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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY

Court Of Common Pleas

George M. McFaddin, Jr. Circuit Court Judge

Case No.: 2016-CP-45-00590, Circuit Court
Appeals Court Docket No.: 2021-000849

Cassandra Selph..... Appellant,

v.

Barbara Boatwright, Margaret S. Daniels, Individually
and as Personal Representative of The Estate of Eli Selph,
Eli Maurice Selph, and Dwayne Selph

Of whom Margaret S. Daniels, Individually and as Personal Representative of the Estate of Eli
Selph, and Dwayne Selph Respondents.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

Whether the Circuit Court erred in ordering Appellant to comply with the terms of a settlement agreement and by imposing court costs, legal fees, and interest based on Appellant's prior lack of compliance with the settlement agreement.

STATEMENT OF THE CASE

I. Brief Summary of Proceedings Related to Appeal

This appeal involves a Circuit Court Order that enforced the terms of a settlement agreement relating to real property claims among family members ("Settlement Agreement"). The Settlement Agreement provided that it would be enforceable by the Circuit Court pursuant to Rule 43(k), SCRCP, and that if an action to enforce the Settlement Agreement by motion became necessary the prevailing party would be entitled to attorney's fees and costs. Settlement Agreement, pp. 1-2.

Under the terms of the Settlement Agreement, Plaintiff Cassandra Selph (hereafter "Appellant") was required to execute the necessary deeds and pay Defendant Margaret S. Daniels (hereafter "Respondent") in the amount of \$40,848.30 by March 23, 2019. Settlement Agreement, p. 1. However, Appellant failed to execute the deeds or tender payment as required by the Settlement Agreement. See Affidavits of Jerome P. Askins, III, and Affidavit of Margaret S. Daniels. As a result, Respondent filed a motion to compel Appellant to adhere to the Settlement Agreement. Notice of Motion and Motion to Compel Compliance with Settlement Agreement, dated April 7, 2020.

After considering the motion along with arguments of counsel and the affidavits that had been filed by the parties, the Circuit Court found that Appellant failed to execute the deeds and make payment as required by the Settlement Agreement and that her failure to do so was without

just cause. Circuit Court Order, dated July 6, 2021, p. 3. As a result, and in accordance with the Settlement Agreement, the Circuit Court ordered Appellant to fully comply with the Settlement Agreement, to pay Respondent the purchase price of \$40,848.30 with interest from March 23, 2019, and to pay Respondent \$5,275.00 for attorney's fees and \$57.36 for costs, which were incurred by Respondent to enforce the Settlement Agreement. Id.

After receiving the Circuit Court's Order ("Order") Appellant filed this appeal seeking review and reversal of the Order on grounds that the record before the Circuit Court did not support the Circuit Court's rulings and award of interest, costs and fees.

II. Detailed Case History

Plaintiff-Appellant, Cassandra Selph, initiated the legal proceedings in this matter when she filed a Summons and Complaint on December 20, 2016, to determine her rights with respect to land owned by her family. The case, and the respective claims to the family property, were resolved when a Settlement Agreement was reached during a mediation held on January 29, 2019. Settlement Agreement, pp. 1-3. The Settlement Agreement was signed, and initialed on each page, by all parties and their attorneys. Id.

The Settlement Agreement discusses certain tracts of land (Tracts 1, 2, 2A, 3, 4 and 5) and incorporates a sketch, which was initialed by all parties. Settlement Agreement, Attachment (Sketch).¹ The Settlement Agreement provides, among other things: "The parties will execute special warranty deeds and any other documents necessary to effect the terms of this Agreement." Settlement Agreement, p. 2.

The Settlement Agreement also provides:

Tract 4 shall be conveyed to Plaintiff [Appellant] for the sum of \$41,000.00 by her, less the sum \$151.70 which represents the deed stamps on this conveyance,

¹ The sketch was prepared by a surveyor selected by Appellant's attorney.

for a net payment to Defendant Margaret S. Daniels [Respondent] of \$40,848.30, which shall be paid by March 23, 2019 and held in trust by Mr. O'Bryan as attorney for Plaintiff, pending final exchange of all deeds.

