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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

LETITIA H. VERDIN, CIRCUIT COURT JUDGE
CASE NO.: 2019-CP-007116

APPELLATE CASE NO.: 2022-00011

JESSIE J. CARTER — APPELLANT

V

OSCAR QUIRROGA d/b/a OSCAR AUTO SALES, and MARCO A. QUIROGA d/b/a OSCAR AUTO SALES, and PALMETTO SURETY CORPORATION — RESPONDENTS

FINAL BRIEF OF RESPONDENT PALMETTO SURETY CORPORATION

October 4, 2022

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2. The trial court correctly found that Carter is not an "Owner", entitled to protection under S.C. 56-15-320(B).
3. Regardless of Issues # 1 or 2 above the Third AC failed to, and could not in reality, allege "fraud" or "fraudulent representations" in connection to the "sale or transfer of a motor vehicle".
4. The motor vehicle dealer bond does not cover Appellant's arguments regarding a financial dispute with Oscar's Auto Sales not returning money accidentally sent by USAA, occurring after Appellant terminated the contract.

STATEMENT OF THE CASE

On or about December 9, 2019, Plaintiff and Appellant Jessie J. Carter ("Carter") filed its initial complaint against Defendant, Respondent Oscar Quirroga d/b/a Oscar Auto Sales ("Oscar"). [R. p.9]. Thereafter, on or about September 25, 2020, Carter filed an amended complaint. [R. p.15]. The amended complaint adds Defendant Respondent Marco A. Quirroga d/b/a Oscar Auto Sales ("Marco") (collectively "Oscar Auto Sales" and hereinafter "OAS"). [R. p.15]. On August 6, 2021, a third complaint was filed, now naming OAS and Palmetto Surety Corporation ("PSC") as Defendants. [R. p.39]. On September 16, 2021, PSC filed a Motion to Dismiss and Answer to the Third AC. [R. p.62]. Thereafter on October 22, 2021, Carter filed a motion for summary judgment [Supp.R. p.1].

In the motion Carter alleges that, as a matter of law, PSC must indemnify Appellant, under the motor vehicle dealer bond, pursuant to S.C. Code § 56-15-320(B). [Supp.R. p.2, ¶3]. More specifically, Carter asserts that the conduct of OAS amounts to "fraud" which would be covered under the above quoted provision. [Supp.R. pp.4-5]. PSC filed a response to the MSJ, which incorporated its motion to dismiss. [R. p.68]. In the response, PSC maintained the position that no fraud had occurred, and that Carter had voluntarily rescinded the contract with OAS, prohibiting a determination that Carter was an "owner" after "sale and transfer". [R. p.69, ¶2].

On or about November 9, 2021, the Honorable Judge Letitia H. Verdin granted PSC's motion to dismiss and denied Carter's motion for summary judgment. [R. p.1]. In doing so, the Court found that Carter "rescinded" the sales contract with OAS, and could not, accordingly be an "owner" under S.C. Code § 56-15-320. [R. p.3, ¶1]. The Court also concluded that as to the remaining OAS defendants, questions of fact precluded the entry of judgment. [R. p.4, ¶1].

FACTUAL RECITATION

According to the Third AC, Carter entered into a contract with OAS on or about July 31, 2019 ("Contract"). [R. p.40, ¶9]. Carter alleges the Contract provides that OAS would sell a 1999 Ford Mustang Cobra ("Vehicle") and Carter would pay a price of five thousand, five hundred dollars ($5,500.00). [R. p.40, ¶9]. Carter paid a deposit of five hundred dollars ($500.00) to OAS in connection to the Contract, and the parties contemplated that the remaining five thousand dollars ($5,000.00) would be financed by Carter. [R. p.40 ¶9]. United Services Automobile Association ("USAA") had "preapproved" Carter for said loan. [R. p.40, ¶9].

The Third AC indicates that on or about August 2, 2019, OAS faxed a funding request to USAA, on behalf of Appellant. [R. p.40, ¶11]. However, Carter never took possession of the vehicle, and per his own Third AC indicated that the delay in possession was caused by a delay in receipt of the payment of the full purchase price through his lender. [R. p.41, ¶11]. Again, and as noted by the Court, the Third AC indicates that it was "Plaintiff [who] became frustrated [] determined to cancel the transaction." [R. p.41, ¶12]. Similarly, OAS thereafter "accepted [Carter's] [rescission/termination] of the contract and refunded [Carter] his $500.00 earnest money deposit on August 5, 2019." [R. p.41, ¶12].

