THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
Charles B. Simmons, Jr., Master

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SC Court of Appeals

Appellate Case No. 2018-000759
Circuit Court Case No. 2016CP2301849

Christopher Lamar Atchison, ... Appellant,

v.

Veronica Jenkins, in her individual and Official capacity as a member or officer of Augusta South, LLC; Augusta South, LLC, and Collins Properties, L.P. Defendants,

Of which Collins Properties, L.P. is the ..... Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

1) Was the Appellant's Notice of Appeal timely as to the February 1, 2018 order and issue of reformation?

2) Was the Respondent's motion to cancel the bond for title and have it declared null and void barred by the doctrine of *res judicata?*

3) Was the Respondent's motion to cancel the bond for title and have it declared null and void barred by the doctrine of waiver?

4) Did the trial judge err in refusing to reform the contract between Augusta South, LLC and the Respondent?

STATEMENT OF THE CASE

This action was initiated by Appellant Christopher Lamar Atchison by the filing of a Summons and Complaint on March 21, 2016 by Michael F. Talley, Esq. Richard Stewart, Esq., filed an answer on behalf of Respondent Collins Proprieties, L.P. The case was referred to Hon. Charles B. Simmons, Master for Greenville County, by consent order dated September 22, 2017. Michanna Talley joined Michael F. Talley on behalf of the Appellant during the trial proceedings.

A hearing was held on December 19, 2017. As a result of that hearing an Order was entered on February 1, 2018 dissolving Augusta South, LLC, the Buyer shown on the bond for title at issue, and denying Atchinson's request for reformation of the bond for title to substitute him as the buyer on the bond for title. On February 8, 2018 the Respondent Collins filed a motion to cancel the bond for title and to have it declared null and void. A hearing was held on March 19, 2018. As a result of that hearing an Order was entered on March 22, 2018 cancelling the bond for title and declaring it null and void. Appellant filed a notice of appeal on April 19, 2018 appealing from the Order dated February 1, 2018, and the Order dated March 22, 2018.

On appeal Michael F. Talley and Michanna Talley represent the Appellant. J. Falkner Wilkes, Richard Stewart and Mark S. Meglic represent the Respondent.

STATEMENT OF FACTS

Respondent, Collins Properties, L.P. entered into a bond for title with Augusta South, LLC (Augusta) for property located in Greenville County. (R. 12). The bond for title contains a clause prohibiting Augusta from assigning or transferring any of its rights or obligations under the bond. (R. 16). Christopher Lamar Atchison and Veronica Jenkins were members of Augusta. (R. 21). Atchinson and Jenkins each executed the bond for title in their representative capacity on behalf of Augusta. (R. 21). Due to internal conflict between Atchison and Jenkins, Augusta failed to keep the property in proper repair and as a result the building was condemned. (R. 4-5;33). The business operated by Augusta subsequently went out of operation and was shut down. (R. 33). Atchison brought an action seeking the dissolution of Augusta and reformation of a Bond for Title between Respondent "Seller" and Augusta "Buyer". (R. 2). Jenkins defaulted and did not appear at trial. (R. 20). Contemporaneous with the filing of the complaint Atchison filed a *lis pendens* on the subject property. (R. 18). The court granted Atchison's request and issued an order dated February 1, 2018 judicially dissolving Augusta. (R. 40). In the February 1, 2018 Order the court further denied Atchison's request to have the bond for title reformed so as to insert him into the agreement as the buyer under the bond for title. (R. 40-43). Atchison sought no other relief in relation to the bond for title. Atchison did not file a motion to alter or amend the February 1, 2018, or seek other relief.

Collins Properties, L.P. as the "Seller" on the bond for title then filed a motion on February 8, 2018, to cancel the bond for title and have it declared null and void. (R. 44). A hearing was held on March 19, 2018. (R. 66-67). As a result of the hearing the master granted the motion and an Order was entered on March 22, 2018 declaring the bond for title null and void.

(R. 77-78).

On April 19, 2018 Atchison filed a notice of appeal on the Order dated February 1, 2018 and the Order dated March 22, 2018. (R. 79).

[Additional facts are contained within the Argument]

ARGUMENT

I. THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WAS NOT BARRED BY RES JUDICATA.

In this case the Appellant sought to dissolve Augusta South, LLC (Augusta) and have the court reform the bond for title to substitute the Appellant into the contract as the buyer in place of Augusta. On December 19, 2017 a hearing was held on the issues of dissolution and reformation. As a result of that hearing an order was entered February 1, 2018 dissolving Augusta and denying reformation of the Bond for Title. The Appellant received notice of filing of the order on February 1, 2018. Neither Augusta nor the Appellant took further action as to the bond for title or sought additional relief.

