

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.

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REPLY BRIEF OF APPELLANT

FEB 27 2020

SC Court of Appeals

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Charleston, South Carolina
February 25, 2020

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
APPELLANT’S REPLY	1
I. THE RESPONDENT FAILS TO CITE ANY LANGUAGE FROM THE MARITAL SETTLEMENT THAT SUPPORTS HIS CONTENTION THAT SUMMARY JUDGMENT WAS APPROPRIATE.	1
A. The Marital Settlement Agreement is not a “business asset” of Warren Holliday.....	1
B. The circuit court did not rule that the Promissory Note fell within the “Other Items of Property” category in the Marital Settlement Agreement.	2
C. There is no evidence that the Promissory Note was one of the “Other Items of Property” held by Warren Holliday.....	3
D. The Respondent is not a third-party beneficiary of the Marital Settlement Agreement and cannot benefit from the release between Patricia Holliday and Warren Holliday found in the “Other Items of Property” provision.....	3
E. The only evidence in the record is that the Marital Settlement Agreement did not address the Promissory Note and that Patricia Holliday retained her interest.....	4
F. South Carolina law specifically provides for the disposition of marital assets held with a right of survivorship but not specifically addressed in a divorce decree.	5
II. S.C. CODE ANN. § 36-3-604 DOES NOT OPERATE TO DISCHARGE APPELLANT’S CLAIM ON THE PROMISSORY NOTE.	6
III. THE TRIAL COURT DID NOT RULE THAT THE APPELLANT’S CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS, AND THEREFORE THAT ISSUE IS NOT PRESERVED FOR REVIEW.....	7
CONCLUSION.....	8

TABLE OF AUTHORITIES

Cases

<i>Duncan v. Investors Diversified Services, Inc.</i> , 285 S.C. 467, 330 S.E.2d 295 (1985)	5
<i>S.C. DOT v. First Carolina Corp.</i> , 372 S.C. 295, 641 S.E.2d 903 (2007)	2, 7
<i>Touchberry v. City of Florence</i> , 295 S.C. 47, 367 S.E.2d 149 (1988)	4
<i>Windsor Green Owners Ass'n v. Allied Signal, Inc.</i> , 362 S.C. 12, 605 S.E.2d 750 (Ct. App. 2004).....	4

Statutes

S.C. Code Ann. § 36-3-604.....	6
S.C. Code Ann. § 36-3-604(a)	6
S.C. Code Ann. § 62-2-507.....	5

Other Authorities

Black's Law Dictionary, 7th ed. (1999).....	7
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APPELLANT'S REPLY

The Respondent's Brief, and in particular the statements set forth in the "Facts of the Case," contains references to documents and alleged facts that are not in the evidentiary record. The Appellant has filed a motion to strike all such references from the record and Respondent's Brief. Further, the Respondent's argument that the Appellant has released her claims against him in the Marital Settlement Agreement must also fail. The Promissory Note, upon which this lawsuit is based, is not even addressed in that agreement. Further, the Respondent is a non-party to that agreement, and may not benefit from the release. Therefore, the circuit court's order must be reversed.

I. THE RESPONDENT FAILS TO CITE ANY LANGUAGE FROM THE MARITAL SETTLEMENT THAT SUPPORTS HIS CONTENTION THAT SUMMARY JUDGMENT WAS PROPER.

The Marital Settlement Agreement, upon which the Respondent bases his entire argument that the Appellant released her claims against him, is a document to which the Respondent is not a party and contains no language addressing or releasing any claims against him. The Respondent attempts to massage the language in an effort to read into mutual boilerplate releases an actual release of the Note claims held personally by the Appellant. However, no reading of the Marital Settlement Agreement leads to this absurd conclusion.

A. The Marital Settlement Agreement is not a "business asset" of Warren Holliday.

The Respondent's summarily state that the "Promissory Note was a business asset" under the terms of the Marital Settlement Agreement and was therefore assigned to Warren Holliday and released. However, the Respondent fails to analyze the language of the agreement when reaching this conclusion. The Marital Settlement Agreement specifically defines "business asset" as Warren Holliday's "interest in several limited liability companies, corporations or other

business entities, a schedule of which is attached hereto as Exhibit A.” (Marital Settlement Agreement). The Promissory Note was a personal asset, held by Warren Holliday and Patricia Holliday as individuals. Patricia Holliday confirmed that it was not a business asset, but was rather a “personal loan.” (Patricia Holliday Tr. at 25). It therefore does not meet the definition of “business asset” under even the most liberal reading of the Marital Settlement Agreement. As such, the Appellant clearly did not relinquish a claim to the Promissory Note as a “business asset.”