In his First Affidavit of Sept. 30, 2020, Carter testified that USAA delivered the remaining funds to Oscar's Auto Sales, by "accident", after Appellant canceled/terminated/rescind the sale, and Oscar accepted the cancellation and returned the deposit. [R. p.35, ¶¶5-6]. Although Carter *subjectively believed* that the USAA loan had not been disbursed to OAS, USAA contacted Carter to make his first loan payment in early October of 2019. [R. p.41, ¶14]. There are no allegations in the Third AC that OAS represented to Carter that his loan had been cancelled, that Carter had taken steps to cancel his own loan, with his own bank, which was his sole responsibility, or that

Carter asked OAS to communicate the termination/cancellation/rescission to USAA. [R. p.41, ¶¶12-16]. Oscar's Auto Sales accepted Carter's own admitted termination, cancellation, and/or rescission of the Contract at face value, and, thus, rightfully sold the vehicle at issue in or about November 1, 2019. [R. p.41, ¶17].

The sole cause of action alleged against PSC in the Third AC is titled Action Against Surety, pursuant to S.C. Code § 56-15-320(B). [R. pp.44-45, ¶¶45-50]. Carter alleges that PSC "provide[d] [a] bond[1] for [Oscar's Auto Sales]." [R. p.44, ¶46]. While, the Third AC indicates, in a conclusory manner, that "[Carter] [is] an owner [who] suffered actual losses and damages by reason of fraud practiced or fraudulent representations made in connection with the sale or transfer of a motor vehicle", Appellant is not actually an "owner" of a vehicle sold by Oscar's Auto Sales. [R. p.45 ¶47]. There are no other factual allegations regarding the "fraud" at issue. There are no other factual allegations regarding Carter's *status* as an "owner", such as to trigger the bond, pursuant to S.C. Code § 56-15-320.

In Carter's motion for summary judgment, he again makes vague, cursory allegations regarding the apparent "fraud", or "fraudulent misrepresentations" made by OAS. [Supp.R. p.8, ¶¶1-6]. In reality, there are no fraudulent facts connected to Carter's ownership of a vehicle. Instead, the facts relied upon in support of summary judgment indicate that a straightforward sales transaction was initiated, which Carter himself subsequently terminated, and the termination was accepted by OAS. [R. p.30., ¶¶5-6]. After considering all the facts and circumstances the Court

[1] As per Exhibit 9, to the Third AC, PSC provided Oscar's Auto Sales with a Motor Vehicle Dealer's and Wholesaler's Surety Bond. Specifically the language of the bond obligates PSC to, "*to indemnify any owner of a motor vehicle, or his legal representative, who may be aggrieved by any fraud, fraudulent representation or violation by said Principal, salesmen, or representatives acting for such Principal within the scope of employment of such salesmen or representatives, of any of the provisions of Title 56 of the South Carolina Code of Laws relating to Motor Vehicle Dealers and the sale and transfer of motor vehicles*". [Third AC, Ex. 9, emphasis added].

rightly ruled that PSC should be dismissed from the litigation, since the bond did not cover Appellant's averment that a transaction had not occurred.

In dismissing PSC, the Court first found that the Contract had been rescinded by Carter, after he "became frustrated and determined to cancel the transaction." [R. p.2, ¶2]. After the rescission, the trial court held that Carter simply cannot claim protection under S.C. Code § 56-16-320(B). [R. pp.1-2]. The Court also found that, per the Third AC, any "fraud", or "fraudulent representations", alleged by Appellant to have been perpetrated by Oscar's Auto Sales, occurred after the sale had been terminated and/or rescinded by Appellant, thus Appellant was not an owner under the Act., were terminated by terminated and/or rescinded. [R. pp.2-3]. Each of these findings was correct and should not be disturbed on appeal.

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRP, the appellate court applies the same standard of review as the trial court." *See Cricket Cove Ventures, LLC v. Gilland*, 701 S.E. 2d 39, 43 (S.C. Ct. App. 2010).

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT CARTER "RESCINDED", OR TERMINATED THE CONTRACT WITH OAS, WHEN IT NOTIFIED OAS OF ITS INTENT TO TERMINATE THE AGREEMENT AND OAS VOLUNTARILY RETURNED THE $500.00 DEPOSIT.

