

JULIE J. ARMSTRONG

CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258

RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org

62



PETER H. ROSENTHAL
647 PLEASANT ST
WEYMOUTH MA 02189-3202

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order Denying Pltffs Motion for Reconsideration

CASE NO: 2017CP1001395

Thomas F True III , plaintiff, et al VS William L Tuorto

This judgment was entered on the 29th day of July, 2019, and notice mailed first class on Thursday, August 01, 2019, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Thomas F. True, III, Individually and as)
 Trustee of Jate IV Trust,)
)
 Plaintiff,)
)
 Vs.)
)
 William L. Tuorto,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

CASE NO.: 2017-CP-10-1395

ORDER DENYING PLAINTIFF'S
 MOTION FOR RECONSIDERATION

RECEIVED

AUG 28 2019

SC Court of Appeals

BY

JULIE J. ARMSTRONG
 CLERK OF COURT

2019 JUL 29 PM 3:15

FILED

This matter came before me upon Plaintiff's Motion for Reconsideration. After considering Plaintiff's motion, Plaintiff's memorandum in support of motion for reconsideration and Defendant's memorandum in opposition to Plaintiff's motion for reconsideration, this court hereby denies Plaintiff's motion to reconsider for the following reasons.

This matter initially came before me on March 13, 2019 to consider Plaintiff's motion for summary judgment. After the hearing, and with careful and considerate deliberation, including Plaintiff's memorandum, counsel for Defendant's memorandum, oral arguments on March 13, 2019, and a review of the entire record, this Court granted Defendant's motion for summary judgment. That order was signed on April 22, 2019 and filed with the Charleston County Clerk of Court on April 26, 2019.

Subsequent to the order, the Plaintiff filed a motion for reconsideration and a memorandum in support of the motion on May 9, 2019. The Defendant filed a memorandum in opposition of Plaintiff's motion for reconsideration on May 29, 2019.

Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Regions Bank v. Schmauch*, 582 S.E.2d 432 (Ct. App. 2003). Once a party moving for summary judgment meets the initial burden

showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Regions Bank*, 582 S.E.2d at 438. Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. *SSi Med. Servs., Inc. v. Cox*, 392 S.E.2d 789 (1990).

I find that Plaintiff has failed to come forward with specific facts showing there is a genuine issue for trial. Rather, Plaintiff recites allegations of his complaint which are allegations of the complaint and not specific facts showing there is a genuine issue for trial. Rule 56(e), SCRCF, requires that supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Although Plaintiff submitted the affidavit of John True, who was not a party to the contract at issue, his affidavit fails to set forth facts as would be admissible in evidence. The Parol Evidence Rule provides that where the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements made contemporaneously with or prior to its execution are inadmissible to contradict, vary or explain its terms. *Ray v. S.C. Nat'l Bank*, 314 S.E.2d 359 (1984). The facts relied upon by Plaintiff in the affidavit are clearly inadmissible and do not comply with the requirements of Rule 56(e), SCRCF.

§32-3-10(4) of the S.C. Code of Laws provides that any contract for an interest in land must be in writing and signed by the party against whom it is seeking to be enforced. §27-35-20 of the S.C. Code of Laws provides that failure to put such a contract in writing renders it void. A contract required to be in writing by the Statute of Frauds cannot be orally modified. *Windham v. Honeycutt*, 302 S.E.2d 856 (1983). In *Windham* the court held evidence of oral modification of the real estate contract violates Statute of Frauds. The facts relied upon by Plaintiff in the affidavit

are inadmissible pursuant to the Parol Evidence Rule and the Statute of Frauds and thus cannot support Plaintiff's claim.

Plaintiff argues that the allegations regarding the bronze lions and furnishings is a separate claim from the contract at issue. Rule 56(e), SCRCF, clearly provides that opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The affidavit submitted by Plaintiff clearly does not comply with the requirements of Rule 56(e) SCRCF. The affidavit states "upon information and belief, upon the foreclosure sale, the said bronze lions and the furnishings belonging to the Plaintiff remain in the possession of Defendant and have not been returned to Plaintiff." The affidavit clearly fails to provide that the affiant had personal knowledge of facts that would be admissible in evidence to support the claim. The affidavit and the Plaintiff have failed to come forward with any admissible evidence to support this claim. As provided in my prior order granting summary judgment, it is clear that the Plaintiff seeks to relitigate the same and identical issues regarding Defendant's alleged breach of the lease agreement which was litigated and determined by order of the Honorable J.C. Nicholson, Jr. on March 31, 2014 and filed with this court on April 3, 2014. That order was not appealed by Plaintiff and is the law of the case. When an issue of fact or law is actually litigated and determined by valid and final judgment, and the determination is essential to the judgment, the determination is conclusive and a subsequent action between the parties. *McNaughton-McKay Elect. Co. of N.C. v. Andrich*, 324 S.C. 275, 482 S.E2d 264 (Ct. App. 1996).

Based on the foregoing, I hereby deny Plaintiff's motion to reconsider.

AND IT IS SO ORDERED.

July 22, 2019


Honorable William Seals