

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Deadra L. Jefferson, Circuit Court Judge

Case No.: 2018-CP-10-0872

Patricia B. Holliday.....Appellant,

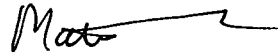
v.

Ross S. Holliday.....Respondent.

INITIAL BRIEF OF APPELLANT

Charleston, South Carolina
December 20, 2019

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ERR IN HOLDING THAT THE APPELLANT RELEASED HER CLAIMS ON THE NOTE IN THE MARITAL SETTLEMENT AGREEMENT?
- II. DID THE TRIAL COURT ERR IN HOLDING THAT S.C. CODE ANN. § 36-3-604 APPLIED TO BAR THE APPELLANT'S CLAIM?
- III. DID THE TRIAL COURT ERR IN ITS INTERPRETATION OF S.C. CODE ANN. § 62-2-507(C)(2)?
- IV. DID THE TRIAL COURT ERR IN HOLDING THAT THE APPELLANT HAD A BENEFICIAL INTEREST IN THE NOTE AS OPPOSED TO A LEGAL INTEREST AS A JOINT HOLDER WITH RIGHTS OF SURVIVORSHIP?

STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of summary judgment to Respondent Ross S. Holliday ("Respondent") on October 11, 2019 and November 15, 2019 denial of the Appellants' motion for reconsideration (collectively, the "Summary Judgment Order"). This case involves a claim for payment on a note given by the Respondent to the Appellant and her former husband, Warren Holliday. The Appellant and Warren Holliday held that Note as joint holders with rights of survivorship. There is one basis for the order granting summary judgment – that Appellant Patricia B. Holliday ("Appellant") transferred her legal interest in the note to Warren Holliday at the time of their 2013 divorce and relinquished all of her rights to Mr. Holliday pursuant to their Marital Settlement Agreement. This holding was made despite the fact that the Marital Settlement Agreement contains no language which supports a finding that the Appellant relinquished her claim on the note. On the contrary, all of the evidence in the record suggests otherwise.

STATEMENT OF FACTS

On or about June 18, 2004, Warren Holliday and the Appellant loaned \$2,000,000 to the Respondent, and the loan was memorialized by a signed promissory note. (Note). Warren Holliday and the Appellant, who were married at the time, were co-equal joint holders of the Note with rights of survivorship.

The Respondent claims, without proof, that he made several payments on the Note during the marriage of Warren Holliday and the Appellant. Specifically, the Respondent alleges that Warren Holliday (the joint holder with the Appellant) orally demanded repayment in 2005, and Respondent claims to have made three payments to Warren Holliday totaling roughly \$810,000 between 2005 and 2007. (Respondent Tr. at 23). Respondent also claims that he also made a \$371,613 payment on December 31, 2010 upon the sale of some real property he alleges he

owned. (Respondent Tr. at 52-53). The Appellant has no knowledge of any repayments on the Note while she was married to Warren Holliday. (Appellant Tr. at 31).

Warren Holliday and the Appellant divorced on December 9, 2013. (Divorce Decree). The Divorce Decree incorporated by reference the August 9, 2013 Marital Settlement Agreement between Warren Holliday and the Appellant. (Marital Settlement Agreement). The Marital Settlement Agreement set forth the terms of the agreement between Warren Holliday and the Appellant concerning division of their marital assets. At the time of the Marital Settlement Agreement, and upon entry of the divorce decree, Warren Holliday and the Appellant remained co-equal joint holders of the Note with right of survivorship.

The Marital Settlement provides for division of marital property, but does not specifically address the Note. (Marital Settlement Agreement). In addition, the Marital Settlement Agreement does not contain a “catch-all” provision dealing with property that is not otherwise addressed. The Marital Settlement Agreement provides for seven categories of property to be divided in the Equitable Apportionment and Division of Property section. (Marital Settlement Agreement at 5). The categories are generally described as follows:

- A. Marital Abode. – This section addresses the residence of Warren Holliday and the Appellant and provides that this asset shall be owned by a trust benefitting the Appellant.
- B. Vehicles. – This section identifies two specific vehicles and provides that the Appellant will retain ownership and Warren Holliday relinquishes any claim to those vehicles.
- C. Household Goods. – This section provides for division of household goods and precious metals. It provides that the Appellant retains possession of the household goods and precious metals will be divided equally.

