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

Appellate Case No. 2019-002002

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

v.

Ross S. Holliday.....Respondent.

FINAL REPLY BRIEF OF APPELLANT

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APPELLANT'S REPLY

The Respondent's Brief, and in particularly the statements set forth in the "Facts of the Case," contains references to alleged facts that are not supported by the evidentiary record. 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. Finally, the Respondent fails to address or even acknowledge material distinctions of fact identified in Appellant's Brief which undermine the legal arguments set forth by the Respondent. Therefore, the circuit court's orders 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 Promissory Note is not a "business asset" of Warren Holliday.

The Respondent summarily states 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 properly 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 busines entities, a schedule of which is attached hereto as Exhibit A." (Marital Settlement Agreement, R. at p. 252, 395). 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., R. p. 199, lines 11 to 15). 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."

Regrettably, the Respondent attempts to characterize the Promissory Note as a "business asset" by boldly misrepresenting Patricia Holliday's deposition testimony in his brief. Patricia Holliday did not, as the Respondent contends, "confirm that this Note was a business asset" nor did she testify that the Promissory Note constituted "a business transaction." (Respondent's Initial Brief at p. 9). Again, the opposite is true:

> Q. This Promissory Note, was it a business asset?
>
> A. No, sir.
>
> Q. What was it?
>
> A. It was a personal loan.
>
> (Deposition of Patricia Holliday, R. p. 199, lines 11 to 15).

Patricia Holliday also never testified that the Promissory Note signed by the Respondent constituted a business transaction between the Respondent and Patricia and Warren Holliday. As the Respondent is well aware, Patricia Holliday testified that it was the Respondent, Ross Holliday **(not Patricia or Warren)**, who used the loan proceeds to enter into a business transaction with certain third parties ("the Holmes") and that neither Patricia nor Warren were

part of that transaction: this was Ross's deal and "his deal alone." Deposition of Patricia Holliday, R. p. 215, line 20 to p. 216, line 15.

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, R. p. 7). 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, R. p. 125). 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, 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, R. p. 236, ¶ 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, R. p. 236, ¶ 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, R. at p. 252, 395) (emphasis 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*

[1] This argument was not made at the summary judgment hearing.

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. Further, Patricia Holliday expressly stated that she did not intend such a result by signing the Marital Settlement Agreement. (Patricia Holliday Affidavit, R. p. 236, 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 R. at pp. 392, 396, 398). Unless a specific asset is 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, R. p. 236;

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

Financial Declaration, R. at p. 263, 465). 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 "[except 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/OR DOCTRINE OF LACHES, 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 Initial Brief at 13. The Respondent's assertion lacks candor and is not reflective of the record below. First, this issue was raised by the Respondent at the hearing on the Respondent's Motion for Summary Judgment, 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, R. at p. 9). The Respondent did not seek reconsideration of this ruling. Therefore, the trial court did not "recognize" or rule 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.") Second, the trial court's subsequent Order reiterated that the trial court had made no ruling regarding the statute of limitations. "[T]he Court did not address the statute of limitations issue in its October 11, 2019 Order because it found the releases contained in the Marital Settlement Agreement to be

dispositive." (June 25, 2021 Order Denying Plaintiff's Motion for Relief from Judgment, R. at p. 21, footnote 8). The Respondent is fully aware the trial court did not rule that Appellant's claims are barred by the statute of limitations or laches yet mischaracterizes the court's findings in his brief.

The Respondent also ignores the trial court's statement that the statute of limitations question could involve a question of fact, further emphasizing that summary judgment is not appropriate under the present circumstances: "[T]he statute of limitations could be a question of fact based on the Defendant's last date of payment on the note." (June 25, 2021 Order Denying Plaintiff's Motion for Relief from Judgment, R. at p. 21, footnote 8). There is, at a minimum, a genuine issue of material fact regarding the statute of limitations. Accordingly, the trial court's order must be reversed.