As a result of the failure of the Appellant or Augusta to seek or take further action as to the bond for title, the February 1, 2018 Order left the Respondent with a contract between itself and a defunct corporation. Presented with a potential cloud on the chain of title for the property the Respondent moved to have the underlying Bond for Title declared null and void. A hearing was held on March 19, 2018, and as a result a second order was issued on March 20, 2018 cancelling the Bond for Title held by the then defunct Augusta.

Appellant appears to argue that the February order was a final order and that the doctrine of *res judicata* applies to bar the Respondent's February 8, 2018 motion to have the Bond for Title cancelled.[1] While the February 1, 2018 Order ruled on the issues of reformation and the dissolution of Augusta, the issue of cancellation of the bond for title was not addressed. The

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[1]If the February order is final, as the Appellant seems to argue, then his notice of appeal would be untimely as to the issues of reformation which arises from the February 1, 2018 Order. Appellant's notice of appeal was filed on July 18, 2018. (R. 79).

doctrine of *res judicata* bars re-litigating issues that were ruled on with finality in a prior order. As the issue of cancellation was not addressed in the February 1, 2018 order, *res judicata* does not apply to bar Respondent from raising it in his subsequent motion.

> Finality will be lacking if an issue of law or fact essential to the adjudication of the claim has been reserved for future determination, or if the court has decided that the plaintiff should have relief against the defendant of the claim but the amount of the damages, or the form or scope of other relief, remains to be determined.

Restat 2d of Judgments, § 13.

It is also important to note that there is no indication that the February 1, 2018 Order was intended to conclude the case as a whole. In comparison, the March order clearly indicates: "All matters raised in the pleadings of this case having been concluded, this matter is ended." The February 1, 2018 Order contains no such language. Subsequent to the February 1, 2018 Order the Respondent therefore remained entitled to move for additional relief relating to any remaining issues in the case.

The Respondent's motion to cancel the Bond for Title was appropriate and timely. The issue of cancellation could not have been addressed prior to the ruling on judicial dissolution. The Appellant's action left the Respondent with a clouded title and no viable buyer on the bond for title. The need for cancellation therefore arose out of the judicial dissolution of Augusta on February 1, 2018 which left the Respondent's property clouded by a bond for title with defunct corporate "Buyer". As a result, the Respondent was entitled to relief. Actions for foreclosure or the cancellation of instruments are actions in equity. *See* Smith Cos. v. Hayes, 311 S.C. 358, 360 n. 1, 428 S.E.2d 900, 902 n. 1 (Ct.App.1993). When a case is referred to a master, Rule 53(c) gives the master the power to conduct hearings in the same manner as the circuit court, unless the

order of reference specifies or limits his powers. Bonney v. Granger, 292 S.C. 308, 356 S.E.2d 138 (Ct.App.1987). Here, the order of reference contains no limitation on the master's authority to hear the case and issue a judgment accordingly. Therefore, the master did not exceed the scope of the reference by hearing the Respondent's motion and cancelling the bond. *See* Smith Companies of Greenville, Inc. v. Hayes, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993). As the issue of cancellation was only created on February 1, 2018 by the first order in the case, consideration of the issue under the Respondent's subsequent motion could not possibly be barred by *res judicata.*

II. THE RESPONDENT DID NOT WAIVE ITS RIGHT TO MOVE FOR SUMMARY JUDGMENT.

The record fails to show that the Respondent waived the right to move for cancellation of the bond for title subsequent to the issuance of the February 1, 2018 Order. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended. Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387–88 (1992). Here, the record fails to show any intentional abandonment or relinquishment of the Respondent's right to oppose reformation or to seek cancellation of the bond for title under the circumstances.

Appellant's argument on waiver based on Rule 8, SCRCP is misplaced. The Respondent's motion to cancel the bond was not an affirmative defense that was required to be pled. Cancellation related to the issues of reformation and dissolution (which the Appellant

raised) and was necessary to completely resolve the case. It was therefore not required to be pled as affirmative relief in the initial pleadings.

