UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re, Gup's Hill Plantation, LLC, Debtor.	C/A No. 15-04492-DD Adv. Pro. No. 16-80104-DD Chapter 11
Bettis C. Rainsford, Plaintiff, v. Apex Bank, Defendant.	**ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE**

This matter is before the Court on a motion filed by Apex Bank ("Apex") on August 26, 2016 to dismiss Bettis C. Rainsford's ("Mr. Rainsford") amended complaint with prejudice [Docket No. 25]. Mr. Rainsford filed a memorandum in opposition to Apex's motion to dismiss on September 30, 2016 [Docket No. 28]. A hearing was held on October 5, 2016. At the conclusion of the hearing, the Court granted Apex's motion. The Court now issues this Order.

BACKGROUND

1. Mr. Rainsford commenced this action on May 31, 2016 in the Edgefield County Court of Common Pleas, asserting causes of action for breach of contract and enforcement of an agreement. Apex removed the proceeding to this Court on July 14, 2016 [Docket No. 1].

2. Apex filed a motion to dismiss the original complaint on July 19, 2016 [Docket No. 4]. Mr. Rainsford filed a memorandum in opposition on August 3, 2016 [Docket No. 15]. Apex filed a reply on August 10, 2016 [Docket No. 21], and Mr. Rainsford filed another response on August 22, 2016 [Docket No. 23].

3. Mr. Rainsford filed his amended complaint on August 22, 2016 [Docket No. 24]. Apex filed its motion to dismiss the amended complaint on August 26, 2016 [Docket No. 25]. Mr. Rainsford filed his memorandum in opposition to the motion to dismiss the amended complaint on September 30, 2016 [Docket No. 28].

4. Gup's Hill Plantation, LLC's chapter 11 bankruptcy case was filed on August 18, 2015. Mr. Rainsford is the sole member of the debtor.

5. Apex filed its proof of claim in Gup's Hill Plantation, LLC's bankruptcy case on May 10, 2016. Apex asserts a claim in the amount of $1,439,286.39, based on a judgment against Mr. Rainsford and his former business partner. The judgment attached to real property that Mr. Rainsford later transferred to Gup's Hill Plantation, LLC. Apex acquired the judgment from SunTrust Bank on October 29, 2015.

6. In the summer of 2015, Mr. Rainsford was approached by Kevin Molony, an attorney who represented himself to Mr. Rainsford as an attorney for Apex.[1] Mr. Molony was attempting to obtain information about two of Mr. Rainsford's former business partners in connection with Apex's attempts to collect unrelated debts owed by those individuals to Apex.

7. In October 2015, Mr. Rainsford again met with Mr. Molony. During that meeting, Mr. Molony advised Mr. Rainsford that Apex was considering the purchase of the judgment at issue here, and intended to pursue collection against Mr. Rainsford's former business partner. Mr. Rainsford raised the issue that he was also obligated on that judgment.

8. Mr. Rainsford and Mr. Molony discussed the possibility of Apex agreeing to forbear from pursuing Mr. Rainsford and his companies if that judgment was acquired, in exchange for Mr. Rainsford providing information to Apex regarding his former business partner's assets

[1] The facts set forth in this Order are taken from Mr. Rainsford's amended complaint and are accepted as true for purposes of the Court's consideration of Apex's motion to dismiss.

and executing deeds in lieu of foreclosure to Apex on two lots owned by one of Mr. Rainsford's companies and subject to a mortgage lien held by Apex. Mr. Rainsford provided information regarding his former business partner's assets to Mr. Molony during this conversation.

9. Mr. Molony suggested that Mr. Rainsford draft documents to memorialize these discussions for execution by an officer of Apex.

10. On October 7, 2015, Mr. Rainsford sent an email to Mr. Molony providing a draft settlement agreement and proposed deed in lieu of foreclosure. Mr. Molony responded on the same date, requesting a change to the documents. He stated, "If you are satisfied with adding that language, I'll get it to the bank and try to have this done by tomorrow. . . . [T]hat sentence would allow us to knock this out in my opinion."

11. Mr. Rainsford made the requested change to the documents and sent them back to Mr. Molony. Mr. Rainsford followed up with Mr. Molony on several occasions, and in each conversation Mr. Molony stated that the executed documents would soon be returned.

12. Mr. Rainsford alleges that Mr. Molony repeatedly advised him that he had authority to bind Apex to their agreement.

13. On October 28, 2015, Mr. Molony advised Mr. Rainsford that "the bank's CEO has become involved and that he's in charge now." The agreement and the deed in lieu of foreclosure were never signed by Apex.