In his Complaint and initial affidavits, Carter correctly alleges that he had terminated or cancelled the sale with OAS, and that he neither took possession of the vehicle at the time of the termination, nor did he own the vehicle prior to USAA wiring the loan funds by "accident". [R. p39; R. p35, ¶¶5-6]. However, after the Trial Court ruled Carter was not an "owner" who had standing to make a claim on the bond, Carter changed positions and alleged that he "became the owner of the vehicle [at issue] when he contracted for the sale, paid the deposit, and was issued an

Affidavit & Notification of Sale of Motor Vehicle in [his] name." [AFB p.4]. Carter also alleges that his "attempt" to rescind the contract was "unsuccessful" and he "remained the 'owner' of the [Vehicle]" thereafter. [AFB p.4]. In that regard, Carter claims that when OAS accepted payment from a third party, USAA it did not return Carter to his "status quo". Carter's position is contradictory and flawed for a variety of reasons.

Rescission is a legal term of art and refers to a cause of action, which seeks *Court* intervention in cancelling a contract on grounds of "mistake, induce[ment] by fraud, misrepresentation, concealment, or imposition [by a party]" when "justice requires." *See King v. Oxford*, 318 S.E. 2d 125, 128 (S.C. Ct. App. 1984). *See also Gibbs v. G.K.H.*, 427 S.E. 2d 701, 702 (S.C. Ct. App. 1993) ("An action to rescind a contract is [one] in equity. The general rule is that for a breach of contract to warrant rescission, the breach must be so fundamental and substantial as to defeat the purpose of the contract."). In cases of *Court ordered* rescission of an agreement, it is a necessary requirement that the parties be "returned to the status quo prior to the contract." *King*, 318 S.E. 2d. at 129. More specifically, a contract may be rescinded, by court action, in the following scenarios:

> (1) where [there is] mistake [that] is mutual and is in reference to the facts or supposed facts upon which the contract is based; (2) where [there is] mistake [that] is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with the true agreement of the parties; (3) where [there is] mistake [that] is unilateral and has been induced by the fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to the rescission, without negligence on the part of the party claiming rescission; or (4) where [there is] mistake [that] is unilateral and is accompanied by very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement, sustained by competent evidence of the clearest kind.

King, 318 S.E. 2d at 129. Notably, contracting parties are always free to terminate a contract by agreement. *See e.g., Moody v. McLellan*, 367 S.E. 2d 449, 451 (S.C. Ct. App. 1988) ("the parties [to a contract] may always terminate a contract voluntarily before the end of the term."); *Carolina*

Cable Network v. Alert Cable TV, 447 S.E. 2d 199, 202 (S.C. 1994) ("Where [a] contract is terminable at will, reasonable notice from either party is all that is required to terminate the agreement.").

These principles apply equally, if not with greater force, to contracts involving the sale of goods under the Uniform Commercial Code ("UCC"). *See* S.C. Code 36-2-309(3) (2021) ("Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party."); S.C. Code 36-2-106(3) (2021) ("Termination occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On 'termination' all obligations which are still executory on both sides are discharged.").

As applied here, PSC argues first and foremost that while coined a "rescission" by Carter, and the Court, Carter's notification to OAS that it was "frustrated" and intended to cancel the purchase of the vehicle, combined with OAS' voluntary return of Carter's security deposit effected a simple "termination" of the Contract by Appellant. The UCC specifically contemplates and permits such actions by parties to a goods contract. At the time that the Contract was terminated, Carter gave up all of his "obligations" under the Contract, and OAS likewise relinquished its obligations to Appellant, thereunder. Carter has never been in physical possession of the Vehicle, and OAS returned Carter's $500.00 payment. The notion that Carter could be an "owner" after specifically and expressly terminating the Contract with PSC is contrary to law and reason.

Furthermore, assuming *arguendo* that principles of the <u>legal remedy</u> of rescission are applied, Carter was, by his admission in the Third AC, returned to the "status quo". In that respect, Carter alleges that *he* paid OAS $500.00 in exchange for the Vehicle. [R. p.40, ¶9]. When he "rescinded" the Contract, that money was returned to his pockets. Accordingly, he was returned to the status

quo. The fact that Carter failed to notify USAA of his own rescission of the Contract, has no bearing on whether he was personally made whole in connection to his dealings with OAS. Instead, as PSC has maintained throughout this litigation, Carter's complaint, if he has one, is with his lender USAA regarding the terms, payment obligations, and specific requirements of his own automobile loan.