The Appellant also argues waiver based on a single comment made by Respondent's counsel at the December 19, 2017 hearing. A review of the transcript from the December hearing shows that there had been preliminary discussions off the record from which the master followed up with some specific questions on the record. Although the full context is impossible to ascertain from the transcript, the discussions on record fail to show that on December 19, 2017, the Respondent intended to waive the right to subsequently seek a cancellation of the bond for title. What the transcript does show is that the Respondent simply took no position as to possession of the property at issue at that stage of the litigation, which was prior to any ruling on the issues of dissolution or reformation. The record further shows that throughout the case the Respondent consistently maintained it's opposition to the Appellant being placed in possession under the bond for title. Any comments made during the hearing in December therefore pertained only to matters *pendente lite* and cannot be construed as a waiver of the Respondent's position on the ultimate issues or related relief in the case.

At the time of the counsel's comment cancellation was not an issue. Since there had been no ruling on the issues of dissolution or reformation at that point in the case (December 2017 hearing), there was no way the Respondent could even know that a motion to cancel the bond for title would subsequently be required. It was only after the December hearing that the issue of cancellation arose. Judicial dissolution of Augusta and the denial of reformation by the order on February 1, 2018, combined with the failure of Augusta or the Appellant to take further action, left the Respondent with a clouded title to the property at issue. It was then and only then that the

need for cancellation of the bond for title became apparent and necessary. Therefore, any statement made at the first hearing, being prior to the issuance of the February 1, 2018 Order, was made without knowledge that the issue of cancellation would even arise. "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387–88 (1992). As a result, any such comment cannot be construed as an intentional abandonment of the Respondent's right to later request cancellation of the bond for title.

III. THE TRIAL COURT PROPERLY HELD THAT THE FACTS AND LAW DID NOT SUPPORT THE REFORMATION OF A BOND FOR TITLE.

Timeliness of the Appeal as to the February 1, 2018 Order

The Appellant's appeal as to the issue of reformation is not properly before the Court. The Appellant argues the court erred in denying reformation of the bond for title entered into between the Respondent and Augusta South, LLC. The issue of reformation was ruled upon in the February 1, 2018 Order. The Appellant received notice of entry of the Order electronically on February 1, 2018. The Appellant did not file a post trial motion. The Appellant did not file his notice of appeal until April 19, 2018, more than thirty days after the Order of February 1, 2018. Appellant argues in his brief that the Order of February 1, 2018 was a final order. If the February 1, 2018 Order constitutes a final order as to the issues ruled upon therein, as the Appellant argues on appeal, then the Appellant's notice of appeal is out of time and this Court lacks jurisdiction over the issue of reformation. *See* Rule 203 SCACR.

The Issue of Reformation

The Appellant claims that he is entitled, through judicial reformation of a contract, to be inserted into the Bond for Title between the Respondent and Augusta South, LLC. This is based on the claim that "he signed the Bond for Title for Augusta South LLC". Appellant's argument ignores the most basic principal of corporate law. A review of the bond for title at issue shows that the Appellant signed only in a representative capacity on behalf of Augusta South, LLC. "Except as provided in Section 12-2-25 for single-member limited liability companies, a limited liability company is a legal entity distinct from its members." *See* S.C. Code Section §33-44-201. Augusta is clearly shown as the only "Buyer" on the bond for title. While Appellant and Jenkins each signed the bond for title, they did so clearly in their representative capacity as members of "Augusta South, LLC (Buyer)". As to the identity of the buyer, the contract is clear and unambiguous, neither the Appellant, nor Veronica Jenkins, were parties to the contract in their individual capacities.

Appellant seeks to insert himself into the bond for title in place of Augusta. He seeks to force judicially what the contract expressly forbids. The bond for title at issues expressly forbids assignment: "The Buyer shall not assign to any third party the Buyer's rights, duties, privileges, or obligations under this agreement." The terms of the bond show clearly that the Respondent agreed to contract with Augusta, and only Augusta, for the duration of the contract. It would therefore be contrary to the express terms of the agreement to force a new party into the contract.

It is well settled that everyone has a right to select and determine with whom he or she will contract, and cannot have another person thrust on him or her without his consent:

But every one has a right to select and determine with whom he will contract, and

> cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.' Humble v. Hunter, 12 Q. B. 310, 317; Winchester v. Howard, 97 Mass. 303, 305; Ice Co. v. Potter, 123 Mass. 28; King v. Batterson, 13 R. I. 117, 120; Lansden v. McCarthy, 45 Mo. 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: 'Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' *Pol. Cont.* (4th Ed.) 425.

Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U.S. 379, 387–89, 8 S. Ct. 1308, 1309–10, 32 L. Ed. 246 (1888);

Here the contract that the Respondent seeks to force himself into is a Bond for Title. Real estate transactions are subject to the same rule:

> It is good sense, as well as sound law, that, in case of a purely executory contract, a party dealing with another as principal, though in fact he is agent, is not compellable, at all events, to accept performance from the undisclosed principal, when discovered, though he may do so. He may well say: "This is not the contract I made." In case an agent, in making a contract with a third party, acts in his own name, and does not disclose the name of his principal, or the existence of an agency, the agent becomes, as to that third party, the contracting party. *1 Am. & Eng. Ency. of Law*, p. 1164. And the third party may stand on the contract which he has made. It was well said in Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9: "A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract. *** He may contract with whom he pleases, and the sufficiency of his reasons for so doing cannot be inquired into." And, were such reasons open to inquiry, it is easy to see that one might be willing to take the warranties of one person in a deed, when he would not take those of another. At any rate, he is only obliged to take the deed which he contracted to take. It follows that the plaintiff was not bound in law to accept Mrs. Coughlan's deed, when tendered.

Pancoast v. Dinsmore, 105 Me. 471, 75 A. 43 (1909).

In the present case the Respondent contracted with Augusta which was comprised of

multiple members. By dissolving Augusta and attempting to force himself into the contract the Appellant would have the court alter the identity of the parties completely. Such a change of parties has been rejected as it undermines the original party's basis for entering the contract in the first place:

> The evidence discloses that plaintiff signed the memorandum dated June 9, under the distinct impression that he was to acquire the property from the Smiths. We think that he was justified in having that understanding not only from what Jones said to him, but also because of the fact that Jones was purporting to act as a real estate salesman. As is to be seen, the authorization of the Frantas was directed to 'Salesman R. Jones.' Under our statute (Section 339.010 RSMo 1949, V.A.M.S.) a real estate broker or salesman is one who sells 'the real estate of others;' not his own property. When plaintiff, on June 10, was asked to sign the contract in which defendant Jones, instead of the Smiths was named as the seller, he refused and demanded the return of his money. In effect, he elected to rescind. This he had a right to do. As was said by a highly respected court in the case of Pancoast v. Dinsmore, 105 Me. 471, 75 A. 43, 45: "A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract. * * * He may contract with whom he pleases, and the sufficiency of his reasons for so doing cannot be inquired into.' And, were such reasons open to inquiry, it is easy to see that one might be willing to take the warranties of one person in a deed, when he would not take those of another.'

Franta v. Hodge, 302 S.W.2d 291, 293 (Mo. App. 1957).

Here the conditions underlying the Respondent's original agreement have clearly changed. At the time the Bond for Title was executed Augusta was a valid corporation and operating a business at the property at issue. (R. 23-51). Contrary to the provisions of the bond for title which required Augusta to keep the building in a good state of maintenance and repair, the building was condemned by the county while in Augusta's possession. (R. 4-5; 51) When the issue of reformation was presented to the master the bond for title was in the name of a judicially dissolved corporation, the building was in a state of gross neglect requiring at least $25,000 to

$30,000 dollars in repairs and had been condemned, and the business operated there had been closed down and was out of operation. (R. 32-33). Clearly the circumstances have changed dramatically since the Respondent negotiated the bond for title with Augusta.

As a result of the Appellant's action in the present case Augusta was judicially dissolved. Reformation as sought by the Appellant would therefore force the Respondent into an agreement with the Appellant under circumstances completely different than existed at the time of the original contract. This is important, as the Bond for Title is not simply a contract for deed but also acts as an extension of credit to the purchaser. Here, the Appellant seeks to force the Respondent to accept his warranty alone for repayment where the business has closed and the building been condemned.[2] This is clearly an entirely different risk scenario than was accepted by the Respondent when executing the Bond for Title. This is precisely the situation that courts have avoided forcing upon a party to a contract:

> When, however, the contract stipulates a performance involving a highly personal element, it is obvious that a performance lacking that element does not measure up. Contracts calling for professional services as an attorney or a physician exemplify performances too personal to permit imposition of the services of another upon the promisee. *Similarly, contracts extending financial credit or trust to a contracting party are of such a personal nature that substitution of another in his stead does not legally suffice.*[3]'(E)very one,' says the Supreme Court, 'has a

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[2]While the Appellant claimed at trial that he personally made payments on the bond for title due to conflicts within Augusta, the payment history submitted by the Appellant clearly shows that all payments were made by Augusta South, LLC. There is no evidence in record that the Appellant made any payments personally. (R. 10; Attachment Aff.).

