

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.

REPLY BRIEF OF APPELLANTS

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

TABLE OF AUTHORITIES

CASES

Klutts Resort Realty, Inc. v. Down'Round Development Corp., 268 S.C. 80, 232 S.E.2d
20 (1977) 3, 4

OTHER AUTHORITIES

Rule 56, SCRCP 2

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?

FACTS

The Appellants reiterates the facts as set forth in the Brief of Appellants. Br. Appellants 2–3, Sept. 29, 2014. We note that the facts as represented by Respondent are significantly different. Br. Resp't 4–7, Nov. 25, 2014.

ARGUMENT

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

Pursuant to Rule 56(c), SCRPC, "if 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."

In the present case, there are questions as to not only the facts, but also the conclusions to be drawn from those facts, and the application of law. Specifically, at issue in this appeal is the fact Marilyn T. Schmitt ("Schmitt") signed a guaranty ("Guaranty") for a promissory note ("Note") to Tidelands Bank ("Tidelands") solely in her capacity as a member of J.R. Gregory Ventures, LLC ("LLC").

- A. Because the plain language of the Guaranty does not indicate Schmitt will be personally liable, Respondent's argument regarding a party reading a contract is without merit.

While Respondent argues that a party is charged with knowledge of the contents of a document that would have been gained by reading the document, reading a document does not change the contents of the document or the nature of the contents. See Br. Resp't 9–11. Specifically, Respondent argues that, had Schmitt read the Guaranty, she would

have learned that she was to be held personally liable in the event of a default by J.R. Gregory Ventures. Br. Resp't 11. The Respondent's argument is truly immaterial.

Schmitt signed the Guarantee, a document she reviewed and interpreted to indicate that the LLC was the party guaranteeing the Note when she signed it as "***Marilyn T. Schmitt, Member***" (emphasis added). R. p. 54. The Guaranty did not plainly define who the guarantor was and did not specify that the individual was liable. See R. p. 54. It said simply, "the Undersigned" when describing the party that would be liable under the terms of the Guaranty. R. p. 54. The "Undersigned" was "Marilyn T. Schmitt, Member." R. p. 54.

Any argument other than that Schmitt unambiguously signed the Guaranty solely in her capacity as a member of the LLC would indicate that there was ambiguity in the document. As argued in the Brief of the Appellants in Section I, Subpart C, the interpretation of an allegedly ambiguous document is for the trier of fact and summary judgment is inappropriate.

B. Respondent's reliance on *Klutts* is misplaced because there are meaningful factual and procedural differences between *Klutts* and the present case.

Klutts Resort Reality, Inc. v. Down'Round Development Corp. is an appeal from an order granting specific performance at the end of a non-jury trial. 268 S.C. 80, 82, 232 S.E.2d 20, 22 (1977). The pertinent facts of the case involve three documents, what the court deemed the "Basic Contract," the Addendum, and the promissory note. See id. at 84-5, 232 S.E.2d at 22-3. There were two groups of plaintiffs, Klutts, the owner of the land, and the original purchasers, whose interest in the development the defendants, Down'Round and its officers, agreed to purchase. Id. As to the buy-out of original purchasers' interest by the defendants, the Basic Contract stated in part, "It is agreed

to herein may be paid by a *Promissory Note of Down'Round endorsed and guaranteed by all of its stockholders, individually*" Id. at 87, 232 S.E.2d at 24. The Court determined that even though there was evidence the officers executed the document in their corporate capacity, the terms of the Basic Contract were clear and that the parties explicitly stated that the note would be guaranteed by the stockholders individually. Id. at 87–8, 232 S.E.2d at 22–24.

The second question in Klutts was whether the officers of Down'Round were also liable in their individual capacity to Klutts based on an Addendum to the Basic Contract where the words "*individually by*" had been added beside the officers' names prior to the officers signing in their corporate capacities. Id. at 84, 88, 232 S.E.2d at 23–5. The court found that the presence of the words "individually by" created an ambiguity and witness testimony, as well as other evidence, was used to determine the intent of the parties. Id. at 89–90, S.E.2d at 25.

In the present case, it cannot be argued that the language of the Guaranty was similar to the language of the Basic Contract in Klutts. The Basic Contract in Klutts explicitly states that the officers will be individually liable while the Guaranty in the present case simply says, "the Undersigned guarantees. . . ." R. at 54. Schmitt signed the Guaranty "Marilyn T. Schmitt, Member." R. p. 54. This is not a case like Klutts where the plain language of the document clearly conveys the intent of the parties to bind corporate officers as individuals.

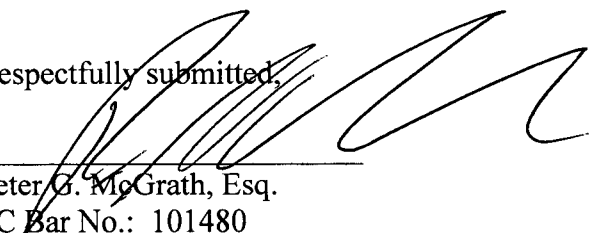
If any comparison can be made to Klutts, it is in that this case should have the opportunity for a trial due to ambiguity of the terms of the Guaranty and Schmitt signing it in her corporate capacity. See R. at 54; Br. Appellants 5–6. In this situation, as asserted

in the Appellants' Brief, Section 1, Subpart C, summary judgment is not appropriate where there is an ambiguity in the contract that the trier of fact must interpret. See Br. Appellants 8-9.

CONCLUSION

The lower court erred in granting summary judgment because Schmitt unambiguously signed the Guaranty in her capacity as an officer of the LLC. Alternatively, any ambiguity in the document would be grounds for reversing summary judgment since the interpretation of an ambiguous contract is a question for the trier of fact. Therefore, the Appellants ask this Court to reverse the Order granting summary judgment and remand the case for further discovery and trial.

Respectfully submitted,



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

January 21, 2015

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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*