Ultimately, Carter bargained to purchase the subject vehicle from OAS, and, thereafter, it was Carter who told OAS that he intended to terminate the Contract. OAS accepted this termination. "But for" Carter's own termination/rescission, none of what Carter now calls "fraud" would have occurred. What is more, OAS returned Carter to the status quo by "refund[ing] his $500.00 earnest money deposit on August 5, 2019". [R. p.41, ¶12]. Whether deemed a termination, under the UCC or a legal "rescission" the allegations in the Third AC, and in Carter's motion for summary judgment make clear that Carter was not an "owner" as of at least August 5, 2019, and thereafter.

II. THE TRIAL COURT CORRECTLY FOUND THAT CARTER IS NOT AN "OWNER" ENTITLED TO PROTECTION UNDER S.C. CODE § 56-15-320(B).

Next, PSC asserts that the trial court correctly found that Carter was not an "owner", entitled to protection under S.C. Code § 56-15-320(B).

The text of S.C. Code § 56-15-320 is clear:

> Each applicant for licensure as a dealer or wholesaler shall furnish a surety bond in the penal amount of fifteen thousand dollars on a form prescribed by the director of the department. The bond must be given to the department and executed by the applicant, as principal, and by corporate surety company authorized to do business in this State, as surety. The bond must be conditioned upon the applicant or licensee complying with the statutes applicable to the license and as indemnification for loss or damage suffered by an owner of a motor vehicle, or his legal representative, by reason or fraud practiced or fraudulent representation made in connection with the sale or transfer of a motor vehicle by a licensed dealer or wholesaler or the dealer's or wholesaler's agent acting for the dealer or wholesaler or within the scope of employment of the agent or loss or damage suffered by reason of the violation by the dealer or wholesaler or his agent of this chapter. An owner or his legal representative who suffers the loss or damage has a right of action against the dealer

> or wholesaler and against the dealer or wholesaler's surety upon the bond and may recover damages as provided in this chapter.

See S.C. Code § 56-15-320 (2021).

The South Carolina Supreme Court has expressly held that, "when [] read in its entirety, it is clear the legislature intended to provide only the owner of a motor vehicle or the owner's legal representative, with a cause of action against the surety on a bond issued pursuant to [the] statute." *See Mid-State Auto Auction v. Altman*, 476 S.E. 2d 690, 692 (S.C. 1996) (emphasis added). The reference to a "legal representative" of an owner requires an appointment of an agent in fact, which is clear from the bill of sale. *See e.g., Centennial Cas. Co. v. Western Sur. Co.*, 772 S.E. 2d 274, 276 (S.C. 2015) (finding "owner" status where the plaintiff was "appointed" the "agent and legal representative" on the bill of sale, "in connection with the sales transaction.").

The term "owner" is not defined by Chapter 56, but the word has been defined as describing a "person who owns something: one who has the legal or rightful title to something." *See* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/owner (last visited Jun. 21, 2022). The law dictionary describes an "owner" as one who has "title to exclusive dominion over property" and further states that "[ownership] is a relationship of a person or entity to a given piece of property that is protected in law as having no superior claimant (other than a claim by the state, which may be manifest in the limited circumstances of eminent domain, police powers occupation, escheat, or the enforcement of a security interest)." *See Owner*, BOUVIER LAW DICTIONARY (10th Ed. 2021).

In the present case, Carter alleges that he was "appointed" the "agent and legal representative" in the bill of sale, and that "likewise, the Affidavit and Notification of Sale to [Carter] was sufficient to establish [Carter] as an owner for the purposes of 56-15-320(B)." [AFB p.3]. In nearly the same breath, however, Carter admits that he "attempted" to "rescind" or "cancel" the

transaction that would have made him an owner. [AFB p.2]. This argument in Appellant's brief is inconsistent, and disingenuous, given the facts Appellant presented to the trial court.