B. The circuit court did not rule that the Promissory Note fell within the “Other Items of Property” category in the Marital Settlement Agreement.

The Respondent argues that Patricia Holliday and Warren Holliday intended to allocate the ownership of the Promissory Note to Warren Holliday under the “Other Items of Property” section of the Marital Settlement Agreement. The circuit court did not rely on this provision in the order granting summary judgment. The circuit court clearly based its holding on the incorrect determination that the Marital Settlement Agreement “gave Warren all property (whether personal or business) that was not specifically given to Patricia.” (Oct. 11, 2019 Order at 5). As set forth in Appellant’s Initial Brief, there is no “catch-all” provision in the Marital Settlement Agreement. Because the circuit court failed to find that the Promissory Note was one of the “Other Items of Property” contemplated in the Marital Settlement Agreement, the Appellant cannot use that provision as a basis to uphold the circuit court’s ruling. *S.C. DOT v. First Carolina Corp.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907, (2007) (citations omitted) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”)

C. There is no evidence that the Promissory Note was one of the “Other Items of Property” held by Warren Holliday.

The Promissory Note was an asset held by Patricia Holliday and Warren Holliday 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.

The Respondent argues that Patricia Holliday and Warren Holliday intended to allocate the ownership of the Promissory Note to Warren Holliday under the “Other Items of Property” section of the Marital Settlement Agreement.¹ However, there is no evidence that this occurred. There is no testimony on the record from Warren Holliday concerning the subject. There is no documentary evidence in the record. What is in the record is Patricia Holliday’s testimony by affidavit, in which states that “she never agreed to discharge Ross Holliday’s obligations under the Promissory Note, [and never agreed] to modify the terms of the Promissory Note.” (Affidavit of Patricia Holliday at ¶ 4). In addition, the Appellant explicitly stated that she “did not intend to release any claims against Ross Holliday on the Promissory Note by signing the Marital Settlement Agreement.” (Affidavit of Patricia Holliday at ¶ 9). Therefore, there is, at a minimum, a genuine issue of material fact regarding whether the parties intended to allocate ownership of the Promissory Note in the Marital Settlement Agreement and the circuit court’s order must be reversed.

D. The Respondent is not a third-party beneficiary of the Marital Settlement Agreement and cannot benefit from the release between Patricia Holliday and Warren Holliday found in the “Other Items of Property” provision.

The Marital Settlement Agreement provides 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.” (Marital Settlement Agreement at 6) (emphasis

¹ This argument was not made to the circuit court.

added). The Respondent, although not a party to the Marital Settlement Agreement, has argued that he benefits from this release, despite the fact that he is not a signatory. He is also not an intended third-party beneficiary of the Marital Settlement Agreement. A third-party beneficiary is a party that the contracting parties intended to directly benefit. *Touchberry v. City of Florence*, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988). The contract must contain specific language evidencing an intent by the parties to confer a substantial benefit on the alleged third-party beneficiary. *Windsor Green Owners Ass'n v. Allied Signal, Inc.*, 362 S.C. 12, 19, 605 S.E.2d 750, 753 (Ct. App. 2004). The Marital Settlement Agreement does not contain any language evidencing an intent to release Ross Holliday's obligations on the Note. The Marital Settlement Agreement does not contain any language evidencing an intent to release Ross Holliday's obligations on the Note. Further, Patricia Holliday expressly stated that she did not intend such a result by signing the Marital Settlement Agreement. (Affidavit of Patricia Holliday at ¶ 9). Therefore, Ross Holliday cannot benefit from the language set forth in the "Other Items of Property" section of the Marital Settlement Agreement.

E. The only evidence in the record is that the Marital Settlement Agreement did not address the Promissory Note and that Patricia Holliday retained her interest.

The Respondent argues that, when read as a whole, the Marital Settlement Agreement unambiguously assigned Patricia Holliday's interest in the Note to Warren Holliday. When read as a whole, the Marital Settlement Agreement does not address the Promissory Note in any form or fashion, and does not contain a "catch-all" provision that assigns all property not otherwise addressed to Warren Holliday.² Indeed, all of the releases in the Marital Settlement Agreement are *mutual* releases. (Marital Settlement Agreement at 3, 7, 9). Unless a specific asset is

² The Respondent repeatedly argues that there is a catch-all provision without citing to any actual provision.

addressed in the Marital Settlement Agreement, there is no way to tell how it was divided and which party was providing the release. This alone creates an ambiguity. Further, Patricia Holliday testified that she did not intend to release her claims on the Promissory Note, and even filed a Financial Declaration in the divorce proceeding which evidences her claim that she retained her ownership interest in the Promissory Note. (Affidavit of Patricia Holliday; Financial Declaration). Therefore, the Marital Settlement Agreement does not address Promissory Note, implicitly or explicitly, and the only evidence is that Patricia Holliday intended to retain ownership. As such, summary judgment was improper and the circuit court's holding must be reversed.

