

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT  
Civil Action No. 2020-CP-23-02297

Zachary Leland Moody and Kristina L. )  
Moody, )  
 )  
Plaintiff, )

v. )

Gabriela B. Lopez, a/k/a Gabriela )  
Baltazar Lopez-Guiterrez, an individual, )  
Leopoldo Vera Hernandez, an individual, )  
Santa Fe Construction, LLC, Juan Carlos )  
Maldonado, an individual, ServPro of )  
Pickens County d/b/a Blue Moon )  
Enterprises, Inc., Scott D. Caulfield, an )  
individual, Keller Williams Western )  
Upstate, The Haro Group of Keller )  
Williams, Creasy Construction, LLC, )  
Harry James Creasy, an individual, and )  
John Allen Drew, an individual, )  
 )  
Defendants. )

**RECEIVED**  
**Sep 25 2023**  
SC Court of Appeals

**ORDER GRANTING MOTION FOR  
SUMMARY JUDGMENT OF SERVPRO OF  
PICKENS COUNTY D/B/A BLUE MOON  
ENTERPRISES, INC.  
(Does Not End Case)**

This matter came before this Court on the Notice of Motion and Motion for Summary Judgment of Servpro of Pickens County d/b/a Blue Moon Enterprises, Inc. (“Motion” of “Blue Moon”) filed on September 27, 2022. A hearing was held before me in Greenville on January 4, 2023. Allen Leland DuPre appeared on behalf of Blue Moon. Townes B. Johnson, III, appeared on behalf of Plaintiffs Zachary Leland Moody and Kristina Moody. On January 2, 2023, Plaintiffs filed “Plaintiff’s Memorandum In Opposition to Defendant Servpro of Pickens County d/b/a Blue Moon Enterprises, Inc.’s Motion for Summary Judgment (“Plaintiff’s Memo”) and submitted the deposition transcript of Zachery Leland Moody in its entirety.

After consideration of the record in the light most favorable to the plaintiffs, the arguments of counsel, the motion and memoranda submitted to me and exhibits thereto, and the applicable

rules and case law, this Court finds that the defendant's Motion should be and is granted because the undisputed facts establish:

1. Blue Moon gave no implied warranty as a matter of law;
2. Blue Moon violated no legal duty on which Plaintiff may base a claim for negligence;
3. There is no evidence to support a claim for civil conspiracy against Blue Moon as a matter of law;
4. Plaintiffs have no claim for equitable indemnity as they are not subjected to a claim by a third party because of Blue Moon;
5. Plaintiffs failed to comply with South Carolina's Notice and Opportunity to Cure Construction Dwellings Act which bars their claim for completed repairs.

#### **SUMMARY JUDGMENT IS APPROPRIATE**

This Court recognizes that summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Folkens v. Hunt, 290 SC 194 (Ct. App.1986). In determining the existence of a genuine issue of material fact the court must view the evidence and all reasonable inferences that may be derived therefrom in the light most favorable to the non-moving party. The Court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. Nolte v. Gibbs International, Inc., 335 SC 72 (Ct.App. 1999). In considering whether to grant summary judgment, the Court must give every benefit of doubt to the non-moving party. Watters v. Terminix Service, Inc., 376 SC 632 (Ct.App. 2008). In order to withstand a motion for summary judgment in a preponderance of evidence standard case the non-moving party need only submit a mere scintilla of evidence warranting determination by a jury to avoid a grant of summary judgment. Turner v. Milliman, 392 SC 116 (2011).

However, "Where the plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law." Humana Hospital-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991). "[T]his court ordinarily will not consider statements of fact presented only in an attorney's argument in determining whether a genuine issue of material fact exists sufficient to preclude summary judgment." West v. Gladney, 341 S.C. 127, 135, 533 S.E.2d 334, 338 (Ct. App. 2000).

Plaintiffs argue that summary judgment is not appropriate in this case because discovery is ongoing. South Carolina law provides that summary judgment must not be granted until the opposing party has had a "full and fair *opportunity* to complete discovery." Evening Post Publ'g Co. v. Berkeley Cty. Sch. Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011) citing Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003)(emphasis added). It is undisputed that this case was filed by Plaintiffs on April 28, 2020. Blue Moon's Motion with accompanying exhibits and affidavit was filed over two (2) years later on September 27, 2022. The Motion was heard on January 4, 2023, over three (3) months later. At the hearing Plaintiff's counsel acknowledged that he had not noticed any depositions in this matter at any time, nor did he identify any other outstanding discovery effort initiated by him, even after he was placed on notice of this Motion. As such, it was undisputed that Plaintiffs had a "full and fair opportunity to complete discovery."

Additionally, if a party opposes summary judgment on the basis that he cannot present facts to oppose summary judgment, he must file an affidavit setting forth the reasons why he is unable to present facts to justify his opposition. See Doe ex rel. Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) ("Rule 56(f) requires the party opposing summary judgment to at least

present affidavits explaining why he needs more time for discovery." ). Plaintiffs filed no affidavit explaining why they had been prevented from completing any discovery necessary to oppose this motion. As such, Plaintiffs have no argument that lack of discovery is a basis to deny this motion.