In the Third Amended Complaint, Appellant Carter makes it clear that he did not purchase, or take possession of the vehicle, and that the purchase/contract had been cancelled. [R. p.41, ¶¶12-16]. The parties to an action are judicially estopped and bound by prior allegations in a complaint unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statement or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible *See Elrod v. All*, 243 S.C. 425, 436 (S.C. 1964).

Appellant testified in his first affidavit, from September 30, 2020, that the transaction/sale, had been cancelled by both parties, that, "the loan proceeds from USAA had been delivered to [OAS] by accident", and that "OAS wanted to keep the money – even though they didn't sell me a car". [R. pp. 34-35, ¶¶4-6, 8]. Appellant reiterated that the contract was cancelled in his second affidavit of June 3, 2021. [R. p.37, ¶4]. Carter only attempted to create and argue that he had ownership, in his third affidavit, of October 22, 2021, in response to PSC's Motion to Dismiss of Sept. 16, 2021, arguing that Appellant was not an "owner" under the Motor Vehicle Dealer Bond, and/or under Title 56. In that regard, Plaintiff's Third Affidavit of October 22, 2021, should be disregarded as a "sham affidavit". The court may disregard a subsequent affidavit as a "sham," that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party's own prior sworn statement. *See Cothran v. Brown*, 357 S.C. 210, 217-218 (S.C. 2004).

Notwithstanding these facts, Carter now wishes to change course and argue that his attempt to cancel the Contract was somehow unsuccessful. The fact that Carter successfully terminated the Contract, and OAS accepted that termination, has been addressed in detail in Section I, *supra*. PSC asserts that given Appellant's own effective termination of the agreement, and his prior testimony in his affidavit that he had done so, means Carter is judicially or equitably estopped from now claiming 'owner' status, in an attempt to maneuver into coverage under the surety bond.

Furthermore, the notion that an Affidavit & Notification of Sale of Motor Vehicle and Receipt, [Supp.R. pp.15-16], somehow constitutes "equitable ownership interest" of a vehicle, even after Carter affirmatively terminated the sale, is contrary to well-established definitions of the term "ownership".[2] There is no actual contract of sale in the record, so there are no terms of an agreement that would give Carter ownership, after he terminated the sale. Moreover, Carter never had possession of the Vehicle and has never held title of the Vehicle. Carter has been repaid the only funds that he personally paid in support of, and consideration to, the Contract

Particularly in light of his own termination or "rescission" of the Contract, Carter cannot claim to be an "owner", in any capacity, when he cancelled the sale, and does not like that his actions prevent him from being an "owner" under the statute. [R. p.41, ¶12]. Because Carter cannot be considered the "owner" or the "agent" of an owner, he cannot avail himself of the statutory cause of action set forth in S.C. Code § 56-15-320.

[2] Appellant did not raise in his brief, arguments made to the trial court about an equitable ownership interest. However, in an abundance of caution, those cases are inapplicable in that, they involve the judicial sale of real property, where a foreclosed homeowner tried to overturn a sale of his home to a third-party buyer. The third-party buyer who won the bid and paid the deposit did not return his deposit, nor did he seek to terminate or rescind the purchase with the Court, as occurred in this case. See *Wachesaw Plantation East Community Services Association, Inc. v. Todd C. Alexander*, 420 S.C. 251, 262 (Ct App. 2017).

III. REGARDLESS OF ISSUES # 1 OR 2 ABOVE, THE THRID AC FAILED TO, AND COULD NOT IN REALITY, ALLEGE "FRAUD" OR "FRAUDULENT REPRESENTATION" IN CONNECTION TO THE "SALE OR TRANSFER OF A MOTOR VEHICLE".

Appellant has not sufficiently alleged fraud, or a fraudulent misrepresentation, either in his pleadings, or on the record before the trial court. Both the Motor Vehicle Dealer bond language, and the statutory regime of Title 56, requires an allegation of fraud by an owner of a vehicle, in connection with the sale of the very same vehicle. The bond protects the named oblige, or "owner" only as to those violations falling within the coverage of the particular surety bond provisions. See *Kennedy v. Henderson*, 289 S.C. 393, 396 (S.C. 1986).

A. Appellant's Claim That He and OAS Agreed to Cancel the Sale of the Vehicle, Is Inconsistent With Claiming Appellant is a Defrauded Owner.

