. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799,802 (Ct. App. 2008) (*citing* Soil Remediation Co. v. Nu-Way Envtl., Inc., 325 S.C. 231, 234, 482 S.E.2d 554, 555 (1997); Lacke v. Lacke, 362 S.C. 302, 309, 608 S.E.2d 147, 150 (Ct.App.2005)). Therefore, when there is a question of construction of an ambiguous contract, summary judgment is improper "because the intent of the parties cannot be gathered from the four corners of the instrument." Pee Dee Stores, 381 S.C. at 241, 672 S.E.2d at 802 (*citing* Gilliland v. Elmwood Prop., 301 S.C. 295, 299, 391 S.E.2d 577, 579 (1990) (internal citations omitted); HK New Plan Exch. Prop. Owner I, LLC v. Coker, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct.App.2007); Bishop v. Benson, 297 S.C. 14, 17, 374 S.E.2d 517, 518-19 (Ct.App.1988)).

At best, Tidelands must ignore the plain text of the Guaranty and suggest that the document is ambiguous. However, it appears that is what the lower court determined. However, there is strong evidence that there was a material issue of fact and that summary judgment should not be granted: (1) there are opposing affidavits as to the intent of the parties, and (2) the court considered documents outside of the Guaranty itself to help

determine the intent of the parties. First, the affidavits submitted with the parties Memorandum prior to the Hearing directly oppose each other as to the intent of the parties when they entered into the Guaranty. See R. pp. 167–208; R. pp. 98–99.; and R. p. 116. This is a factual dispute that should have led to further discover and then a trial.[3] This case was in its infancy and significant discovery had not begun. Summary judgment was inappropriate at this juncture in this case.

The second issue arose from the materials considered by the court during the hearing. Again, when announcing the findings at the conclusion of the hearing in the present case, the court indicated that it determined the intent of the parties not on what was contained within the four corners of the Guaranty itself, but based on the reading of the Commitment Letter in combination with the Guaranty. R. p. 26, lines 1–13. The Commitment Letter is not a part of the Guaranty and shows that the ruling was based on disputed interpretations and was parol evidence. See R. pp. 189–190; R. pp. 54–55. Schmitt's counsel moved to strike the Commitment Letter for several reasons, including relevance. R. p. 71, lines 6–14. Since the court did not sustain this objection and went on to consider the Commitment Letter in making his ruling during the hearing, it would indicate that the court found the Guaranty to be ambiguous. As such, following Pee Dee Stores, it was improper to grant summary judgment in this case. Therefore, the court's

[3] The Respondent argued and the lower court adopted the view that it was a unilateral mistake on the part of Schmitt when she signed the Guaranty as "Member." However, in order for the theory of unilateral mistake to apply, there must be "no ambiguity in the terms of the contract, and the other contractor has no notice of such mistake and action in perfect good faith." Alderman v. Bivin, 233 S.C. 545, 551–52, 106 S.E.2d 385, 388 (1958). Here again, the lower court seemed to find that the Guaranty was ambiguous and Tidelands had notice of the "mistake" as they should have noted Schmitt signed as "Member" at the closing and corrected any misunderstanding then. Therefore, the theory of unilateral mistake is inapplicable in this situation.

grant of summary judgment should be reversed and the case should be remanded for further discovery and trial.

CONCLUSION

The lower court made a reversible error in failing to consider the plain language of the Guaranty that was signed, "Marilyn T. Schmitt, Member." In addition, the court impermissibly considered parol evidence to determine the intent of the parties to an unambiguous contract. Alternatively, the lower court erred in granting summary judgment regarding the construction and intent of the parties to an ambiguous contract. Therefore, LLC and Schmitt respectfully ask this Court to reverse the lower court's finding of Marilyn T. Schmitt's personal liability on the Guaranty if it deems the Guaranty unambiguous, and to reverse the grant of summary judgment and remand the case for further discovery and trial of the disputed facts or at least for full discovery and an opportunity for further fact finding.

Respectfully submitted,

January 21, 2015

Peter G. McGrath, Esq.
SC Bar No.: 101480
McGrath Law Firm, PA
802 Johnnie Dodds Boulevard
Mount Pleasant, SC 29464
pmcgrath@mcgrathlawfirm.com
(843) 606-2755
Attorney for Appellants J.R. Gregory Ventures, LLC and Marilyn T. Schmitt

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CERTIFICATE OF COUNSEL

The undersigned, Peter G. McGrath, certified that this final Brief of Appellants and Reply Brief complies with Rule 211(b), SCACR.

January 21, 2015

Peter G. McGrath, Esq.
SC Bar No. 101480
McGrath Law Firm, PA
802 Johnnie Dodds Boulevard
Mount Pleasant, SC 29464
(843) 606-2755
Attorney for Appellants J.R. Gregory Ventures, LLC and Marilyn T. Schmitt