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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Ninth Judicial Circuit

Jennifer B. McCoy, Circuit Court Judge

Case No. 2021-001227

Gerald R. Smith ....Respondent

v.

United Cable Construction Co., Inc.,
South Atlantic Communications, Inc.,
Brandon W. Linder, and
Karla Linder ....Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENT IN REPLY

I. Appellants presented at least a scintilla of evidence at both the Master-in-Equity's hearing and the Court of Common Pleas hearing that gave rise to a genuine issue of material fact.

Respondent's assertion that Appellants presented no evidence and that Appellants conceded that they had not presented evidence (Resp't Br. 17.) is without merit, and warrants further scrutiny. At both the hearing before the Master-in-Equity and the Court of Common Pleas, Appellants placed two key issues before each court, and neither court addressed them, namely, the ambiguities within the Parties' Modification Agreement and the remedy in the event of a breach of the Parties' Modification Agreement.

When interpreting a contract, a court must ascertain and give effect to the intention of the parties. *Chan v. Thompson*, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct. App. 1990). A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). "The determination of the parties' intent is then *a question of fact*." *Id.* (emphasis added). Where the contract's language is ambiguous, however, the Court should construe the language liberally and most strongly in favor of the party who did not write or prepare it. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 500, 649 S.E.2d 494, 403 (Ct. App. 2007) (citing *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981)). Whether an ambiguity exists in the language of a contract is also a question of law. *Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302.

The Modification Agreement (R. p. 156-157.) that Respondent seeks to enforce is an attempted modification of the Primary Agreements between the parties to this case, with the exception of Appellant Karla Linder. It is clear from the Parties' Modification Agreement (*Id.*)

that the parties intended to reduce Appellant Brandon Linder's debt to Respondent. What remains unclear are the Parties' rights and obligations in the event of a breach of the Modification Agreement. Appellant Brandon Linder had no equivocation in his understanding of the Modification Agreement. On May 15, 2019, a hearing on the merits of Respondent's Declaratory Judgment action was held. While under oath, Appellant Brandon Linder explained his understanding of the Modification agreement:

> MR. MLYNARCZYK: So let's talk about intent for a minute. Look at the third paragraph down that starts with whereas. It says whereas the sale of the seller Gerald Smith is agreeable to reduce the payoff to 300,000 provided the following terms are met. What did that mean to you?
> MR. LINDER: Just what it says, it means that if I can do these things that he will do this for me -- he will reduce the debt for me if I can make these things I tried to make these things happen. There was two hurricanes in a 30-day period a couple of months after this that just wiped my whole -- all the money I had and everything out so there was no way I could make these things happen.
> MR. MLYNARCZYK: So at this point, I mean obviously if you had $300,000 sitting in the bank you would have cut the check?
> MR. LINDER: I would pay him immediately.
> MR. MLYNARCZYK: You admit this is a fantastic deal?
> MR. LINDER: Yes, sir.
> MR. MLYNARCZYK: And you tried everything in your power to accomplish these things on this list?
> MR. LINDER: Yes, sir.
> MR. MLYNARCZYK: Okay. And what was your understanding based on that preamble to it, what was your understanding if you could not do these things on the list?
> MR. LINDER: That he was going to -- that I would owe him a million dollars.
> MR. MLYNARCZYK: Okay And just to reiterate what we said before, in all of the documents we've addressed so far your wife was not involved in that purchase at all, was she?
> MR. LINDER: No, Sir.
> MR. MLYNARCZYK: Okay. Do you know why she was required to sign this document?
> MR. LINDER: I assume because her name was on the loan at the bank. I told them I had a loan at the bank. I told them I had a foreclosure, I told them that the IRS had liens on it.

> MR. MLYNARCZYK: Okay. So she's on the property at 144 Frankie?
> MR. LINDER: Yes, sir.

(R. pp. 348-349).