As noted above, Carter dubiously claims that he became "the owner of the vehicle [at issue] when he allegedly contracted for the sale, paid the deposit, and was issued an Affidavit & Notification of Sale of Motor Vehicle in [his] name." [AFB p.4] (emphasis added). This position, taken at face value, wholly precludes any allegations of "fraud" or "fraudulent representation" in connection to the "sale" of the vehicle; a triggering condition of S.C. Code § 56-15-320(B).

Carter inconsistently maintains that he is an "owner" [i.e., the sale was complete] *at the point in time* when he paid the deposit and signed the contract, while also contradictorily contending that "fraud", which he argues triggered the motor vehicle dealer bond, pursuant to S.C. Code § 56-15-320m occurred well after Appellant admits to having terminated the contract. Thus, Carter ended the "sale" before the complained of financial transaction (USAA "accidentally" wiring the loan proceeds) occurred. In Appellant's Third Amended Complaint, Paragraphs 13 & 14, Appellant specifically alleges that he "cancelled the contract, and having received back his earnest money deposit, reasonably and rightfully presumed the transaction to be a closed matter". [R. p.41, ¶¶13-

14]. In paragraph 14, Appellant alleges that the funds had been transferred by USAA to OAS "for an automobile that Plaintiff did not purchase and of which Plaintiff had never taken possession." [R. p.41, ¶¶13-14].

Moreover, Appellant testified in his First Affidavit of September 30, 2020, that the transaction had been terminated or canceled, and that he, "didn't think USAA was going to send the money to [OAS]" and that, "[OAS] never informed [Carter] the loan proceeds from USAA had been delivered to them by accident". [R. p.35, ¶¶5-6]. This is not an allegation of fraud, and certainly not one that occurred after terminated the sale with OAS. Carter cannot have his metaphorical cake and eat it to, by clearly alleging that the transaction was cancelled, and that the funds in question were delivered by accident, and now somehow disingenuously claiming that OAS did something fraudulent in connection with a sale, or that he is somehow an owner.

B. Appellant Has Not Sufficiently Pled An Allegation of Fraud, or a Fraudulent Misrepresentation, Such As to Trigger the Motor Vehicle Dealer Bond.

Appellant has not plead the cause of action (or the elements, thereof, or any specific facts which would support a cause of action) for either Fraud, or Fraudulent Misrepresentation, in his Third Amended Complaint against OAS. [R. p.39]. Chapter 56 defines "fraud" as "[including], in addition to its normal legal connotation, the following: a misrepresentation in any manner, whether intentionally false or due to gross negligence, or a material fact; a promise or representation not made honestly and in good faith; and an intentional failure to disclose a material fact." *See* S.C. Code § 56-15-10(m) (2021). The same chapter also defines, a "sale" as "the issuance, transfer, agreement for transfer, exchange, pledge, hypothecation, mortgage in any form, whether by transfer in trust or otherwise, of any motor vehicle or interest therein or of any franchise related thereto; and any option, subscription or other contract, or solicitation, looking to a sale, or offer or attempt to sell in any form, whether spoken or written." *Id.* at (l).

These definitions set the parameters of the conduct which will trigger the statutory claim set forth in S.C. Code § 56-15-320. The statute is unambiguous and requires that there be misrepresentations or omissions of material fact, which must be made in connection to the "transfer" of a "motor vehicle" or the solicitation, offer or contract for sale. The Third AC does not, and cannot, make out a prima-facie claim under these definitions. The Third AC indicates that Carter voluntarily entered into the Contract for sale of the Vehicle and paid a deposit. [R. p.40, ¶9]. OAS also represented that it would "accept payment of the $5,000.00 balance from USAA". [R. p.40, ¶10]. These representations were all true. At that time, OAS held title to the Vehicle. [R. p.41, ¶¶16-17]. Furthermore, as alleged by Carter, OAS did accept payment of the balance from USAA, as it indicated it would. [R. p.41, ¶¶13-14].

