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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS OF NEWBERRY COUNTY
Samuel M. Price, Jr., Special Referee

Appellate Case No. 2017-0001678

Robert G. Shirey,

Respondent,

v.

Gwen G. Bishop
Cassandra Robinson
And TD Bank, N.A

Defendants,

Of whom Gwen G. Bishop
and Cassandra Robinson are,

Appellants.

RETURN TO PETITION FOR REHEARING AND/OR REHEARING *EN BANC*

Respondent, pursuant to the Court's request under Rule 219(b) and 221(a), South Carolina Appellate Court Rules ("SCACR") submits this Return to Appellants' Petition for Rehearing and/or Rehearing *en banc*.

ARGUMENT

Respondent asserts the Court, through a unanimous panel, correctly affirmed the lower court.

In this return, Respondent will address the arguments made by Appellants in their petition in the order raised therein.

I. This Court Correctly Held That Appellants Waived Any Statute of Frauds Defense.

In its April 22, 2020 opinion (the "Opinion"), this Court held that Appellants waived any statute of frauds defense it may have otherwise asserted. (Opinion, § I.a). The Court correctly found that Appellants failed to plead this affirmative defense. A party must plead the statute of frauds to be afforded its protection. Rule 8(c), South Carolina Rules of Civil Procedure ("SCRCP"); Parker v. Shecut, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000), *overruled on other grounds by* Parker v. Shecut, 349 S.C. 226, 562 S.E.2d 620 (2002); American Wholesale Corp. v. Mauldin, 128 S.C. 241, 122 S.E. 576 (1924).

It was Appellants' failure to plead the statute of frauds which resulted in their waiver of it. After all, "[i]t is elementary that the principal purpose of pleadings is to inform the pleader's adversary of the legal and factual positions which he will be required to meet at trial." Shirley's Iron Works v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013). This Court recently noted in Garrison v. Target Corporation, 429 S.C. 324, 838 S.E.2d 18 (Ct. App. 2020), that the requirement that affirmative defenses be plead is "to avoid surprise and undue prejudice by providing the plaintiff with notice and the opportunity to demonstrate why the affirmative defense should not succeed." While the Appellants seem to place some significance on the fact that testimony regarding unwritten agreements appears in the record, this evidence is irrelevant. The very same record also shows Appellants never moved to amend the pleadings to conform with the evidence presented at trial. Thus, the Appellants never did, in fact, plead the statute of frauds, and because "the party seeking the protection of the statute of frauds ***must*** plead it", this failure constitutes a waiver of any such defense. American Wholesale Corp., 128 S.C. at 243, 122 S.E. at 576 (emphasis added).

Accordingly, no rehearing on this issue is warranted.

Appellants argue in their petition that this Court erred in finding that neither Appellant argued the statute in the proceedings below. This argument likewise misses the mark. Appellants cite a colloquy between counsel and the lower court during the cross-examination of Appellant Gwen Bishop. On pages 204-205 of the record, Appellants trial counsel raised an objection to a line of questioning by Respondent's counsel wherein the statute was mentioned. However, the special referee refused any argument on the objection and the matter was never raised again at trial. (R. 205). The imposition of an objection does not amount to an amendment of pleadings to assert an affirmative defense. Again, it is the failure to plead the defense that constitutes the waiver of the statute of frauds. Id.

The Appellants' petition also makes reference to the fact that the lower court made mention of the statute of frauds on the last page of its order dated May 17, 2017. This order does not purport to supplement the Appellants' pleadings, nor does it cure the waiver of the defense occasioned by their failure to plead it. Instead, this portion of the order merely recites, correctly, that even if Appellant Bishop had not failed to perform under the 2015 Contract, her admission that she did, in fact, agree to appear for the closing of the transaction on August 13th and that Respondent had the right to rely on that agreement meant the statute of frauds was unavailable to her. Florence Printing Co. v. Parnell, 178 S.C. 119, 182 S.E.2d 313 (1935) (holding that a party who orally extends time of performance of a written contract within the statute of frauds will be estopped to claim the benefit of the statute where the other party, acting in reliance on the extension fails to exercise his rights as provided by the written contract).

In any case, the one reference by Appellants' trial counsel to the statute of frauds at trial was never argued and the defense does not appear in the pleadings. The first time the matter of the

statute was raised to and ruled on by the trial court was in relation to Appellants' motion for reconsideration. (R., pp. 16-19). A party cannot raise an issue for the first time in a Rule 59(e), SCRCP motion which could have been raised at trial. *e.g.*, MailSource, LLC v. M.A. Bailey & Assocs., Inc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003). Therefore, the petition for rehearing should be denied.