### UNDISPUTED FACTS

In their complaint, Plaintiffs, Zachary Leland Moody and Kristina L. Moody ("Plaintiffs"), allege that they purchased a home located at 221 Foxhound Road, Simpsonville, South Carolina, 29680 (hereinafter "Home") from Defendant Gabriela B. Lopez ("Lopez"). Lopez is alleged to be married to Defendant Leopoldo Vera Hernandez ("Hernandez"). Hernandez is or was, upon information and belief, an employee of Santa Fe Construction, LLC ("Santa Fe"), a company believed to be owned by Defendant Juan Carlos Maldonado ("Maldonado").

Blue Moon filed an affidavit in support of its motion, and Plaintiff presented no evidence to dispute the sworn testimony set forth the Affidavit. ("Affidavit," Motion Exhibit A) Blue Moon is an entity in the business of repairing homes due to incidents such as flood or fire. Id. Blue Moon holds a general contractor's license with the State of South Carolina for the purpose of performing these repairs. Id. Blue Moon does not and has not ever constructed new homes. Id. Defendant Scott D. Caufield (hereinafter "Caufield") was an employee of Blue Moon and in 2014 was the qualifier on Blue Moon's contractor's license. Id. This means he had taken the requisite tests administered by the State of South Carolina to qualify Blue Moon for this license. Id. Blue Moon discovered that Caufield had embezzled funds from it. Id. Caufield was then terminated on November 25, 2016. Id. Caufield executed a Confession of Judgment in favor of Blue Moon on which he made payments until 2020. Id. At the hearing Plaintiff presented no evidence to dispute the Affidavit.

A building permit was issued by the City of Simpsonville for the construction of the Home on June 17, 2014, showing Scott Caufield as the purported contact for the contractor and Lopez as the owner. (“Permit,” Motion Exhibit B) “Blue Moon Enterprises” on the application as the contractor. Id. Payment for the permit was made by a check issued from the account of Santa Fe. (Motion Exhibit C) In its Affidavit Blue Moon states that it was not aware that its license had been used by Caufield to construct the Home. (Motion Exhibit A)

In their complaint Plaintiffs allege that they purchased the Home from Lopez in April 2017. Compl. at ¶30. Mrs. Moody admits that at the time they purchased the home they did not know who participated in the construction of the home. (“K. Moody Dep.” - Motion Exhibit D). Before the purchase Mrs. Moody had not heard of Blue Moon. Id. at Ll. 9-10.

Plaintiffs allege they began experiencing issues related to defective work at the Home in 2018. Compl. at ¶31. Plaintiffs retained Defendant John Allen Drew (“Drew”) to investigate and repair the issues. Id. at ¶33. Plaintiffs allege that Defendant Creasy Construction, LLC, and/or Harry James Creasy (“Creasy”) “lent” Drew its construction license to perform repairs, as Drew was unlicensed. Id. at ¶¶34-35. Plaintiffs allege that Drew “walked off” the project without completing repairs although he had been paid. Id. at ¶37.

On or after August 7, 2019, Blue Moon received a Notice of Complaint made by the Plaintiffs regarding the Home issued by the South Carolina Department of Labor, Licensing and Regulation (“SCLLR”), (“LLR Complaint” - Motion - Exhibit E) Blue Moon informed LLR that its license had been used without its knowledge. (Affidavit - Motion - Exhibit A) On January 16, 2020, after performing an investigation, LLR dismissed the action against Blue Moon. (“LLR Dismissal,” Motion Exhibit F)

Plaintiffs filed this action on April 28, 2020 against Lopez, Hernandez, Santa Fe, Maldonado, Blue Moon, Caufield, and others. See Compl., generally. Lopez, Hernandez and Creasy were dismissed prior to this hearing due to settlements. See ###Dismissal###

### ANALYSIS

Blue Moon was neither the builder nor the seller of the Home, and as such, there is no basis for liability to the Plaintiffs on its part as a matter of law. Plaintiff's only argument raised in its opposition to this motion was that Blue Moon was vicariously liable for the actions of Caufield. See Plaintiffs' Memo, generally. However, this argument fails to create an issue of fact as to the claims asserted by the Plaintiff as a matter of law. Plaintiff acknowledges that to establish a theory of liability under *respondeat superior*, the court must find that a tort was committed by the servant acting within the scope of his employment citing Falconer v. Beard-Laney, Inc., 215 S.C. 321, 330, 54 S.E.2d 904, 908-09 (1949). Here, Plaintiff offered no evidence to dispute the Affidavit of Blue Moon which states that it had no knowledge of Caufield's actions regarding the Home and that it received no benefit from the construction of the Home. As set forth below, Plaintiffs fail to put forth evidence to support the causes of action alleged in their complaint as a matter of law.