- D. Business Assets. – This section provides that “Warren [Holliday] presently owns or holds an interest in several limited liability companies, corporations or other business entities, a schedule of which is attached hereto as Exhibit A. The Parties agree that Warren shall retain and continue full ownership and interest in any and all such companies and other business assets which Warren holds at this time.” The Note was not listed in Exhibit A, and was never held by one of Warren Holliday’s limited liability companies, corporations or other business entities. Furthermore, the Note was held jointly by Warren Holliday and the Appellant. There is no evidence in the record that the Note was deemed a business asset.
- E. Accounts. - This section provides that Warren Holliday and the Appellant retain control of their own individual financial accounts.
- F. Trust Funds and Other Inherited Property. This section provides that Warren Holliday and the Appellant will retain all trust funds and inherited property they individually own.
- G. Other Items of Property. – This section provides for distribution of “all other personal property acquired during the marriage, including, but not limited to, household furnishings, appliances, bank accounts, retirement accounts, money situated in other accounts, jewelry, sporting equipment, and all other personal property of value.” As to these items of property, the Marital Settlement Agreement provides that “Warren [Holliday and the Appellant] have made a physical division of [the property]”, and that “the parties each release the other from all claims of interest to any monies or assets in the possession of the other or titled in the name of the other party unless stated otherwise herein.” There is no

evidence in the record concerning the distribution or transfer of any ownership interest in the Note between Warren Holliday and the Appellant.

H. Debts. This section relates to debts and obligations that Warren and Patricia incurred, and not money owed to them.

The Respondent claims that, after the divorce, he assisted Warren Holliday in paying off another loan, and that Warren Holliday forgave the debt on the Note. (Respondent Tr. at 33-37; 72-73). The payment that allegedly resulted in the forgiveness of the debt occurred on January 22, 2016, when Zeezrom Properties, LLC paid \$1,104,374.46 to Synovus Bank. (Respondent Tr. at 71). The source of this payment was not from the funds of the Respondent. Rather, it was funded by a capital contribution made by Warren Holliday to Zeezrom Properties, LLC – a business wholly owned by Warren Holliday. (Respondent Tr. at 72). The Respondent claims that Warren Holliday then marked the Note “paid in full,” but he does not have a copy of that alleged document. (Respondent Tr. at 73). Further, the Appellant never forgave the amount owed to her on the Note. (Appellant Affidavit).

The Appellant made a demand for payment on the Note on July 12, 2017. (Demand Letter). The Respondent made no payments in response to that demand, and the Appellant filed this lawsuit on February 20, 2018. (Complaint).

ARGUMENT

This appeal is to be determined using the summary judgment standard applied by the circuit court. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). In evaluating a motion for summary judgment, a court must view “the evidence and all reasonable inferences . . . in the light most favorable to the non-moving party.” *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007). “[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 in

order to withstand a motion for summary judgment.” *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). This standard requires merely “the slightest amount of relevant evidence” on an issue to warrant denial of summary judgment. *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 278, 701 S.E.2d 742, 743 (2010) (dissenting opinion).

I. THE CIRCUIT COURT ERRED IN HOLDING THAT THE APPELLANT RELEASED HER CLAIMS ON THE NOTE IN THE MARITAL SETTLEMENT AGREEMENT.

At all relevant times, the Appellant and Warren Holliday held the Note jointly with a right of survivorship. (Note). Therefore, each of them had an independent ownership interest in the Note at the time of the Marital Settlement Agreement and Divorce Decree in 2013.¹ The trial court ruled that, as a matter of law, the Appellant released her own independent interest in the Note by entering into the Marital Settlement Agreement. (Oct. 11, 2019 Order at 5-7). However, the Marital Settlement Agreement is not a one-sided document in which the Appellant simply released her claims or transferred her personal interest in the Note. It is a mutual document by which Warren Holliday and the Appellant released claims against each other. (Marital Settlement Agreement). It does not address the Note (explicitly or implicitly), does not contain a “catch-all” provision that provides that either Warren Holliday or the Appellant released claims to property not specifically addressed, and certainly cannot be interpreted to read that the Appellant either released her claims or transferred her interest in the Note to Warren

¹ South Carolina law provides for disposition of assets held with a right of survivorship among spouses who later divorce. Prior to January 1, 2014, the right of survivorship was not severed. *Duncan v. Investors Diversified Services, Inc.*, 285 S.C. 467, 472, 330 S.E.2d 295, 297-298 (1985) (divorce did not revoke beneficiary designation in a retirement plan as a matter of public policy). Effective January 1, 2014, S.C. Code Ann. § 62-2-507 provides that “[e]xcept as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce or annulment, the divorce or annulment of a marriage: (2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship.” Therefore, there is a legal issue regarding whether the right of survivorship between Warren Holliday and the Appellant was severed at the time of the divorce in December of 2013. However, it is clear that, at worst, the Appellant retained a one-half interest in the Note after the divorce under South Carolina law.