II. This Court Properly Determined That the Appellants' Argument That the Equities Do Not Favor Specific Performance Was Not Preserved for Appeal.

In the Opinion, this Court held that Appellants' argument that the equities in this matter do not favor specific performance in favor of Respondent was not properly preserved for appellate review. (Opinion § I.b). Appellants did not raise any such equitable arguments below. The lone argument made below related to the "time of the essence" provision of the Shirey Contract. This Court correctly found that the argument was made by Appellants for the first time on appeal, and, therefore, it is not properly before the Court. Malloy v. Thompson, 409 S.C. 557, 762 S.E.2d 690 (2014) (holding that an issue cannot be raised for the first time on appeal, but must have instead been raised to and ruled upon by the trial court to be preserved for appellate review).

Notwithstanding the Appellants' failure to preserve the issue, the Appellants' claims in this regard are without merit. The Appellants assert that the trial court's finding that ordering specific performance is equitable in this matter is a factual finding. (Petition for Rehearing, p. 6). This is false. Instead, the lower court's specific enforcement of the subject contract is an exercise of the court's discretionary adjudicative powers. *e.g.*, Amick v. Hagler, 286 S.C. 481, 334 S.E.2d 525 (Ct. App. 1985) (the decision to grant or refuse specific performance of a contract to sell real estate is within the sound discretion of the trial judge).

It is well settled that the courts of South Carolina will enforce a contract to sell land that is

fair and was entered into openly and aboveboard. Id. Here, as set forth in the Opinion, it was Appellant Bishop that approached Respondent about purchasing the property. (Opinion, p. 9). There is not even a hint, much less any evidence, in the record of fraud or impropriety on the part of the Respondent; whereas, the record is replete with evidence of the inequitable conduct of the Appellants. It was Appellant Bishop that failed to appear for the closing with Respondent on August 12, 2015. In light of her absence at the appointed time, it was Appellant Bishop that admittedly agreed to appear for closing the following day. (R., pp., 61;193, ln. 12-20; 210, ln. 1-16). Appellant Bishop that testified Respondent had every right to rely on her agreement to appear for the closing on August 13, 2015. (R., p. 61). It was Appellant Bishop that failed to live up to her word and again failed to appear, sending instead a doctor's excuse indicating her absence was "medically advised". (R., 288).

The record here shows that notwithstanding the fact that she was allegedly so ill as to be unable to attend the closing, Appellant Bishop was conveniently able to manage to surreptitiously go before a notary to sign a deed conveying the subject property to her niece, Appellant Robinson. (R., pp. 171, ln. 6-10; 288). The lower court found that Appellant Bishop did all of this on the "advice and counsel of [Appellant] Robinson". (R. 8). Moreover, this Court found it notable that despite her knowledge of Respondent's claims to the property, Appellant Robinson drafted a second contract for the sale of the subject property that included a provision that provided, "[t]he seller [Appellant Bishop] also agrees to indemnify the Buyer [Appellant Robinson] of any and all ***issues of illegality or fraud concerning this transaction***." (Opinion, p. 10) (emphasis added). The record, therefore, is clear that even the Appellants knew their conduct was inequitable and the trial court agreed. Based on its evaluation of the credibility of the witnesses, the special referee found that the Shirey Contract was entered into openly and aboveboard and should be specifically performed.

Consequently, even if the Appellant's had preserved the issue of the equities of the transaction, the equities are distinctly in Respondent's favor. The petition for rehearing should be denied.

III. The Opinion Contains No Internal Inconsistencies.

Appellants argue the Opinion contains internal inconsistencies because the Court determined that the Appellants' equities argument was not preserved because it was not raised and ruled on below yet did not also find that the Respondent failed to preserve the issues of a confidential relationship between the Appellants and Respondent's status as a bona fide purchaser. This argument is misplaced.

In addition to the distinction referenced above between the lower court's findings of fact and its exercise of discretion in applying the law to such facts, the Appellants' argument disregards the significance of the fact that Respondent has not challenged any portion of the lower court's order. Thus, the Court need not conduct any preservation analysis as it relates to Respondent. On the other hand, however, it is Appellants who seek the wholesale reversal of the trial court's decision in this case. As a result, whether Appellants have created a record below which places the myriad of issues they raise properly before this Court is a question this Court must examine as a basic threshold matter.