After these acts toward the "sale" of the Vehicle occurred, Carter "cancelled", "terminated", or "rescinded" the Contract, due to his own "frustration." [R. p.41, ¶12]. In connection to his termination, OAS returned his deposit. [R. p.41, ¶12] ("[OAS] accepted [Carter's] termination of the contract and refunded [Carter] his $500.00 earnest money deposit."). Carter then failed to act with respect to *his own* lender, to advise USAA of his cancellation. These allegations fail to allege any actionable "fraud" in connection to the "sale" in this case. What is more, given the facts alleged, there is no possible cure to this defect.[3]

[3] PSC notes that procedurally, the Court granted its request to be dismissed from the case on a motion to dismiss, rather than on summary judgment. However, PSC also submits that the Court was at liberty to treat its motion to dismiss as one for summary judgment, given that Carter had filed a motion for summary judgment on the same grounds which was pending before the court, and heard contemporaneously with the motion to dismiss. *See Martin v. Companion Healthcare Corp.*, 593 S.E. 2d 624, 627 (S.C. Ct. App. 2004) ("When a court is considering a motion to dismiss and matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."). [MSJ:9] ("[PSC] argues that [Carter's] ownership interest ceased to exist once [Carter]

C. Appellant Cannot Claim Breach of Contract Accompanied by Fraud, When He Terminated the Contract Before the Alleged Fraud Occurred.

Appellant has only alleged a cause of action for Breach of Contract Accompanied by Fraud. There can be no sustainable cause of action for Breach of Contract, Accompanied by Fraud, if there was no Contract in existence when the Fraud occurred. To recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish (1) the contract was breached; (2) the breach was accomplished with a fraudulent intention; and (3) the breach was accompanied by a fraudulent act. *See Minter v. GOCT, Inc.*, 322 S.C. at 529-30, 473 S.E.2d at 70 (S.C. App 1996). "In an action for breach of contract accompanied by a fraudulent act, the fraudulent act element is met by any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design." *See Perry v. Green*, 313 S.C. 250, 254, 437 S.E.2d 150, 152 (Ct. App. 1993).

In order to establish the first element, it is of paramount importance that a contract was in existence when the alleged fraudulent act occurred. Appellant makes very clear the timing of events in his Affidavit of Sept. 30, 2020, when he says that he canceled the contract before the funding from USAA was wired. "An [OAS] employee told me there was a problem with the funding from USAA and that I had to wait to speak with someone about it. After waiting more than 1 hour . . .I became frustrated and decided to cancel the purchase. I spoke to Oscar directly and he agreed to cancel the transaction." [R. p.34, ¶4]. Appellant then testifies that OAS refunded his $500 on August 5, 2019, that, "At this point, I thought everything was over . . . I didn't think

attempted to cancel the sale . . . As the money [for purchase of the vehicle] has never been returned, [Carter's] ownership interests in the vehicle remain."). Because Carter presented evidence and proofs in support of the very issue on which PSC sought dismissal, the Court was not limited to the four corners of the Third AC and was free to treat the motion to dismiss as one for summary judgment.

USAA was going to send the money. Unfortunately, I was wrong. USAA sent [OAS] the $5,000 on August 5, 2019 – the same day [OAS] refunded my deposit". [R. p.35, ¶5]. Appellant complains only that OAS never informed Appellant that USAA sent the money, after Appellant had already canceled the contract. [R. p.35, ¶6]. Thus, Appellant has never alleged a breach of contract, accompanied by fraud, such as to trigger the Motor Vehicle Dealer Bond, as contemplated by Title 56.

IV. THE MOTOR VEHICLE DEALER BOND DOES NOT COVER APPELLANT'S ARGUMENTS REGARDING A FINANCIAL DISPUTE WITH OSCAR'S AUTO SALES NOT RETURING MONEY ACCIDENTALLY SENT BY LENDER USAA, OCCURRING AFTER APPELLANT TERMINATED THE CONTRACT.

Just as a Construction License Bond is not a Performance Bond guaranteeing the completion of work under a contract, a Motor Vehicle Dealer Bond is a type of license bond, that does not guarantee the particulars of contract claims, or even tort claims, generally arising out of a contractual relationship. *Kennedy v. Henderson,* 289 S.C. 393, 396 (S.C. 1986). This is particularly true when that contractual relationship was terminated by the Appellant, with consent of the Principal, prior to the allege act occurring. Specifically, the language of the Motor Vehicle Dealer bond obligates PSC to:

> *to indemnify any owner of a motor vehicle, or his legal representative, who may be aggrieved by any fraud, fraudulent representation or violation by said Principal, salesmen, or representatives acting for such Principal within the scope of employment of such salesmen or representatives, of any of the provisions of Title 56 of the South Carolina Code of Laws relating to Motor Vehicle Dealers and the sale and transfer of motor vehicles*.