Holliday as a matter of law. The trial court committed plainly reversible error in holding otherwise.

A. The Marital Settlement Agreement does not address the Note, expressly or implicitly.

The trial court held that the “Marital Settlement Agreement, by its terms, resolved all issues of ownership of marital assets [between Warren Holliday and the Appellant].” (Oct. 11, 2019 Order at 5). The trial court cited a long quote from the agreement which provides for a mutual release between the parties, and quotes two provisions of the Equitable Apportionment and Division section, but inexplicably never states which of the sections unequivocally provides that the Appellant transferred her rights to the Note. (Oct. 11, 2019 Order at 2-3). That is because there is no such section. The Marital Settlement did not address the Note explicitly or implicitly.

As set forth above, the Marital Settlement Agreement sets forth seven categories of property to be divided in the Equitable Apportionment and Division of Property section of the agreement. It is undisputed that none of these categories expressly addressed the Note. The trial court appears to cite two of the categories from the Equitable Apportionment and Division of Property section without specifically holding that the Note falls within either one: Business Assets and Other Items of Property. (Oct. 11, 2019 Order at 2-3).

The Business Assets subsection of the Marital Property Agreement provides, in relevant part:

Warren [Holliday] presently owns or holds an interest in *several limited liability companies, corporations or other business entities, a schedule of which is attached hereto as Exhibit A*. The parties agree that Warren shall retain and continue full ownership and interest in any and *all such companies* and other business assets which Warren holds at this time. [The Appellant] hereby relinquishes and waives any claim she may have in or against these business assets, except as provided in the Patricia Holliday trust.

(Marital Settlement Agreement) (emphasis added). It is undisputed that the Note was held by Warren Holliday and the Appellant in their individual names and not in a limited liability company, corporation or other business entity. The Note is not listed in Exhibit A (and Exhibit A was not submitted into the record). Further, the Appellant testified that the Note was a personal loan to the Respondent. (Appellant Tr. at 25). Therefore, the Note is clearly not a “business asset” that was assigned or transferred to Warren Holliday.

The Other Items of Property subsection of the Marital Settlement Agreement provides:

Warren and [the Appellant] have made a physical division of all other personal property acquired during their marriage, including, but not limited to, household furnishings, appliances, bank accounts, retirement accounts, money situated in other accounts, jewelry, sporting equipment, and all other personal property of value . . . [and] . . . the parties each release the other from all claims of interest to any monies or assets in the possession of the other or titled in the name of the other party unless stated otherwise herein.

(Marital Settlement Agreement at 6).

The trial court cited no evidence that any physical division of the Note was agreed to by Warren Holliday and the Appellant, much less any division that transferred the Appellant’s interest in the Note to Warren Holliday. The only evidence of the parties’ intent is found in documents which clearly demonstrate that the parties did not intend for the Appellant’s interest in the Note to be transferred and released. In the Appellant’s affidavit, she clearly stated that she did not agree to release claims on the Note by operation of the Marital Settlement Agreement. (Holliday Affidavit). In addition, the Appellant submitted a financial declaration in the divorce proceeding on December 10, 2013 – several months after the Marital Settlement Agreement – in which she claims ownership of her interest as a holder of the Note. (Financial Declaration).

The trial court based its ruling on the language of the Marital Settlement Agreement, which is anything but unambiguous as it relates to the Note. Indeed, it is only where an

agreement is clear on its face and unambiguous that the court may “interpret its lawful meaning and the intent of the parties as found within the agreement.” *Smith-Cooper v. Cooper*, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001). However, a contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. *Id.* The determination of the parties’ intent is then a question of fact, and the trial court must be reversed if the Marital Settlement Agreement was ambiguous as to the disposition of the Note. *Gilliland v. Elmwood Properties*, 301 S.C. 295, 300, 391 S.E.2d 577, 579-580 (1990) (reversing summary judgment order where language of subject contract was ambiguous).