Settlement Agreement, p. 2.

With respect to enforcement of the agreement, the Settlement Agreement provides:

This Agreement shall be enforceable by the Court pursuant to Rule 43(k), SCRPC, and as a contract between the parties. If an action is necessary to enforce this Agreement, by motion or otherwise, the prevailing party shall be entitled to his or her attorney's fees and costs for the necessity of enforcing this Agreement.

Settlement Agreement, pp. 2-3.

Appellant refused to comply with the Settlement Agreement. Specifically, she failed to execute the necessary deeds and failed to make the payment of \$40,848.30 to Respondent by March 23, 2019.² As a result, on April 7, 2020, Respondent moved to compel compliance with the Settlement Agreement and sought attorney's fees, costs, and interest against Appellant pursuant to the provisions in the Settlement Agreement. Notice of Motion and Motion to Compel Compliance with Settlement Agreement, dated April 7, 2020.

On June 26, 2020, Respondent filed a memorandum in support of the motion to compel, along with an affidavit of Respondent's counsel. Memorandum in Support of Motion to Compel Compliance with Settlement Agreement, dated June 26, 2020, and Affidavit of Jerome P. Askins, III ("Askins Affidavit"), dated June 26, 2020. The Askins Affidavit attested to Appellant's failure and refusal to execute the necessary deeds and specified the amount of attorney's fees and costs incurred by Respondent for enforcement of the Settlement Agreement as of the date of the affidavit. Askins Affidavit, p. 1.

² Appellant still has not tendered payment to Respondent despite being in possession of the property since the mediation on January 29, 2019.

On November 27, 2020, Appellant filed an Affidavit in response to Respondent's motion to compel. Affidavit of Cassandra Selph ("Selph Affidavit"), dated November 27, 2020. In the Selph Affidavit, Appellant asserted that the Settlement Agreement was not binding because it was not filed in court. Id. at p. 1. Appellant also asserted that her delay in executing the deeds was due to confusion and changes caused by Respondent's attorney. Id. at pp. 2-3.³

The Honorable George M. McFaddin, Jr., Circuit Court Judge, set the hearing date for the motion to compel for January 14, 2021.

On January 4, 2021, which was ten days prior to the hearing, Respondent electronically filed an additional affidavit of counsel. Affidavit of Jerome P. Askins, III ("Additional Askins Affidavit"), which was dated and time stamped January 4, 2021. The Additional Askins Affidavit provided supporting information for the motion to compel. Askins Affidavit, pp. 1-5. Specifically, the Additional Askins Affidavit set forth the details of the agreement between the parties, Appellant's failure to comply with the Settlement Agreement, and the legal fees and costs incurred to enforce the Settlement Agreement as of January 4, 2021. Id.

That same day, Respondent's attorney attempted to electronically file an affidavit of Respondent to provide further support for the motion to compel. See Affidavit of Margaret S. Daniels, dated January 4, 2021 ("Daniels Affidavit"). However, the Daniels Affidavit was not received and date stamped by the Circuit Court until January 5, 2021. Id. The Daniels Affidavit described, among other things, the amount owed to her by Appellant under the Settlement Agreement and Appellant's failure to make payment by the required date. Daniels Affidavit, p. 2. It also described how Appellant had assumed possession and control of the property described as

³ There were changes due to a misstatement of total acreage in the Sketch (52.53 acres that should have been listed as 49.95). However, the issue was easily resolved by a proportionate reduction in acreage for all parties and did not justify a refusal to execute the deeds or a delay in making payment to Respondent. Order, p. 3.

Tract 4 in the Settlement Agreement following the mediation even though she had not made the required payment. Id.