14. Apex completed the acquisition of the SunTrust judgment on October 29, 2015.

CONCLUSIONS OF LAW

Fed. R. Civ. Pro. 8(a)(2)[2] requires a pleading to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." A party may challenge the sufficiency of a

[2] Made applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7008.

pleading by filing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)[3]. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Apex's motion seeks dismissal of Mr. Rainsford's amended complaint with prejudice on three main grounds. Because the alleged agreement between Apex and Mr. Rainsford, as discussed in more detail below, fails to satisfy the South Carolina Statute of Frauds, the amended complaint fails to state a claim upon which relief can be granted as a matter of law, and must be dismissed.

The alleged agreement between Apex and Mr. Rainsford is subject to the South Carolina Statute of Frauds since it involves transfer of title of real property. Apex argues that because Mr. Rainsford has failed to produce any writing signed by a representative of Apex with authority to bind Apex, the alleged agreement does not meet the requirements of the South Carolina Statute of Frauds. Mr. Rainsford responds that his email exchange with Mr. Molony, attached to his amended complaint as Exhibit C, constitutes a writing that satisfies the South Carolina Statute of Frauds and that Mr. Molony had authority to bind Apex to the agreement.

The South Carolina Statute of Frauds is found at S.C. Code § 32-3-10 and provides:

No action shall be brought whereby:

> (1) To charge any executor or administrator upon any special promise to answer damages out of his own estate;
> (2) To charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person;
> (3) To charge any person upon any agreement made upon consideration of marriage;
> (4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; or

[3] Made applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7012.

> (5) To charge any person upon any agreement that is not to be performed within the space of one year from the making thereof;
>
> Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

"To satisfy the Statute of Frauds, every essential element of the contract must be expressed in a writing signed by the party to be compelled." *Fici v. Koon*, 372 S.C. 341, 346 (2007) (citing *Cash v. Maddox*, 265 S.C. 480, 220 S.E.2d 121 (1975); *Speed v. Speed*, 213 S.C. 401, 49 S.E.2d 588 (1948)). *See also Springob v. University of South Carolina*, 407 S.C. 490, 496 (2014) ("In order to satisfy the statute of frauds, there must be a writing signed by the party against whom enforcement is sought, and 'the writings must establish the essential terms of the contract without resort to parol evidence.'") (quoting *Cash v. Maddox*, 265 S.C. 480, 220 S.E.2d 121 (1975)). "The burden of proof is on the party seeking to enforce the contract." *Fici*, 372 S.C. at 346 (citing *Cash v. Maddox*, 265 S.C. 480, 220 S.E.2d 121 (1975)).

Because the alleged agreement between Mr. Rainsford and Apex envisioned the transfer of two lots to Apex by one of Mr. Rainsford's business interests, it involved the transfer of an interest in land and falls under S.C. Code § 32-3-10(4). As a result, for the agreement to be enforceable, a writing must exist that contains both the essential terms of the parties' agreement and the signature of an authorized representative of Apex, the party against whom Mr. Rainsford seeks to enforce the agreement. Although Mr. Rainsford argues that the email satisfies the requirement of a writing, the email is not sufficient to satisfy the requirements of S.C. Code § 32-3-10(4), both because the email from Mr. Molony was, at best, a counterproposal, and because Mr. Molony did not have authority to bind Apex.

South Carolina law recognizes both actual and apparent authority. "[A]ctual authority is expressly conferred upon the agent by the principal." *Roberson v. S. Finance of South Carolina,*

Inc., 365 S.C. 6, 11 (2005) (citing *Moore v. North Am. Van Lines*, 310 S.C. 236, 239, 423 S.E.2d 116, 118 (1992)); *see also Anderson Bros. Bank v. EBT Prop. Holding Co., Inc.*, 2013 WL 8507807, at *3 (S.C. Ct App. Mar. 13, 2013) ("Actual authority is expressly conferred upon the agent by the principal."). The amended complaint contains only allegations regarding Mr. Rainsford's conversations with Mr. Molony – it does not contain any allegations of Mr. Molony's actual authority as conferred by Apex. Mr. Rainsford argues in his memorandum in opposition to the motion to dismiss that actual authority exists because Mr. Hailey, a representative of Apex, made statements to him "through Mr. Molony" regarding Mr. Molony's ability to bind Apex. However, statements made by an alleged agent are not sufficient to establish actual authority.

There are also no sufficient allegations of apparent authority. Under South Carolina law,

> 'Apparent authority to do an act is created as to a third person by written or spoken words *or any other conduct of the principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.' 'Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief.' 'Moreover, an agency may not be established solely by the declarations and conduct of an alleged agent.'