Despite the patent ambiguities and the Parties' conflicting interpretations of the Modification Agreement, the Master-in-Equity found that the Modification Agreement was "[a] valid and binding contract between and among the parties to this case."[1] (R. p. 8). However, the Master-in-Equity's analysis of the Modification Agreement was limited to whether it met the elements of a contract and no further. The Master-in-Equity did not interpret the Modification Agreement's terms or construction, nor whether or how the Modification Agreement could be enforced. Those issues lingered until Respondent brought suit to enforce the Modification Agreement. (R. pp. 137-157). Appellants raised those very same issues, forefront and center, before the Court of Common Pleas in their Memorandum in Opposition to Summary Judgment. (R. pp. 231-239, 433-436). Here, the contract at issue is ambiguous as its terms are reasonably susceptible of more than one interpretation. *Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302. Respondent's interpretation of the Modification Agreement is that he could enforce it in lieu of the Parties' Primary Agreements. (R. pp. 156-157, 168-169). However, Appellants have an entirely different, yet reasonable, interpretation of the Modification Agreement, namely, in the event of Appellants' breach of the same, Appellants would not be entitled to the entire basis of their bargain, a reduction of Appellants' previously owed debt. These varying, yet reasonable, interpretations of the same instrument give rise to a genuine issue of material fact. Moreover, any ambiguities within the Modification Agreement must be construed against its drafter, the

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[1]Appellants contend that they were not required to raise the issue of contract construction and enforceability during the Declaratory Judgment action. The issues of contract interpretation and enforceability were specifically left out of the Master-in-Equity's consideration. (R. p. 234).

Respondent. *See Moody v. McLellan*, 295 S.C. 157, 367 S.E.2d 449, 451 (Ct. App. 1988) (courts must construe any doubt and ambiguities in an agreement against the drafter of the agreement).

Further confounding the ambiguities in the parties' Modification Agreement was Karla Linder's involvement and Respondent's requested relief. As discussed above, Appellant Karla Linder's only involvement in this transaction was her mistaken belief that she needed to sign the Parties' Modification Agreement. (R. pp. 349-350, 353). Beyond Appellant Karla Linder's tangential involvement with the Modification Agreement, the record does not contain sufficient evidence to warrant any judgment against Appellant Karla Linder.

In addition, the Respondent, the Master-in-Equity, and the Court of Common Pleas all contend that the Modification Agreement is valid and binding. However, Respondent has chosen to enforce provisions of the Modification Agreement that benefit him and reject those provisions that do not. In particular, Paragraphs 3, 4, and 5 of the Modification Agreement (R. p. 155.) which requires Appellants Brandon and Karla Linder to convey a particular parcel of land to Respondent. (*Id*). However, Respondent did not seek enforcement of those provisions and specifically abandoned them. (R. pp. 437-438).

In determining whether to grant summary judgment, the pleadings and documents on file must be liberally construed in favor of the nonmoving party who must be given benefit of all favorable inferences that might reasonably be drawn from record. *Bates v. City of Columbia*, 301 S.C. 320, 391 S.E.2d 733 (Ct. App. 1990); *McNair v. Rainsford*, 330 S.C. 332, 499 SE 2d 488 (Ct. App. 1998). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *McNair*, 330 S.C. at 342 499 SE 2d at 498 (Ct. App. 1998).

Here, between Appellant Brandon Linder's sworn testimony, Appellants' counterclaim, Appellants' affirmative defenses, and the record taken as a whole, when construed liberally in favor of Appellant, the Court erred in granting summary judgment.

II. Public Policy is not served by ordering specific performance in this case.

Respondent's contention that an award of specific performance in this instance should be upheld because "[t]hat portion of public policy that promotes the idea that in an orderly society promises must be kept and if they are not there are consequences," (Res. Brf. 17.)[2] is without merit. If Respondent's position was taken to its logical conclusion, then Public Policy would require the enforcement of any agreement that meets the rudimentary elements of a contract, regardless of the contract's underlying terms and conditions. Fortunately, Respondent's position is not the rule. "The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." *White v. JM Brown Amusement Co., Inc.*, 360 S.C. 366, 601 S.E.2d 342 (2004). As discussed in Appellant's Initial Brief, the order at issue violates several public policies, namely, enforcement of the judgment beyond ten years[3], and the prohibition of "wager policies" pertaining to life insurance.[4] Reversal in this instance is warranted because the Modification Agreement is repugnant to public policy.

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[2] Respondent cites *Guignard v. Atkins*, 282 S.C. 61, 317 S.E.2d 137 (S.C. App. 1984) and *Holly Hill Lumber Co. Inc v. Mccoy*, 201 S.C. 427, 23 S.E.2d 372 (1942) in support of his public policy counterargument. Although *Holly Hill* and *Guignard* were cases in which specific performance was ultimately upheld, those cases are distinguishable from the present case as they dealt strictly with land sale contracts.