[R. p.56]. None of the provisions of Title 56 concern the financing of a vehicle, or claims that, after a contract was terminated by Appellant, that the Dealer in question didn't advise the lender not to wire the money, or that the Dealer had any obligation to tell the Appellant his Lender had accidentally wired the funds. Even to the extent Appellant argues he has properly alleged fraud, which is denied, Appellant is not alleging fraud which would fall under Title 56. To the extent

Appellant has a claim, it is a financial dispute involving Appellant's Lender, and not one for fraud relating to the sale and transfer of a motor vehicle as defined by Title 56.

In an analogous construction license bond case, the South Carolina Supreme Court, in *Lite House v. North River Ins. Co*, 322 S. C. 26 (S.C. 1996) held that even "misconduct" alleged in a complaint, which might result in a construction license being revoked, might not be sufficient to trigger recovery under the specific terms of a construction license bond, where the bond covers statutorily defined safety and health concerns, and the allegations of misconduct are financial and/or concern failure to pay monies.

> Here, the wrongful acts alleged in petitioner's complaint, i.e., Grimsley's failure to pay petitioner for the materials and Grimsley's signing of false affidavits indicating petitioner had been paid, had nothing to do with the actual construction of the residences involved. Consequently, no violation of any construction standard is alleged or inferred in petitioner's complaint. In short, whereas Grimsley's acts of failing to pay for the materials and signing the false affidavits may constitute "misconduct", and may be grounds to revoke, suspend, or restrict Grimsley's license pursuant to S.C. Code Ann. § 40-59-90 (Supp. 1995) and 27 S.C. Code Ann. Reg 106-7 (Supp. 1995), or may be grounds for criminal prosecution under S.C. Code Ann. § 29-7-20 (Supp. 1995), the acts do not fall within the purview of the protection extended by the surety bond at issue.

Lite House v. North River Ins. Co., 322 S.C. 26, 31 (S.C. 1996).

Title 56 of the South Carolina Code of Laws contains 35 sub-Chapters. The only Chapters which would remotely concern the sale of a vehicle by a Motor Vehicle Dealer would be the following:

- Title 56, Chapter 19; Protection of Titles to Interests in Motor Vehicles (Arts. 1-9). *See* S.C. Code 56-19-10, et. seq. (2018);
- Title 56, Chapter 28; Enforcement of Motor Vehicle Express Warranties; *See* S.C. Code 56-28-10, et. seq. (2016);
- Title 56, Chapter 29; Motor Vehicle Chop Shop, Stolen, and Altered Property. *See* S.C. Code 56-29-10, et. seq. (1987); and/or
- Title 56, Chapter 32, Motor Vehicle Damage Disclosure Act. *See* S.C. Code 56-32-10, et. seq. (1995).

It is no wonder the Appellant is required to be an "owner" of a subject vehicle in order to make a claim on this bond, as the terms of the bond are such that only an "owner" could make these claim under the bond if fraud, or a fraudulent misrepresentation was made regarding:

- Whether the dealer actually held clear title to the vehicle, or whether there was a lien on the vehicle, or whether the vehicle was stolen (Title 56, Chapter 19);
- Whether a new vehicle conformed with express warranties by the dealer (Title 56, Chapter 28);
- Whether the vehicle being sold had an altered Vehicle Identification Number (VIN) or other prohibition constituting an unlawful chop shop (Title 56, Chapter 29); and/or
- Whether damage to the vehicle was properly disclosed to the Buyer (Title 56, Chapter 32).

Appellant's arguments amount to no more than a financial disagreement, as to what OAS was required to do with monies from USAA, which USAA "accidentally" wired into OAS bank account, and/or when OAS should have done something, all after Appellant and OAS had terminated the sales contract, and after Appellant admitted he did not purchase and/or take possession of the vehicle in question. [R. p.41, ¶¶13-16]. Appellants' attempted arguments that OAS sold the vehicle twice, or that Appellant somehow retained an "equitable ownership interest" are disingenuous and should be disregarded, for reasons stated supra.

CONCLUSION

WHEREFORE PSC Respectfully Requests this Appellate Court affirm the decision of the lower court below, which granted PSC's motion to dismiss, for the reasons set forth herein and to award any and all other relief deemed just and necessary under the circumstances.

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