THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge
Trial Court Case No. 2018-CP-10-00872

Appellate Case No.: 2019-002002

Estate of Patricia B. Holliday.....Appellant,

vs.

Ross S. Holliday.....Respondent.

AMENDED FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Marital Settlement Agreement, which was incorporated into the Family Court's Order and Final Decree of Divorce, distribute the ownership of the Promissory Note at issue to Warren Holliday?

II. Did Appellant release her claim to the Promissory Note from Respondent in the Marital Settlement Agreement, which was incorporated into the Family Court's Order and Final Decree of Divorce?

III. Does the statute of limitations bar Appellant's claim for breach of contract?

COUNTER-STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of summary judgment in favor of Respondent Ross S. Holliday (hereinafter "Respondent") by Order dated October 11, 2019, and the November 15, 2019, Order denying Appellant's Motion for Reconsideration. The case was initially brought by Appellant, who sued Respondent, her son, in an effort to collect on a 2004 Promissory Note, which had been payable to the order of the Appellant and her now deceased ex-husband Warren Holliday (hereinafter "Warren"). The circuit court granted summary judgment for the following stated reasons:

(1) "[T]he Marital Settlement Agreement, by its terms, resolved all issues of ownership of marital assets."

(2) Appellant admitted that the Promissory Note at issue was a marital asset;

(3) The Marital Settlement Agreement gave Warren, "all property (whether personal or business) that was not specifically given to [Appellant];"

(4) Appellant "expressly released Respondent, "who is an heir, personal representative, successor and assignee of Warren – from 'all suits, actions, causes of action' that result from or arise out of the 'marital relationship ... from the beginning of the world to the date of this agreement.'"

(5) Appellant "released any claims to the Note repeatedly throughout the document." [1]

There is no material issue of fact in the record which supports a grant of summary judgment to Respondent on these grounds, as well as an additional ground that the circuit court did not reach as set forth herein.

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[1] R. p. 5.

STATEMENT OF FACTS

On June 18, 2004, the late Warren Holliday ("Warren") obtained from the National Bank of South Carolina ("NBSC") a $2 million line of credit, secured by one of the business rental properties that he owned in an LLC. On that same date, Warren drew down the entire $2 million to loan to his son, Respondent Ross Holliday ("Respondent"), who signed a Promissory Note payable to the order of Warren and his wife at the time, the Appellant. Appellant provided no money or other security and was not a borrower on the loan from NBSC. At the time, Warren included his wife as an obligee on the Promissory Note as part of Warren's and her "estate plan." Appellant considered the Promissory Note to be a "joint asset" along with all of Warren's business properties and assets. R. pp. 48-50, 51-52, 55.

Warren loaned the money to Respondent to fund the purchase of an interest in a Utah construction business in which Warren had considered investing. Both Appellant and Respondent testified that the loan was a business transaction between Warren and Respondent. R. pp. 55, and 31. The NBSC Note stated that the "purpose of the loan" was "revolving line of credit for business investments." R. p. 69.

In or about 2005 to 2007, Warren Holliday demanded that Ross make payments on the Note so that the NBSC loan could be paid off, and Respondent testified that he made certain payments but that the Promissory Note and the NBSC loan were not paid off in full until 2016. Appellant admitted that she had no evidence that Respondent did not make the payments he claimed. R. pp. 53-55, 121, and 129-130.

Beginning in 2010, and continuing until his death in 2016, Warren had serious medical problems that prevented him from continuing to manage his rental property business, and both he and Appellant asked Ross to take over managing their business affairs. R. pp. 55, 70-76 and 121.

In March of 2012, Warren, Appellant and Respondent executed a Financial Arrangements Agreement that memorialized Warren's and Patricia's arrangement to have Respondent handle all of their business and other financial affairs. See R. , pp. 70-76.

In 2013, Appellant initiated a divorce proceeding against Warren, and, on August 9, 2013, Appellant and Warren executed a Marital Settlement Agreement, which resolved all issues, including distribution of real and personal property owned by them. Appellant released all her claims to Warren's business and personal assets, including all assets in his possession, in exchange for the marital abode, payments of $16,000 per month for life, and other assets. See R., pp. 31-43. On December 9, 2013, the Family Court issued its Final Order and Decree of Divorce which adopted the Marital Settlement Agreement and the Addendum thereto as the Order of the Court. See R., pp. 218-220.