Appellant filed an “Affidavit in Reply” on January 12, 2021. Affidavit of Cassandra Selph, dated January 12, 2021. In the Affidavit in Reply, Appellant objected to the Additional Askins Affidavit and the Daniels Affidavit on grounds that they were untimely.⁴ Id. at pp. 1-2. Appellant also asserted that she should not be blamed for the delay in the fulfillment of the Settlement Agreement because she alleged there had been changes to the agreement. Id. at p. 2. To support her assertions regarding the delay she submitted an email chain between her and her attorney. Id., Exhibit A.

The Circuit Court heard oral argument on the motion to compel on January 14, 2021, and then took the matter under advisement. Hearing Transcript, pp. 3-19.

On June 30, 2021, the Circuit Court requested additional briefing from the parties regarding Appellant’s argument that the affidavits submitted by Respondent were untimely. Email of Lucius Bullock, Law Clerk to Judge George McFaddin, dated June 30, 2021. In response to the Circuit Court’s request, Respondent submitted a letter to the Circuit Court on June 30, 2021, and Appellant submitted a letter to the Circuit Court on July 2, 2021. Correspondence submitted by email for Jerome Askins on June 30, 2021, and letter from Bernard Mitchell Alter to Judge McFaddin, dated July 2, 2021.

On July 6, 2021, by written order, the Circuit Court held in favor of Respondent on the motion to compel and issued an award of legal fees, costs and interest to Respondent. Circuit Court Order, dated July 6, 2021. Appellant filed a Notice of Appeal on August 2, 2021.

⁴ In her Affidavit in Reply, Appellant erroneously stated that both the Askins Affidavit and the Daniels Affidavit were submitted on January 5, 2021. However, the Circuit Court’s time stamp shows that the Askins Affidavit was filed on January 4, 2021.

STANDARD OF REVIEW

“In South Carolina jurisprudence, settlement agreements are viewed as contracts.” Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). “An action to construe a contract is an action at law.” Byrd v. Livingston, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (Ct. App. 2012). “In an action at law, on appeal of a case tried without a jury, the judge’s findings will not be disturbed unless they are without evidentiary support.” *Id.* However, questions of law may be reviewed with no particular deference to the trial court. Kinghorn v. Sakakini, 426 S.C. 147, 151, 825 S.E.2d 748, 749-50 (Ct. App. 2019).

ARGUMENT

I. The Circuit Court’s finding that Appellant failed to comply with, and breached, the Settlement Agreement is supported by the evidence in the record.

Settlement agreements are viewed as contracts between the parties. See Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass’n, 343 S.C. 335, 540 S.E.2d 843 (2001) (holding the enforcement of the terms of a settlement agreement is a contract and viewed as an action at law); Estate of Revis v. Revis, 326 S.C. 470, 484 S.E.2d 112 (Ct. App. 1997) (using contractual interpretation standard regarding ambiguous language to determine whether to admit parol evidence about a property settlement agreement); and Arnold v. Yarborough, 281 S.C. 570, 316 S.E.2d 416 (Ct. App. 1984) (holding that once attorneys agree to settle a case, the settlement cannot be repudiated unless fraud exists). Further, “[a]n action to construe a contract is an action at law reviewable under an ‘any evidence’ standard.” Pruitt, 343 S.C. at 339, 540 S.E.2d at 845.

In this case, the Settlement Agreement terms were clear, including the obligations of Appellant with respect to Respondent. Appellant was required to execute the necessary deeds

and pay Respondent \$40,848.30, by March 23, 2019, to purchase Respondent's interest in Tract 4. Settlement Agreement, p. 2.

It is undisputed that all of the required parties executed the deeds necessary to fulfill the Settlement Agreement except Appellant. See Affidavits of Jerome P. Askins, III and Affidavit of Margaret S. Daniels. It is also undisputed that Respondent did not receive the payment of \$40,848.30 for Tract 4 by March 23, 2019 as contemplated by the Settlement Agreement.⁵ *Id.* Further, the record establishes that Appellant took possession of Tract 4 following the mediation, and has maintained possession, even though she failed to pay Respondent for her interest in Tract 4. Affidavit of Margaret S. Daniels, p. 2.