[3] *See Home Port Rentals, Inc. v. Moore*, 359 S.C. 230, 234, 597 S.E.2d 810, 812 (Ct. App. 2004) (holding that executions on final judgment or decrees must occur within ten years from the date on which the judgment was entered).

[4] *See Henderson v. Life Ins. Co.*, 176 S.C. 100, 127-128, 179 S.E. 680, 691 (1935) ("It is firmly established that insurance procured by one person on the life of another, in which the party

III. Appellants' Motion to Alter or Amend was timely, properly preserved the issues on appeal, and Appellants were entitled to the relief requested.

Respondents allege that Appellants' Motion to Alter or Amend "[w]as flawed in form and substance and [the Court of Common Pleas] properly denied the motion." (Resp. Br. 17). This argument fails for a number of reasons.

First, Appellants' Motion to Alter or Amend was timely filed and served. "A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(e), SCRCP. The Court of Common Pleas entered its formal written order on August 24, 2021. (R. pp. 119-127). Appellants served their motion, via email and U.S. Mail on September 3, 2021, ten days after their receipt of the formal written order. (R. pp. 242-250). Therefore, Appellants timely filed and served their Motion to Alter or Amend.

Second, Appellant's Motion to Alter or Amend properly preserved the issues presently on appeal. A party must a file a motion to alter or amend when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). "A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Id.* (emphasis in original. *See Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 826 S.E.2d 585 (2019) ("A court's decision to deny a motion to amend should not be based on the court's perception of the merits of an amended complaint"). Appellants raised seven issues on appeal. (App. Br. 1). All seven of those issues were raised in Appellants' Motion to Alter or Amend. (R. pp. 242-249). The Respondent, through his Brief, was unable to identify any issue on appeal that was not properly

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effecting the insurance has no interest, is void as a wager contract against public policy, which condemns gambling speculation upon human life.")

preserved in Appellants' Motion to Alter or Amened. (*Id.*). Therefore, Appellants properly preserved and raised all issues before this Court.

IV. Appellants' Rule 60(b), SCRCP Motion was proper, and the Court of Common Pleas abused its discretion by denying it.

Respondent's assertion that relief under Rule 60, SCRCP is inapplicable to the present case because "There was no clerical mistake. There was no mistake, inadvertence, excusable neglect, newly discovered evidence or fraud," (Resp't Br. 18.) misses Appellants' arguments entirely. Despite quoting Rule 60, SCRCP, verbatim, Respondent failed to address Appellants' argument as to why they were entitled to relief under Rule 60(b), SCRCP, namely, that the Modification Agreement is void and unenforceable (Appellants' Br. 22.), and the Court of Common Pleas abused its discretion in denying it. Despite Respondent's assertions to the contrary (Resp't Br. 15), relief can be afforded to Appellants from both the declaratory judgment order (R. pp. 1-11.) and the order granting summary judgment. (R. pp. 119-127). *See Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013) (holding that because a special referee had already entered a final order and had no remaining duties to perform, the Rule 60(b) was properly before the circuit court because the motion presented a separate matter that did not run afoul of the general rule prohibiting one circuit court judge from overruling another); *See also Bank of S.C. v. Player*, 341 S.C. 424, 535 S.E.2d 128 (2000). The Court abused its discretion in denying Appellants' Motion to Alter or Amend and a reversal of the Court's grant of summary judgment is warranted.

V. Appellants' Rule 15(b), SCRCP Motion was proper as it would have permitted a trial on the merits.

As discussed in Argument I, *supra*, and contrary to Respondent's assertions, Appellants submitted at least a scintilla of evidence to warrant the denial of Respondent's Motion for Summary Judgment. Respondent's remaining retort to Appellants' argument that Appellants' Rule 15(b), SCRCP Motion would not have changed the outcome is dubious at best. (Resp't Br. 17).

"[W]hen issues are not raised by the pleadings but are 'tried by express or implied consent of the parties, *they shall be treated in all respects as if they had been raised in the pleadings*.'" *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000) (quoting Rule 15(b), SCRCP) (emphasis added). As in *Staubes*, Appellant expressly and impliedly tried, and therefore raised affirmative defenses that warranted further consideration by the Court of Common Pleas.