IV. EVEN IF, ASSUMING ARGUENDO, RESPONDENT'S STATUTE OF LIMITATIONS AND LACHES DEFENSES HAD BEEN A) RULED UPON AND B) PRESERVED FOR REVIEW, SUMMARY JUDGMENT IS STILL NOT APPROPRIATE BECAUSE THE STATUTE OF LIMITATIONS HAD NOT RUN.

Even if the statute of limitations issue were before the Court, the Respondent contends that he made payments on the Note on December 31, 2010 and again in 2016. (Ross Holliday Deposition, R. p. 345, lines 4-21; p. 357, line 19 to p. 358, line 16; p. 360, line 1 to p. 361, line 22; p. 377, line 22 p. 378, line 24). The applicable statute of limitations is S.C. Code Ann. § 36-3-118(b), which reads:

> Except as provided in Subsection (d) or (e), if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, ***an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years***.

S.C. Code § 15-3-130 – entitled "Suits on causes saved from bar of statute by part payment or written acknowledgement" - provides:

> All actions upon causes of action which would be barred by the statute of limitations but for part payment or a written acknowledgment shall be brought on the original cause of action and the part payment or written acknowledgment shall be evidence to prevent the bar of the statute of limitations.

Therefore, the part payments allegedly made by the Defendant in 2010 and 2016 serve to re-start the period of limitations. This lawsuit, brought in 2018, was not untimely based on the ten-year statute of limitations. (Appellant's Memorandum in Opposition to Motion for Summary Judgment, filed September 24, 2019, R. at pp. 119-123; See also Appellant's Proposed Order, submitted April 9, 2021, R. p. 473; March 31, 2021 H'ring Tr., R. p. 568, line 17 – p. 571, line 11).

The Respondent's contention that Appellant's breach of contract claim is barred by the equitable doctrine of laches is also unavailing. The "statute of limitations, rather than laches, is applicable to a legal as opposed to an equitable claim." *Treadaway v. Smith*, 325 S.C. 367, 378, 479 S.E2d 849, 856 (Ct. App. 1996) *citing Edens v. Edens*, 312 S.C. 488, 435 S.E.2d 851 (1993). "Therefore, laches does not operate to bar a legal claim when the applicable statute of limitations has not run." *Id.* An action for breach of contract is a legal claim. *Id.* As such, the defense of laches does not apply. (Appellant's Memo in Opposition, filed September 24, 2019, R. at p. 123).

V. THE RESPONDENT FAILS TO ADDRESS, OR EVEN ACKNOWLEDGE, THOSE FACTS IDENTIFIED IN THE APPELLANTS BRIEF, WHICH MATERIALLY DISTINGUISH THE PRESENT CASE FROM *LANIER v. LANIER* AND *LANS v. GATEWAY 2000, INC.*

The Respondent's Brief notably ignores those facts, identified in the Appellant's Brief, which materially distinguish the present case from *Lanier v. Lanier, Inc.*, 364 S.C. 211, 612 S.E.2D 456 (Ct. App. 2005) and *Lans v. Gateway 2000,* Inc., 110 F. SUPP. 2D 1 (D.D.C. 2000), The reason for the Respondent's silence is clear: The cases are factually and materially

distinguishable. (See Appellant's Reply to Respondents Memo in Opposition, filed November 4, 2020, R. pp. 468-472). Both *Lanier* and *Lans* concern circumstances in which the party seeking relief from judgment knew about a document and its contents, but failed to raise the existence of that document to the trial court. In the present case, the discovery of the original Note was consequential because it is evidence that ***original*** Note was in the possession of Patricia Holliday, not because the contents of the original Note differed from what was presented at the summary judgment hearing or that the contents of the original note would have changed the outcome. The circuit court abused its discretion by failing to recognize and apply this distinction. This was an error of law, and warrants reversal.

CONCLUSION

For the reasons set forth above, and in the Appellant's Brief, Appellant respectfully requests that this Court reverse the circuit court's grant of summary judgment to Respondent Ross S. Holliday on October 11, 2019, reverse the denial of the Appellant's motion for reconsideration on November 15, 2019, reverse the Order Denying Plaintiff's Motion for Relief from Judgment on June 25, 2021, and remand this case for trial.

[Signature on following page]

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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