Under these circumstances, there is more than sufficient evidence to support the Circuit Court's finding that appellant breached the Settlement Agreement. Details regarding Appellant's breach were included in the Memorandum in Support of Motion to Compel, Askins Affidavit, Additional Askins Affidavit, and Daniels Affidavit. In addition, Appellant's affidavits do not deny that she failed to execute the deeds or ensure payment to Respondent in a timely manner. See Selph Affidavit and Affidavit in Reply. As such, Appellant's argument that the Circuit Court "had no basis" to find that Appellant did not comply with the Settlement Agreement is clearly unfounded.

Appellant also asserts that Respondent was required to provide a written demand to comply and time for Appellant to cure her breach before filing a motion to compel. However, no such requirement was imposed by the Settlement Agreement. To the contrary, the Settlement Agreement provides for attorney's fees and costs when "an action" is necessary, by motion or otherwise, to enforce the Settlement Agreement. Settlement Agreement, pp. 1-3. As the

⁵ By her own admission, Appellant put funds into escrow but the funds were not paid to Respondent.

Circuit Court proceedings and this appeal show, the motion to compel was a necessary action to enforce the Settlement Agreement that Appellant still has not complied with.

Further, the cases cited by Appellant, Hobgood v. Pennington, 300 S.C. 309, 387 S.E.2d 690 (1989) and Ingram v. Kasey's Associates, 340 S.C. 98, 531 S.E.2d 287 (2000), do not impose a written demand requirement for all settlement agreements. In Hobgood, the Court found that in a contract where “time is not originally of the essence, it may be made so by one party giving notice to the other that he will insist on performance by a certain date.” 300 S.C. at 314, 387 S.E.2d at 693. Here, the time for execution of the deeds and delivery of payment to Respondent was set. Thus, there was no need to give notice to insist on performance by a specific date.

Ingram involved an option to purchase and the Court found that to exercise the option required notice and payment of the purchase price. 340 S.C. at 104-105, 531 S.E.2d at 290. In option cases, it is necessary to give notice of intent to exercise the option, and tender payment, to bind the other party to the transaction. Id. However, this case does not involve an option and no such notice is required when the transaction is settled with a purchase price and payment date already established.

Substantial evidentiary support, including the Settlement Agreement itself along with affidavits detailing Appellant’s failure to adhere to the terms of the Settlement Agreement, are included in the record. Therefore, Circuit Court’s findings with respect to the breach should not be disturbed. Pruitt v. Livingston, 398 S.C. at 241.

II. The Circuit Court appropriately awarded interest and attorney's fees and costs due to Appellant's breach of the Settlement Agreement.

The Settlement Agreement provides:

This Agreement shall be enforceable by the Court pursuant to Rule 43(k), SCRPC, and as a contract between the parties. If an action is necessary to enforce this Agreement, by motion or otherwise, the prevailing party shall be entitled to his or her attorney's fees and costs for the necessity of enforcing this Agreement.

Settlement Agreement, pp. 2-3.

Under the terms of the Settlement Agreement, Respondent was the prevailing party on the motion to compel, which was an action necessary to enforce the Settlement Agreement. As such, Respondent was entitled to attorney's fees and costs incurred for the enforcement proceedings. In addition, should Respondent prevail in this appeal, Respondent would also be entitled to the attorney's fees and costs incurred in the appeal as these proceedings have also become necessary for enforcement of the Settlement Agreement.

With respect to interest, "[t]he general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). Further, prejudgment interest is permitted by operation of law if the sum is certain or capable of being reduced to certainty. Smith-Hunter Constr. Co. v. Hopson, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005). "Stated another way, prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties." Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 258-259 (2006) (internal citations omitted).

In this case, the Settlement Agreement included the amount owed to Respondent, \$40,848.30, and the date for payment, March 23, 2019. Settlement Agreement, p. 2. Thus, the

sum was certain along with the dates for calculating interest. As such, the Circuit Court's award of interest was proper.

III. All of the affidavits submitted by Respondent to the Circuit Court were properly admitted and considered under SCRPC, Rule 6.