In particular, Appellants argued that the Master-in-Equity's Declaratory Order was limited in its preclusive effect (R. p. 432.); that the Modification Agreement contained ambiguous terms (R. p. 432); that a condition precedent to Respondent's performance was not met (R. p. 433.); the affirmative defense of impossibility (R. p. 434.); that specific performance wasn't an available remedy because Respondent had an adequate remedy at law (R. pp. 436-437.); that compelling Appellant Brandon Linder to obtain life insurance in the amount of one million dollars in favor of Respondent wasn't an available remedy; (R. pp. 437-438); Respondent's conflicting and selective enforcement of some, but not all of the Modification Agreement's terms (*Id.*); that the contract was not severable (R. p. 437); that there was ineffective waiver of binding arbitration (R. p. 440); and that Respondent failed to assert any affirmative defenses to Appellants' counterclaim (R. p. 442). Despite a record replete with affirmative defenses, expressly and impliedly tried, the Court of Common Pleas denied Appellant's Motion to Conform to the Evidence via Form 4 Order. (R. pp. 134-136). This was an abuse of discretion that warrants reversal.

VI. Respondent failed to address several issues raised by Appellants, thus conceding them.

"[I]f an appellee fails to respond to an issue in its brief, the [appellate] court may treat the failure to respond as a confession that the appellant's position is correct." *First Union Nat. Bank of S.C. v. FCVS Commc'ns*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), rev'd in part, 328 S.C. 290, 494 S.E.2d 429 (1997) (quoting Am.Jur.2d *Appellate Review* § 555, at 254 (1995));

accord Turner v. S.C. Dep't of Health & Env't Control, 377 S.C. 540, 661 S.E.2d 118 (Ct. App. 2008). *See also Transportation Ins. Co. & Flagstar Corp. v. S.C. Second Inj. Fund*, 389 S.C. 422, 432, 699 S.E.2d 687, 692 (2010) (holding that an appellate court will decline to consider an argument where there is no citation of authority, and it is so conclusory as to be an abandonment of the issue on appeal).

Respondent failed to address Appellants' arguments as to whether Respondent came to the Court with clean hands while seeking equity.[5] Respondent could not point to any sufficient evidence that would warrant judgment against Appellant Karla Linder.[6] Respondent further failed to specifically refute Appellants' argument that pubic policy and statute prohibit enforcement of judgments beyond ten years (Appellants' Br. 13.) and the that Modification Agreement is no more than a "wager policy" likewise in violation of public policy (*Id.* at 14). Respondent failed to address Appellants' argument that specific performance is not an available remedy and that Respondent can be made whole with monetary damages.[7] Respondent offered no counter to whether the Modification Agreement is ambiguous and how said ambiguities must be construed against Respondent as the drafter.[8] In addition, Appellants argued that Respondent could not seek equity as his hands were unclean. (Appellants' Br. 9). Respondent failed to offer any retort to Appellants' defense of unclean hands. Finally, and most glaringly, as to Appellants' Argument V, Respondent offers no rebuttal. As discussed in Argument V of Appellant's Brief (Appellant's Br. 17.), the parties' contract places no specific obligations or conditions upon Appellants United Cable Construction Co., South Atlantic Communications, Inc., and Karla Linder. However, judgment in

[5] *See* Argument I(C), *supra*
[6] *See* Argument I(D), *supra*
[7] *See* Argument IV, *supra*
[8] *See* Argument V(B), *supra*

the amount of $332,475.30 was entered against each Appellant, in the same amount, with no indication of joint and/or several liability. As to Appellants' arguments detailed above, Respondent failed to respond to them, therefore conceding the same.

CONCLUSION

For the argument set forth above, Appellants United Cable Construction Co., Inc., South Atlantic Communications, Inc., Brandon W. Linder, and Karla Linder respectfully request this Court to reverse Court of Common Pleas Orders dated August 5, 2021, August 24, 2021, August 26, 2021, and October 1, 2021, remand the matter for a trial on the merits, and award them such other and further relief as this Court deems just and proper.

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CERTIFICATE OF COUNSEL

The undersigned certified that Appellants' Final Brief and Appellants' Final Brief in Reply comply with Rule 211(b), SCACR.

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