The Marital Settlement Agreement provides that Patricia Holliday and Warren Holliday “made a physical division of personal property.” There is complete ambiguity as to whether or how physical division of the Note was made. As set forth above, the Appellant affirms that she did not agree to transfer her interest in the Note to Warren Holliday, and her affirmation is supported by the financial declaration she submitted to Family Court after the Marital Settlement Agreement was signed. (Appellant Affidavit) (Appellant’s Financial Declaration). Neither the Respondent nor the trial court cited any evidence that Warren Holliday and the Appellant intended that the Note would become the property of Warren Holliday. The fact is that the Marital Settlement Agreement did not address the Note, and therefore both the Appellant and Warren Holliday retained their respective interests after the divorce. The trial court therefore erred in holding that the Marital Settlement Agreement unambiguously assigned the Appellant’s ownership rights in the Note to Warren Holliday.

- B. The Marital Settlement Agreement contains no “catch-all” provision which assigns or transfers any property not otherwise addressed to Warren Holliday.**

The trial court inexplicably and erroneously agreed with the Respondent that the Marital Settlement Agreement provides that any property not specifically addressed was given to Warren Holliday. (Oct. 11, 2019 Order at 5) (“When Warren and Patricia obtained a divorce, they entered into a Marital Settlement Agreement that gave Warren all property (whether personal or business) that was not specifically given to the [Appellant].”); (Oct. 11, 2019 Order at 6) (“The Court finds that the language of the Marital Settlement Agreement provides [the Appellant] expressly released any and all claims she had to the marital assets, both business and personal or [the Appellant] and Warren, except as provided in the Agreement.”). The Marital Settlement Agreement contains no such language, and the trial court failed to cite the language to which it referred. As set forth above, the Marital Settlement Agreement contains a mutual release and a section on the disposition of marital property, none of which unambiguously address the disposition of the Note or of any property not otherwise addressed. Therefore, the trial court clearly erred in holding that the Marital Settlement Agreement unambiguously assigns all property not otherwise addressed to Warren Holliday.

II. THE TRIAL COURT ERRED IN HOLDING THAT S.C. CODE ANN. § 36-3-604 APPLIED TO BAR THE APPELLANT’S CLAIM.

The trial court erred in holding that the Appellant discharged the Respondent’s obligation under the Note. The Court held that Patricia Holliday discharged Ross Holliday’s obligation on the Note, as a matter of law, pursuant to S.C. Code Ann. § 36-3-604. This holding evidences a complete misreading of the statute.

S.C. Code Ann. § 36-3-604 provides, in relevant part:

- (a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party’s signature, or the addition of words to the instrument indicating

discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed record.

A plain reading of the statute makes it clear that the discharge must be made by some direct act related to the Note itself. The “person entitled to enforce an instrument,” *i.e.* the Appellant, must mark the instrument or renounce her rights against the Respondent in a signed record. This is made clear in *In re Washington*, 581 B.R. 150, 158 (Bkrcty. D.S.C. 2017), the only case to interpret the statute. In that case, the court held that the issuance of an IRS Form 1099-C “Cancellation of Debt” was insufficient to evidence a cancellation of amounts owed on a guaranty pursuant to S.C. Code Ann. § 36-3-604, particularly where there was no evidence that that guaranty or related loan documents had been delivered to the debtor as discharge of the debt or intentionally destroyed or marked cancelled. *Id.* The Appellant did not discharge Respondent’s liability by signing an ambiguous Marital Settlement Agreement with a third party (Warren Holliday) that contains no reference to the Note, much less an intent to transfer ownership or discharge. As set forth herein, the Appellant had no intent to discharge the Respondent from his obligations on the Note. Therefore, the trial court committed reversible error by holding that the Appellant had discharged the Respondent’s obligation as a matter of law.

III. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF S.C. CODE ANN. § 62-2-507(C)(2).

The trial court held that S.C. Code Ann. § 62-2-507 did not operate to “preserve” Appellant’s interest in the Note. (Oct. 11, 2019 Order at 6). This evidences a complete misunderstanding of the applicable law and the Appellant’s argument.