Appellant claims that the Additional Askins Affidavit and the Daniels Affidavit should not have been considered by the Circuit Court because they were not submitted in the compliance with Rule 6 of the South Carolina Rules of Civil Procedure ("Rule 6"). These claims are without merit and contrary to the clear language of Rule 6.

Rule 6(d) provides in pertinent part:

A written motion other than one which may be heard *ex parte*, and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing, unless a different period is fixed by these rules or by an order of the court. Such an order may for cause shown be made on *ex parte* application. When a motion is to be supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served not later than two days before the hearing, unless the court permits them to be served at some other time. The moving party may serve reply affidavits at any time before the hearing commences.

In this case, Respondent filed the motion to compel compliance with the Settlement Agreement on April 7, 2020, and filed a memorandum in support of the motion to compel along with the Askins Affidavit on June 26, 2020. As such, the written motion and supporting affidavit were filed more than five months prior to the time specified for the hearing. Respondent filed another affidavit, the Additional Askins Affidavit, ten days prior to the hearing. Then, Respondent filed the Daniels Affidavit, which was dated ten days prior to the hearing but not accepted electronically in the Circuit Court filing system and time stamped until nine days before the hearing.

Both the Askins Affidavit and the Additional Askins Affidavit were filed ten days or more prior to the hearing in accordance with the supporting affidavit requirement in Rule 6.

These affidavits contained ample evidentiary support for the Circuit Court’s rulings. The Daniels Affidavit, which supplemented the two Askins affidavits, was an additional affidavit that was filed and provided to Appellant well in advance of two-day requirement for additional affidavits in Rule 6.⁶

The Circuit Court considered the Appellant’s Rule 6 timeliness argument after requesting additional briefing on the topic and did not find Appellant’s argument persuasive. Email of Lucius Bullock, Law Clerk to Judge George McFaddin, dated June 30, 2021; Askins letter to the Circuit Court, dated June 30, 2021; Alter letter to the Circuit Court, dated July 2, 2021; Order p. 5. Based on the record before the Circuit Court it was clear that Appellant had more than sufficient time to respond to the affidavits submitted by Respondent as evidenced by her Affidavit in Reply that she filed two days before the hearing. See Kitchen Planners, LLC v. Friedman, 432 S.C. 267, 285, 851 S.E.2d 724, 734 (2020) (where the Court of Appeals found that the circuit court properly refused a motion to strike an affidavit when there was sufficient time to respond to the affidavit as evidenced by the submission of an opposing affidavit). Even if an affidavit was not submitted with the technical requirements of the rules (which did not occur in this case), the Circuit Court would have discretion as to whether to accept the affidavit, strike the affidavit, or grant a continuance. See Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) (“where noncompliance with the technical requirements of the rules causes no prejudicial effect, failure by the trial court to grant a continuance on that basis is harmless error.”)

As such, the Circuit Court properly rejected Appellant’s attempts to strike the affidavits submitted by Respondent.


⁶ The Circuit Court could have also properly considered the Daniels Affidavit as a reply affidavit under Rule 6.

CONCLUSION

For the aforementioned reasons, Respondent requests that the Court of Appeal affirm the Circuit Court's Order, dated July 6, 2021, including the Circuit Court's award of attorney's fees and costs, and order for Appellant make payment to Respondent with interest from March 23, 2019, until the indebtedness is paid. Respondent further requests that the Court of Appeal issue an award to Respondent for reasonable legal fees and costs incurred in responding to the appeal as such fees and costs were necessary for the enforcement of the Settlement Agreement.

Respectfully Submitted,

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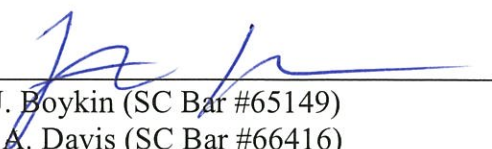
I certify that I have served the Respondent Initial Brief on the counsel of record listed below, by electronic mail and U.S. Mail a copy of same on April 22, 2022, addressed to:

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