In the Marital Settlement Agreement, Appellant released any and all claims that she might have had to Warren's business assets, which included the Promissory Note from Respondent. The Marital Settlement Agreement contained numerous statements that Appellant released all her claims to any property arising out of and during her marriage other than as set forth in that agreement. The Agreement provided in pertinent part:

> "Whereas, the parties now consider it to be in their respective best interests to settle all issues between themselves and all matters heretofore arising or hereafter to arise from their marital union; they have reached a permanent, complete, and final agreement; ... and they desire that [the agreement] shall constitute the total agreement between them, both now and following any divorce which either might obtain, with respect to all matters which were raised or could have been raised between the parties hereto, other than the issue of divorce itself."
>
> "The parties do hereby waive, release and forever acquit, and do hereby discharge each other, their administrators, successors, heirs, assigns of and from any and all suits actions, causes of action, claims, demands, damages (known, unknown, foreseen and unforeseen), ... including, but not limited to, those resulting from or arising out of the marital relationship between Warren and Patricia, their marriage, separation or divorce, or any tort, or other legal or equitable claim

(except those arising from a breach of this Agreement) from the beginning of the world to the date of this Agreement. The parties hereby expressly waive and release any claim either party may have in or against the Probate Estate of the other party pursuant to a Will, a spousal election or any other provision of the S.C. Probate Code."

"The parties agree that Warren shall retain and continue full ownership and interest in any and all [of his] companies and other business assets which Warren holds at this time. Patricia hereby relinquishes and waives any claim she may have in or against these business assets, except as provided in the Patricia Anne Holliday Trust [which provided for the $16,000 monthly payments]. Warren shall retain sole authority to manage these business assets personally, or at his sole discretion, delegate or appoint management of these business assets to a person holding durable power of attorney."

"Except to the extent set forth in this Agreement, Warren and Patricia have made a physical division 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. The parties each release the other from all claims of interest to any monies or assets in the possession of the other... Each shall retain sole ownership of all such properties in his or her possession or titled in his or her name unless such property is made the property of the other pursuant to the terms of this Agreement."

"Warren and Patricia each waive any claim of inheritance or right that they may be entitled to by virtue of the SC Probate Code to share in the other's estate... Warren and Patricia are limited to the receipt of those properties or monies as outlined in this Agreement."

R., pp. 31-44.

Appellant has received every payment to which she is entitled under the Marital Settlement Agreement both before and after the death of Warren. Although Appellant clearly remembered the existence of the Promissory Note, as evidenced by her filing a Financial Declaration on December 10, 2013, the day after her divorce was entered, stating that the

Promissory Note was a marital asset, she failed to include the Promissory Note in the property to which she was entitled under the terms of the Marital Separation Agreement. [2]

Warren died on September 26, 2016. At no time while Warren was alive did Appellant assert any claim to Warren or demand for payment to Respondent. On July 12, 2017, Patricia's lawyer made her first and only demand that Ross repay the $2 million note, more than thirteen years after the note was given. On February 19, 2018, Patricia initiated this action to collect from Ross on the note.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Turner v. Milliman, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). Summary judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc., 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006). Where the record is devoid of any allegation or evidence tending to show there is a material fact in issue, the moving party is entitled to summary judgment as a matter of law. Milligan v. Liberty Life Ins. Co., 313 S.C. 478, 481, 443 S.E.2d 381, 382 (1994); Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 117, 410 S.E.2d 537, 546 (1991) ("[B]ald allegations are insufficient to create a genuine issue of fact."); George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 593, 545 S.E.2d 500, 505 (2001) ("The party opposing summary judgment cannot simply rest on mere allegations or denials contained in the pleadings."). Thus, the appellant cannot rely upon the mere allegations of her complaint, but instead, she must offer proof of the

[2] This filing was of no force, because Appellant's claims to the Note had already been addressed in the Marital Settlement Agreement and, even if not specifically addressed, implicitly addressed because Appellant did not raise the issue of the Note during the proceedings.

existence of a genuine issue of fact. Dyer v. Moss, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985).

Appellate courts may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal. See Rule 220, SCACR; see also I'On, L.L.C. v. Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (explaining that a respondent may raise additional reasons to affirm the lower court's ruling because it would "be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review").

ARGUMENT

I. ANY CLAIM APPELLANT HAD TO THE PROMISSORY NOTE WAS RELEASED IN THE MARITAL SETTLEMENT AGREEMENT WHICH WAS INCORPORATED BY THE FAMILY COURT IN ITS FINAL ORDER AND DECREE OF DIVORCE.

The Family Court has exclusive jurisdiction "to hear and determine actions for divorce ... and for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage..." S.C. Code Ann. § 63-3-530(A)(2). The Family Court Final Order and Decree of Divorce, dated December 9, 2013, stated that the parties presented the Marital Settlement Agreement to the Court and that it "purports to resolve all issues by and between the parties with the exception of the ultimate divorce." R., pp. 218-220. It further stated that: "The Parties read an additional addendum to the Marital Agreement into the record: 1. The personal property acquired by and between the parties during the marriage has been equitably divided to their mutual satisfaction..." R., pp. 218-220. The Court made a finding that "the Parties entered into [the Marital Agreement, the Addendum to the Marital Agreement and The Patricia Anne Holliday Marital Trust] voluntarily, without duress, and after having been fully [sic] apprized of the financial status of one another." R., pp. 218-220.