"An appellate court cannot address an issue unless first raised by appellant and ruled on by the trial judge." Thomasko v. Poole, 349 S.C. 7, 10, 561 S.E.2d 597, 598 (2002). Error preservation requirements are intended "to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Without an initial ruling by the trial court, a reviewing court simply would not be able to properly evaluate whether the trial court committed error. Staubes v. City of Folly Beach, 339

S.C. 406, 412, 529 S.E.2d 543, 546 (2000).

Accordingly, that a preservation inquiry is required in the review of Appellants' assignments of error below but is entirely unnecessary with respect to Respondent does not amount to an inconsistency; rather, it is simply a recognition of the appropriate roles of the trial and appellate courts based on long settled precedent.

Based on the foregoing, the petition for rehearing should be denied.

CONCLUSION

A rehearing of this matter is unwarranted. This Court correctly held that Appellants waived any statute of frauds defense by failing to plead it as required. The statute of frauds is an affirmative defense which must be plead or the defense is waived. The purpose of requiring affirmative defenses to be plead is to avoid surprise and prejudice to the plaintiff by providing notice and the opportunity to prepare to show the court why any affirmative defense should not succeed. Neither of Appellants plead the statute of frauds and, to the extent testimony of unwritten agreements coming into evidence at trial has any significance (Respondent does not concede that it does), neither moved to amend their pleadings to conform to the evidence. Therefore, the defense was not plead and was therefore waived.

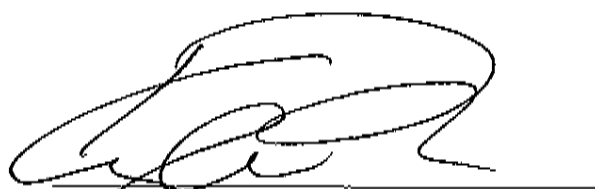
Moreover, the Court rightly held that Appellants have not preserved for appellate review their argument that the equities in this case do not favor specific performance. This argument was not made below. It cannot be raised for the first time on appeal.

Contrary to Appellants' assertion, the lower court's finding that specific performance in favor of Respondent was equitable was not a finding of fact but represents instead an exercise in the court's discretion after considering all of the evidence and weighing the credibility of the witnesses. Towards that end, the record is devoid of even an allegation of wrongdoing on the part of the

Respondent. However, the record is filled with evidence that Appellants knew their conduct was inequitable. Therefore, the trial court was right to find that the equities of the case favor the Respondent.

Finally, the fact that this Court is required to conduct an issue preservation analysis with respect to all of the various issues raised by Appellants but is not compelled to conduct such an analysis with respect to Respondent does not amount to an inconsistency within the Opinion. Respondent has not challenged the lower court's decision, whereas Appellant, by definition, has. A preservation review for the party seeking to overturn a trial court's decision is simply a recognition of the longstanding precedent that a reviewing court is unable to properly evaluate whether the trial court committed the error the party assigns if the matter is not first raised to and ruled upon by the trial court. What Appellants contend is an inconsistency is instead a valuable feature of our appellate jurisprudence.

The petition for rehearing and/or rehearing *en banc* should be denied.



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June 9, 2020

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PROOF OF SERVICE

I certify that I have served a copy of the Respondent's Return to Appellant's Petition for Rehearing and/or Rehearing *En Banc* by mailing a copy of same via regular United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below, addressed to its attorney of record, Jason Scott Luck, Esq., Garrett Law Offices, 1075 E. Montague Avenue, North Charleston, South Carolina 29405.

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June 9, 2020

VIA FACSIMILE (803-734-1839) AND US MAIL
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: Robert G. Shirey v. Gwen G. Bishop, Cassandra Robinson, and TD Bank, N.A.
Court of Appeals Case No.: 2017-001678

Dear Ms. Kitchings:

Enclosed please find one (1) original unbound copy of the Respondent's Return to Petition for Rehearing and/or Rehearing *En Banc*. I understand that the Supreme Court's order of March 20, 2020, remains in effect such that no further copies are required. Please let me know if I am mistaken and the Court will require additional copies.

Should you have any questions, concerns, or require something further, please do not hesitate to contact me. With my kindest regards, I am,

Sincerely,

POPE PARKER JENKINS, P.A.

Kyle B. Parker

KBP/rb
Enc.
cc: Jason Scott Luck, Esq.(via email & US Mail)

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FAX COVER SHEET

Date: _____

To: The Honorable Jenny Abbott Kitchings From: Kyle B. Parker

Fax: 803-734-1839

Re: Appellate Case No. 2017-001678

TOTAL PAGES (including cover sheet): 11

MESSAGE:

Please see the attached.

Thanks,

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