[3]Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U.S. 379, 387-388, 8 S.Ct. 1308, 32 L.Ed. 246 (1888); Wetherell Bros. Co. v. United States Steel Co., 105 F.Supp. 81, 85-86 (D.Mass.1952), *aff'd*, 200 F.2d 761 (1st Cir. 1953); Sims v. Cordele Ice Co., 119 Ga. 597, 46 S.E. 841, 843 (1904); Harney v. Hellgren, 322 Ill. 126, 152 N.E. 481, 483 (1926); Salmon Lake Seed Co. v. Frontier Trust Co., 130 Me. 69, 153 A. 671, 673-674 (1931); E. M. Loews, Inc. v. Deutschmann, 344 Mass. 765, 184 N.E.2d 55, 56 (1962); D. C. Hardy Implement Co. v. South

> right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent.' He also, says the Court, has 'the right to the benefit (he) anticipate(s) from the character, credit and substance of the party with whom (he) contract(s).' [Humble v. Hunter, 116 Eng.Rep. 885, 887 (Ex. 1848)]. Moreover, says another court, '(i)t is competent for the parties to make any contract a personal one no matter what the subject-matter.' Professional skill and financial integrity are qualities as to which everyone is prone to exercise a high degree of selectivity-a prerogative upon which all would-be contractors may insist. The opinion neither of judge nor juror as to the capabilities of a replacement is acceptable as a substitute for the promisee's own judgment and tastes in the matter.

Clayman v. Goodman Properties, Inc., 518 F.2d 1026, 1035–37 (D.C. Cir. 1973), *emphasis added, footnotes omitted*; *See also* Delaware County v. Diebold Safe & Lock Co., 133 U.S. 473, 488, 10 S.Ct. 399, 33 L.Ed. 674; Burck v. Taylor, 152 U.S. 634, 651, 14 S.Ct. 696, 38 L.Ed. 578; Central Union Bank v. New York Underwriters' Ins. Co., 4 Cir., 52 F.2d 823, 78 A.L.R. 494; Florance v. Kresge, 93 F.2d 784, 787 (4th Cir. 1938); Hardy v. Williams, 31 N.C. 177; Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co., 152 U.S. 200, 14 S.Ct. 523, 38 L.Ed. 411; School Sisters of Notre Dame v. Kusnitt, 125 Md. 323, 93 A. 928, L.R.A.1916D, 792; 46 Am. Jur., Sales, section 42; William Iselin & Co. v. Saunders, 231 N.C. 642, 645, 58 S.E.2d 614, 616 (1950).

In Clayman the contract required the optionees, upon an exercise of the option, to assume one-half of a large mortgage indebtedness on the property. There the requirement was an assumption of half of the outstanding balance, as distinguished from acceptance of a half interest in the property subject to the mortgage. Here, as in Clayman, the relief sought would change the

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Bend Iron Works, 129 Mo. 222, 31 S.W. 599 (1895); Kutschinski v. Thompson, 101 N.J.Eq. 649, 138 A. 569, 571 (1927); New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 180 N.Y. 280, 73 N.E. 48, 51-52 (1905); Menger v. Ward. 87 Tex. 622, 30 S.W. 853, 854-855 (1895); Kinman v. Howard, 465 S.W.2d 400, 401 (Tex.Civ.App.1971); J. Maury Dove Co. v. New River Coal Co., 150 Va. 796, 143 S.E. 317, 327 (1928).

identity and number of parties involved in the Respondent's original credit analysis. While the only party that was obligated previously was Augusta, it was an on-going business with operational assets supported by the cooperation and work of two members. None of which now exists. As a result the Appellant can not now provide the same conditions upon which the Bond for Title was offered. Accordingly, Respondent cannot be compelled to accept what plainly is considerably less than what the contract requires:

> But the basic principle controlling decision of those cases has also been applied-properly, we think-where one party assigned his rights to another party on the debtor side of a contract extending credit. We are unable to distinguish a case-the one here-in which one of three parties whose credit was bargained for as a contract term declines to participate in its performance. In each situation the contract demands the credit of particular contractors, and must be given its just due.

Clayman v. Goodman Properties, Inc., 518 F.2d 1026, 1035–37 (D.C. Cir. 1973).

Here the Appellant sought to force the Respondent into an agreement under circumstances completely different from the circumstances existing at the time the Respondent negotiated and entered into the bond for title with Augusta. The Master properly refused to reform the contract between Respondent and Augusta.

CONCLUSION

Based on the foregoing, the decision of the lower court should be affirmed.

[signature page follows]

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CERTIFICATE OF COUNSEL

I certify that the Final Brief of Respondent complies with Rule 211(b) SCACR and has been redacted according to the Orders of the Supreme Court.

Respectfully submitted,

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