F. South Carolina law specifically provides for the disposition of marital assets held with a right of survivorship but not specifically addressed in a divorce decree.

The Respondent incorrectly argues that the Family Court necessarily had to order the division of all assets held by Patricia Holliday and Warren Holliday. South Carolina law has always provided for disposition of assets held with a right of survivorship among spouses who later divorce where those assets are not specifically addressed in the divorce decree. 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 Agreement does not specifically address the Promissory Note, the division of that asset, held in a right of survivorship, is controlled by either prior common law or S.C. Code Ann. § 62-2-507 (which was effective after the entry of the divorce decree). As such, Patricia Holliday either obtained a full interest in the Promissory Note upon Warren Holliday’s death (if the former common law applies), or obtained a one-half interest (if § 62-2-507 applies). That is a legal determination for the circuit court to resolve.

II. S.C. CODE ANN. § 36-3-604 DOES NOT OPERATE TO DISCHARGE APPELLANT’S CLAIM ON THE PROMISSORY NOTE.

S.C. Code Ann. § 36-3-604 (a) 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.

The Respondent contends that the Appellant renounced her rights against the Respondent by entering into the Marital Settlement Agreement.

First, § 36-3-604 plainly does not provide for renunciation of rights against a non-party to an agreement. It contemplates that the “person entitled to enforce an instrument” – in this case, Appellant – “may discharge the obligation of a party to pay the instrument” – in this case Respondent – “by renouncing rights *against the party* by a signed record.” The Respondent is not a party to the Marital Settlement Agreement, and any renunciation could have only inured to the benefit of Warren Holliday. Therefore, the Marital Settlement Agreement cannot operate as a discharge of the Respondent’s obligation under the Promissory Note.

Second, as set forth above, the Marital Settlement Agreement does not operate as a renunciation of the Appellant’s rights. Indeed, to renounce something is to “give up or abandon

formally” or “to disclaim.” Black’s Law Dictionary 1299 (7th ed. 1999). The Marital Settlement Agreement does not list or otherwise mention the Promissory Note, nor is the Respondent a released party in that document. Therefore, the Marital Settlement Agreement cannot be read to release the Appellant’s claims against the Respondent, a non-party to that agreement. Simply put, there is no evidence that the Appellant renounced her claim to repayment of the Promissory Note in any signed record. Therefore, § 36-3-604 does not operate as a release.

III. THE TRIAL COURT DID NOT RULE THAT THE APPELLANT’S CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS, AND THEREFORE THAT ISSUE IS NOT PRESERVED FOR REVIEW.

The Respondent attempts to argue that the trial court’s order must be upheld because the Appellant’s claim is barred by the applicable statute of limitations. In doing so, the Respondent goes so far as to argue that the trial court “recognized” that Appellant’s claim is barred by the statute of limitations. Respondent’s Brief at 12. This issue was raised by the Respondent, but the trial court refused to rule on the issue:

The Court has concluded that Plaintiff is barred from suing for breach of contract in this case due to the Marital Settlement Agreement as explained above. Since this issue is dispositive the Court declines to address the merits of the Defendant’s statute of limitations argument on summary judgment.

(Oct. 11, 2019 Order at 7). The Respondent did not seek reconsideration of this ruling. Therefore, the trial court in no way “recognized” or ruled upon Respondent’s contention that the Appellant’s claim is barred by the statute of limitations. As such, the issue is not preserved for appellate review. *S.C. DOT*, 372 S.C. at 301, 641 S.E.2d at 907, (2007) (citations omitted) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”).

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.

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PROOF OF SERVICE


I do hereby certify that on the 25th day of February 2020, I served a copy of the within Reply Brief of Appellant on all counsel of record via First Class Mail, postage pre-paid and addressed as follows:

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Re: Patricia B. Holliday v. Ross S. Holliday
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WBD Ref: 101682.0001.1

Dear Ms. Kitchings:

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

By copy of this letter with enclosure, we are serving a copy of 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 stylized flourish.

Matthew Tillman

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Enclosures


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