

Contracts Tea No. 9 (November 2011)

SOUTH CAROLINA

When you have a series of agreements among the parties and the termination agreement is unclear, it is for the jury to decide if the parties' rights are terminated.

In *North American Rescue Products, Inc. v. Richardson* (case No. 4909), the South Carolina Court of Appeals affirmed the circuit court's holding that the defendant had the right to receive seven and one-half percent of the plaintiff's stock because the contract was ambiguous and the termination provision was only a portion of the tripartite agreement between the parties.

In 2000, P.J. Richardson, on behalf of Reeves Manufacturing, and Bon Castellani, on behalf of North American Rescue Products, Inc. (NARP), contracted to cross-sell their products and pay each other commissions equal to twenty-five percent of the taxable income of their companies. The companies also agreed to issue twenty-five percent of their companies' respective stock to each other ("Agreement no. 1") but subsequently entered an oral argument to reduce the percentage of stock from twenty-five percent to seven and one-half percent. ("Agreement no. 2"). Thereafter, Richardson and Castellani signed a tripartite Agreement of Termination, Settlement, and Release Contract, which purported to release the parties from their original agreement but retain their option to purchase seven and one-half percent of stock under a separate option agreement ("Agreement no. 3"). The Agreement no. 3 contained clauses of termination, release of claims and a merger clause.¹ The separate option agreement was never signed.

¹ 1. Termination of the 2000 Outline. The parties agree that the 2000 Outline and any and all agreements, ... are terminated.

2. Settlement. All claims and potential claims of any nature whatsoever that have been, could have been, or in the future could be asserted by the parties ... are hereby settled ... for ... the payment by [Reeves/Richardson] of the sum of \$100.00 ...

3. [Reeves and Richardson] Release. NARP and [Castellani] hereby remise, release and forever discharge each [other] of and from all, and all manner of, actions, causes of action, ... and demands whatsoever, whether in law or equity ... It is specifically

In 2007, NARP filed suit and requested a declaratory judgment that Richardson did not have the right to acquire seven and one-half percent of NARP stock because the Agreement no. 3 unambiguously and unequivocally terminated the Agreement no. 1 and no. 2. Richardson filed a counterclaim alleging breach of contract and requesting specific performance. The circuit court held that Richardson was entitled to acquire seven and one-half percent of NARP stock. Indeed, the court found the Agreement no. 3 quite ambiguous² and that the testimony was conflicting. The Court therefore denied NARP's motion for a directed verdict. According to the court, whether Richardson did have the right to acquire seven and one-half percent of NARP stock, was a question of fact for the jury. The jury returned a verdict for Richardson.

On appeal, NARP argues that the circuit court erred because the merger clause within Agreement no. 3 terminated Richardson's right to acquire seven and one-half percent of NARP stock.

agreed and understood by the parties that the foregoing release is not intended to, and shall not, release any of the parties from that certain, separate Option Agreement dated [15 Dec], 2004 pursuant to which NARP and [Castellani] have granted [Richardson] an option to purchase 7.5% of the capital stock of NARP.

4. NARP and [Castellani] Release. [Reeves] and [Richardson] hereby remise, release and forever discharge each [other], ... of and from all, and all manner of, actions, causes of action, ... and demands whatsoever, whether in law or equity ... It is specifically agreed and understood by the parties that the foregoing release is not intended to, and shall not, release any of the parties from that certain, separate Option Agreement dated [15 Dec], 2004 pursuant to which NARP and [Castellani] have granted [Richardson] an option to purchase 7.5% of the capital stock of NARP.

5. Entire Agreement. This Agreement sets forth the entire agreement and understanding of the parties relating to the subject matter contained herein, and merges all prior discussions and agreements, both oral and written, between the parties.

² Y'all might be certain that you entered into that November 8, 2004 termination agreement but I don't think the evidence shows that. ... And the terms of the contract are absolutely ambiguous [sic]. ... [I]t borders on being completely understandable. So ... all these issues are going to go to the jury.

The Court of Appeals affirmed the lower court's decision and granted Richardson specific performance. Construing the evidence in a light most favorable to Richardson, the court stated there was ample evidence in the record from which the jury could find that the document containing the termination provision was only a single portion of an overarching, three-step agreement between the parties.

In case of a misrepresentation, public record cannot shield fraudulent sellers from responsibility.

In *Moseley v. All Things Possible* (case No. 27074), the South Carolina Supreme Court held that a real estate buyer could succeed on the merits of a fraudulent misrepresentation claim even if the public record would have revealed the existence of an undisclosed easement.

Petitioner All Things Possible, Inc., (ATP) sold an undeveloped subdivision lot to Respondents Michael and Marsh Moseley, who intended to build a home on the lot. However, the Moseleys received an altered plat, which did not reveal the existence of an underground, surface-water drainage easement running diagonally across the entire length of the property. The easement was not recorded in any chain-of-title deed and was not discovered in the title search. After purchasing the lot, the Moseleys discovered the easement and, consequently, could not build a suitable home on the property. The Moseleys sued ATP alleging several causes of action, including fraud. The circuit court determined the Moseleys proved fraud by clear and convincing evidence and awarded actual and punitive damages against ATP.

On appeal, ATP argued that there is no clear and convincing evidence that it engaged in fraud. Further, ATP argued that Moseleys' claim must fail because the misrepresentation was discoverable in the public record.

The Court upheld liability for fraud because there was evidence in the record demonstrating that the Moseleys relied on the falsified plat and ATP's statements that a home could be built on the lot. The Court stated the jury would decide whether the Moseleys' reliance on the misrepresentations was reasonable. Additionally, the Court declared that the Moseleys could assert a fraud claim even if the public record would have exposed the existence of the easement. The Court

noted that the purpose of the recording scheme is to protect innocent purchasers rather than fraudulent sellers.

For further information, please contact info@nathancrystal.com.