As set forth hereinabove, the Marital Settlement Agreement distributed the marital assets to Appellant and Warren. It specifically provided that Warren retained "full ownership and interest in any and all [business entities listed in Exhibit A] and ***other business assets which Warren holds at this time.***" R., p. 36.

Even if the Promissory Note was not a "business asset," the Marital Settlement Agreement discussed "Other Items of Property" and stated: "Except to the extent set forth in this Agreement, Warren and [Appellant] have made a physical division of all other personal property acquired during the marriage ... The parties each release the other from all claims of interest to any monies or assets in the possession of the other ...unless stated otherwise herein. Each shall retain sole ownership of all such properties in his or her possession ... unless such property is made the property of the other pursuant to the terms of this Agreement." R., p. 37.[3] Both Appellant and Respondent testified that the original Promissory Note was in Warren's possession, so this item of personal property was Warren's property by the express terms of the agreement. Contrary to Appellant's argument that she did not give up her interest in the Promissory Note, because it was not specifically discussed in the Marital Settlement Agreement, there was a catchall that included all personal property, and that provision established that Warren owned the Promissory Note.

The Marital Settlement Agreement finally provided that, "in the event this Agreement is incorporated in said [Family Court] decree or order, it shall be a final resolution of the rights of the parties..." R., p. 41.

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[3] The Promissory Note at issue in this case is a "negotiable instrument" as defined by the Negotiable Instruments Section of the South Carolina Commercial Code. See S.C. Code Ann. § 36-3-104.

Appellant argues that the Marital Settlement Agreement is completely ambiguous "as to whether or how physical division of the Note was made."[4] In fact, the Marital Settlement Agreement does not mention the Promissory Note at all. But the Agreement specifically disposes of every asset owned by the parties and provides that all assets not in the possession of the Appellant belonged to Warren.

In any event, a mere lack of clarity on casual reading is not the standard for determining whether a contract is ambiguous. Gamble v. Moise, 288 S.C. 210, 341 S.E.2d 147 (Ct. App. 1986). To determine if a contract term is "reasonably susceptible of more than one interpretation," the court must look at its plain language with reference to all of the agreement's provisions. North American Rescue Products, Inc. v. Richardson, 411 S.C. 371, 769 S.E.2d 237 (2015) ("A contract must be read as a whole document so that one party may not create ambiguity by pointing out a single sentence or clause"); see generally, § 30:5. Ambiguity as a prerequisite to interpretation and construction—The determination of ambiguity, 11 Williston on Contracts § 30:5 (4th ed.). The "Business Assets" section gave all business assets to Warren, and the "Other Items of Property" section gave to Warren all personal property that he possessed at the time of the agreement.

Therefore, Appellant's argument, although disguised as one dealing with ambiguity, is merely an evidentiary argument that contradicts the evidence in the record. Appellant fails to even address the fact that the Family Court had exclusive jurisdiction to settle "all legal and equitable rights ... to the real and personal property of the marriage" (S.C. Code Ann. § 63-3-530(A)(2)) and that the Family Court did settle all such rights "to the real and personal property of the marriage" in its Final Order and Decree of Divorce. R., pp. 218-220.

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[4] No "physical division" of the Note ever occurred, and neither party has alleged that a "physical division of the Note" occurred. Therefore, Appellant is attempting to create ambiguity where it does not exist.

II. IN ACCORDANCE WITH S.C. CODE § 36-3-604, APPELLANT DISCHARGED ANY OBLIGATION OF RESPONDENT TO PAY HER ON THE NOTE.

S.C. Code § 36-3-604(a) provides that "[a] person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by intentional voluntary act..., or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed record." The Marital Separation Agreement is a signed record for the purposes of this section, and Appellant agreed in that record that she released Respondent.[5]

On the very first page, the Marital Settlement Agreement states "the parties ... settle all issues between themselves and all matters heretofore arising or hereafter to arise from their marital union; they have reached a permanent, complete, and final agreement ... with respect to all matters which were raised or ***could have been raised*** between the parties hereto." See R., p. 31. On page 6 of the Marital Settlement Agreement, Appellant "hereby relinquishes and waives any claim she may have in or against these business assets, except as provided in the Patricia Anne Holliday Trust." R., p. 36. On page 7 of the Marital Settlement Agreement, it states she releases and waives "any and all right, title, or interest he or she has, or may have had, to any trust funds, inheritances, accounts, gifts, or property of any kind inherited by the other party, or gifted to the other party, or held in trust for the benefit of that party, except as may be specifically provided herein." R., p. 37. Then again on page 9, it says "Warren and Patricia are limited to the receipt of those properties or monies as outlined in this Agreement." R., p. 39. A signed record could not be more clear on this point.