Froneberger v. Smith, 406 S.C. 37, 47 (Ct. App. 2013) (internal citations omitted). Again, Mr. Rainsford relies solely on statements made by Mr. Molony, the alleged agent, to establish that Mr. Molony possessed authority to bind Apex. There is no allegation of any representation by Apex as to Mr. Molony's authority, other than those allegedly made by Mr. Hailey through Mr. Molony. These statements are not sufficient to establish apparent authority under South Carolina law.

Finally, we turn to Mr. Molony's status as an attorney. Without express authority from the client, an attorney does not have the power to bind a client in matters outside the context of pending litigation. *See Ex parte Jones*, 47 S.C. 393 (1896) ("Counsel for appellant argues that an attorney has no power to release a lien, or substitute one security for another, without express authority

from the client, and cites such cases . . . . But such cases do not apply. It is true that attorneys, under their general authority as such, have no such powers; but there is a wide and clear distinction between the acts of attorneys under their general authority in matters not in court, and the acts of attorneys in the conduct and progress of a suit in court."). *See also Graves v. Serbin Farms, Inc.*, 295 S.C. 391, 393 (Ct. App. 1988) ("It, then, is the well-settled law of this state that the authority of an attorney of record to settle claims is limited to the claims presented by the pleadings in a given case and that any settlement that goes beyond these matters must be expressly agreed to be the client."); *Arnold v. Yarborough*, 281 S.C. 570, 572 (Ct. App. 1984) ("Our Supreme Court held there is a vast distinction between the acts of an attorney within his general authority in a matter not in court and his acts during the conduct and progress of a suit in court."); *Hall v. Benefit Ass'n of Ry. Employees*, 164 S.C. 80 (1932) ("But even in cases where actions are pending, and attorneys are of record, there is a border line beyond which they cannot go and bind their clients. Attorneys, as such, without express authority, have no right to compromise or settle their clients' rights, to release a lien, or substitute one security for another, in matters not in court.") (citing *Ex parte Jones*, 47 S.C. 393; *Dixon v. Floyd*, 73 S.C. 202 (1906)). The Fourth Circuit has stated:[4]

> The attorney-client relationship, by custom, however, does not imply that an attorney has authority to act as principal and resolve matters of substance. . . . Thus, when a client retains an attorney to represent the client in litigation, the implied authority of the attorney is limited to conducting procedures and taking necessary steps to prosecute or defend the client in the litigation. Substantive decisions of whether to bring suit, to dismiss suit, or to settle are not by implication ones that the attorney is authorized to make. Similarly, when a client retains an attorney to represent the client in a transaction, the attorney has implied authority to negotiate the terms of an agreement or operative papers to their final form. But custom of the relationship does not imply an authority for the attorney to execute the documents on behalf of the client. This becomes particularly evident when the form of a contract is one which calls for the signature of the principals.

[4] This case involved an interpretation of North Carolina law and cited to the Restatement (Second) of Agency, as well as case law from North Carolina, Ohio, and Massachusetts. These principles appear in accord with South Carolina law.

Schafer v. Barrier Island Station, Inc., 946 F.2d 1075, 1079 (4th Cir. 1991) (internal citations omitted).

At the time that Mr. Rainsford and Mr. Molony's discussions regarding the agreement took place, there was no litigation between Mr. Rainsford and Apex regarding the SunTrust judgment. In fact, the email that Mr. Rainsford relies on in seeking to establish the parties had a binding agreement is dated October 7, 2015, and on that date, Apex did not own the judgment. Because there was no pending litigation, absent express authorization from Apex, Mr. Molony did not have the ability to bind Apex to the agreement. It is also significant that the unsigned settlement agreement, attached to the amended complaint as Exhibit A, required the signature of someone other than Mr. Molony.

Based on the allegations asserted in the amended complaint, Mr. Molony did not have the authority to bind Apex to the alleged agreement. Accordingly, the October 7, 2015 email exchange between Mr. Rainsford and Mr. Molony is not sufficient to satisfy the South Carolina Statute of Frauds. The agreement is unenforceable under S.C. Code § 32-3-10, and Mr. Rainsford's amended complaint must be dismissed.[5]

Mr. Rainsford previously amended his complaint, and any further amendment which could withstand a motion to dismiss would require alteration of the facts, which have been fully set forth in the responses and memoranda filed by Mr. Rainsford. Therefore, Mr. Rainsford will not be permitted to further amend his complaint.

[5] Because of this disposition, it is unnecessary to address Apex's remaining grounds for dismissal.

CONCLUSION

For the reasons set forth above, Apex's motion to dismiss is granted. Mr. Rainsford's amended complaint is dismissed with prejudice, and this adversary proceeding is concluded.

AND IT IS SO ORDERED.

FILED BY THE COURT
10/13/2016

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

Entered: 10/14/2016

David R. Duncan
Chief US Bankruptcy Judge
District of South Carolina