The only relevance of Section 62-2-507 and prior common law is that South Carolina law has always provided for disposition of joint property held with right of survivorship among divorced spouses when that property is not otherwise addressed in a divorce settlement. Prior to

January 1, 2014, the right of survivorship was not severed. *Duncan v. Investors Diversified Services, Inc.*, 285 S.C. 467, 472, 330 S.E.2d 295, 297-298 (1985) (divorce did not revoke beneficiary designation in a retirement plan as a matter of public policy). Effective January 1, 2014, S.C. Code Ann. § 62-2-507 provides that “[e]xcept as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce or annulment, the divorce or annulment of a marriage: (2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship .”

Therefore, since the Marital Settlement does not address the Note, the issue is whether S.C. Code § 62-2-507 retroactively applied to sever the Appellant’s interest from Warren Holliday at the time of their divorce (leaving her with one-half of the Note) or whether prior law controlled, making the Appellant the holder of the entire Note by survivorship at the time of Warren Holliday’s death in 2016. This issue was not decided by the trial court and is not on appeal. However, since the trial court misconstrued the statute and the Respondent’s argument, its order is in error on this point and must be reversed.

IV. THE TRIAL COURT ERRED IN HOLDING THAT THE APPELLANT HAD A BENEFICIAL INTEREST IN THE NOTE RATHER THAN A LEGAL INTEREST AS A JOINT HOLDER WITH RIGHTS OF SURVIVORSHIP.

Although not clear, it appears that the trial court found that the Appellant had a beneficial interest, rather than legal interest, in the Note. This is absolutely incorrect. A “beneficial interest” is a “right or expectancy (such as a trust or an estate) as opposed to legal title to that thing.” Black’s Law Dictionary 149 (7th ed. 1999). The Appellant was, and is, a legal holder of the Note with right of survivorship. (Note). She had a legal right to enforce it, and was not a beneficiary. See S.C. Code § 36-3-301 (holder is entitled to enforce negotiable instrument).


Therefore, the Appellant had her own legal interest in the Note that was not an expectancy dependent on Warren Holliday. The trial court's citations to case law concerning release of a beneficial interest in a marital agreement are wholly improper, and the entire ruling was in error.

CONCLUSION

For the reasons set forth above, Appellant Patricia B. Holliday respectfully requests that this Court reverse the circuit court's grant of summary judgment to Respondent Ross S. Holliday ("Respondent") on October 11, 2019 and November 15, 2019 denial of the Appellants' motion for reconsideration and remand this case for trial.

Charleston, South Carolina
December 20, 2019

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Appellate Case No. 2019-002002
WBD Ref: 101682.0001.1

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Appellant's Initial Brief and Designation of Matter, with Proof of Service. Please file the originals and return the filed copies to me via the enclosed, self-addressed stamped envelope.

By copy of this letter with enclosure, we are serving same on all counsel of record.

Thank you for your assistance.

Sincerely,

Womble Bond Dickinson (US) LLP

A handwritten signature in black ink that reads "Matt" followed by a long horizontal flourish.

Matthew Tillman

Enclosures

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Deadra L. Jefferson, Circuit Court Judge

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Patricia B. Holliday.....Plaintiff,

v.

Ross S. Holliday.....Respondent.


PROOF OF SERVICE

I do hereby certify that on the 20th day of December, 2019, I served a copy of the within Initial Brief of Appellant on all counsel of record via First Class Mail, postage pre-paid and addressed as follows:

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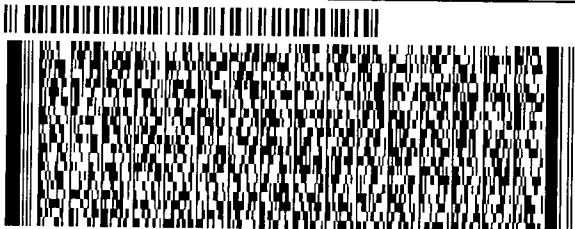
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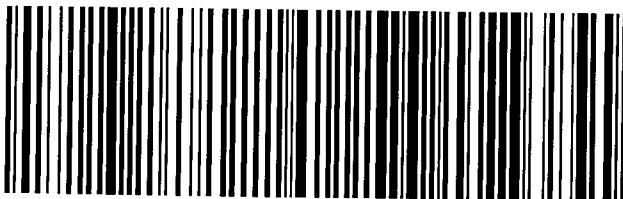
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