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[5] In her brief, Appellant cites In re Washington, 581 N.R. 150 (Bkrtcy. D.S.C. 2017), as support for her argument that the Marital Separation Agreement did not discharge her claim to the Promissory Note. However, this case has no bearing on the issues herein and merely hold that an IRS Form 1099-C does not discharge a claim under § 36-3-604(a)(i). Respondent's argument is that Appellant's claim was discharged under § 36-3-604 (a)(ii).

Appellant expressly released all rights to property stemming from her marriage with Warren—which most obviously included the Note (as admitted by Appellant). R., pp. 49-50.

In the Marital Settlement Agreement, Appellant expressed multiple releases. A release is a contract and contract principles of law should be used to determine what the parties intended. Curry v. Carolina Ins. Grp. of SC, Inc., 428 S.C. 60, 73, 832 S.E.2d 760, 766 (Ct. App. 2019). When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. Id. at 73-74; 832 S.E.2d at 767. The terms of the contract must be "interpreted according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense." Bluffton Towne Ctr., LLC v. Gilleland-Prince, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015).

Appellant executed a General Release of Liability on page 3 of the Settlement Agreement:

> **GENERAL RELEASE OF LIABILITY.** The parties do hereby waive, release and forever acquit, and do hereby discharge each other, their administrators, successors, heirs, assigns of and from any and all suits, actions, causes of action, claims, demands, damages (known, unknown, foreseen, and unforeseen), costs, expenses, compensation, and all consequential damages, including, but not limited to, those resulting from or arising out of the marital relationship between Warren and Patricia, their marriage, separation or divorce, or any tort, or other legal or equitable claim (except those arising from a breach of this Agreement) from the beginning of the world to the date of this Agreement....

R., p. 33. In this provision, Appellant released Warren Holliday's "administrators, successors, heirs, assigns" from "all suits, actions, causes of action," etc. that result from or arise out of the "marital relationship ... from the beginning of the world to the date of this agreement." R. p. 33.

On page 11, the Agreement states: "there are no representations, warranties, promises, covenants, or undertakings other than those expressly set forth herein." R. p. 41. On that page, the Agreement continues to say "[t]here are no representations or warranties other than those

expressly set forth herein, and this Agreement shall be binding upon and shall inure to the benefit of the heirs, personal representatives, executors, administrators, successors, and assigns of the parties hereto." Id.

It is undisputed that the Note was entered into during the marriage of Appellant and her husband. Appellant testified that her consideration for the Note was her "marital assets." See R. pp. 49-50 and 55. She even testified that this was a "business transaction." R. p. 55. Respondent was an heir, a successor, an assign, and the Personal Representative of Warren. Respondent holds all of those titles; therefore, Appellant expressly waived any and all claims arising out of the marital relationship against Respondent.

III. AS AN ADDITIONAL GROUND FOR THE GRANT OF SUMMARY JUDGMENT, APPELLANT'S CLAIM FOR PAYMENT ON THE NOTE IS BARRED BY THE STATUTE OF LIMITATIONS.

As the Circuit Court Order recognized, Respondent argued that Appellant's claim is barred by the applicable statute of limitations. In fact, S.C. Code Ann. § 36-3-118(b) applies to a Note payable on demand[6] and requires that a plaintiff bring an action within six years after a demand for payment has been made or within ten (10) years of the date of the note if no payments have been made. Appellant never made a demand for payment and testified that she had no knowledge as to whether Respondent made any payments to Warren. Thus, Appellant went thirteen (13) years without requesting payment on the Note or even inquiring as to whether the Note had been, or was being, paid.

Respondent testified that his father made a demand for payment in late 2005 or early 2006. R., p. 65. Appellant testified that her husband had called Ross to tell him that he had to make payments "on a couple occasions because we were in need of money" and that he was

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6 The Note expressly states that it is "payable upon demand." By its terms, the Note requires full payment within six months following the date of demand.

"going to have to make some effort to pay on this loan." R., p. 53-54. Even assuming that a demand for payment was made in the mid 2000's and Respondent had made the payments that he claimed to have made, with the last one being in 2010, the 6 year statute of limitations ran in 2017, and Patricia did not initiate her action until 2018.

Respondent's claim is barred by the statute of limitations, which is a separate ground for the granting of summary judgment to Respondent.

CONCLUSION

For all the above reasons, Respondent Ross Holliday respectfully requests that this Court affirm the circuit court's grant of summary judgment to Respondent on October 11, 2019 and further affirm the circuit court's November 15, 2019 denial of Appellant's Motion for Reconsideration.

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July 22, 2020

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Amended Respondent's Final Brief complies with Rule 211(b), SCACR.

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