#### **I. Blue Moon gave no implied warranty as a matter of law.**

Because Blue Moon did not contract to construct or sell the Home, no implied warranty was given by Blue Moon as a matter of law. While Plaintiffs do not specify what implied warranty they seek to enforce against Blue Moon, only two such warranties have been held to apply to residential homes: the implied warranty of habitability and the implied warranty of workmanlike service.

The first, the implied warranty of habitability, does not apply to Blue Moon because it never sold the Home. The "determining factor" as to whether this warranty applies is "not whether

the defendant actually builds the defective house, but that he places it, by the initial sale, into the stream of commerce.” Arvai v. Shaw, 289 S.C. 161, 164, 345 S.E.2d 715, 717 (1986). Here, Plaintiff offered no evidence that Blue Moon placed the Home in the stream of commerce. As such, this warranty does not apply to Blue Moon as a matter of law.

The second, the implied warranty of workmanlike service, is also not applicable because Blue Moon did not construct the Home. This implied warranty has been articulated as follows, “[A] builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent workmanlike manner.” Kennedy v. Columbia Lumber, 384 S.E.2d at 736. While privity of contract is not required to bring this action in the residential construction context, this warranty liability is “characterized” as “arising from the construction contract to which a builder is a party.” Id. citing Carolina Winds Owners' Association, Inc. v. Joe Harden Builder, Inc., 297 S.C. 74, 843, 374 S.E. 2d. 897, 903 (Ct. App. 1988). There is no evidence that Blue Moon was ever a party to a contract to construct the Home. There is no evidence that Blue Moon was paid to construct the Home. There is no evidence that it actually participated in the construction of the home. There is only evidence that its license was used to pull a permit without its knowledge, and this is insufficient to support this warranty claim.

Under South Carolina law an implied warranty does not arise simply because a permit is pulled. In Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67 (S.Ct. 2008), the court held that the implied warranty of workmanlike services was limited to apply to a “builder-vendor.” In Smith, the court refused to impose liability on Breedlove who pulled the permits to construct his personal residence which he later sold. The Court stated that the “rationale supporting the imposition of liability for breach of an implied warranty of workmanlike service is that the purchaser is forced to rely on the skill of the professional builder.” Id. at 72. The court found that Breedlove never

held himself out to the purchaser, Smith, to be a licensed contractor or to have any expertise in construction. Id. There was no reliance by the purchaser on the skill of Breedlove. Id. The court did not find that Breedlove was liable under this theory as he was “not in the business of constructing homes and because our policy of protecting purchasers, who must rely on the skill and expertise of professional builders, is not implicated by the facts to this case.” Id.

Likewise, Blue Moon is not in the business of constructing homes. Its general contractor’s license was used to obtain the permit, but it did not participate in the construction of the Home. Plaintiffs were not aware that Blue Moon’s name was on the Permit before they purchased the Home. Plaintiffs present no evidence of reliance on Blue Moon’s experience in homebuilding because they have none. As such, this implied warranty does not apply to Blue Moon. Because Blue Moon was neither the builder nor the seller of the Home, it is entitled to judgment as a matter of law on the theory of warranty.

## **II. Blue Moon violated no legal duty on which Plaintiff may base a claim for negligence.**

Plaintiffs cannot prove that Blue Moon violated any legal duty owed to the Plaintiffs, and as such Plaintiffs cannot recover in negligence. In order to establish a claim for negligence, a plaintiff must show, "(1) [D]efendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual or proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages." Doe v. Marion, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). "Without a duty, there is no actionable negligence." Id. "The existence of a duty owed is a question of law for the courts." Washington v. Lexington Cty. Jail, 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct. App. 1999).

In Kennedy v. Columbia Lumber, 384 S.E.2d at 734, the South Carolina Supreme Court allowed a tort action to be brought against a builder where the builder violates (1) an applicable building code, (2) deviates from industry standards, or (3) constructs a house that he knows or should know will pose a serious risk of physical harm. Here, Plaintiffs offered no evidence that Blue Moon (or even Caufield) participated in the actual construction of the Home, and thus, did not violate an applicable building code or industry standard. Additionally, Blue Moon did not know that the Home was being built and as such did not and could not have known that the Home would pose any risk of harm. Plaintiffs' LLR Complaint against Blue Moon was dismissed. As such, Plaintiffs cannot establish that Blue Moon violated a duty owed to Plaintiffs.

In Smith v. Breedlove, 677 S.E.2d at 72, the Court rejected the mere pulling of a permit as a basis for a negligence action. Instead, the Court found that the builder/owner did not owe the purchaser a duty of care in the construction of the home not because he was unlicensed, but "because he did not undertake and agree to construct the residence for [the purchaser] or for anyone else." Id. The Court upheld the trial court's finding that "the undertaking or agreement to construct a dwelling for another" is what creates the duty to exercise and use due care in the construction of the dwelling. Id. Negligence liability was not imposed on Breedlove based on his pulling of the home's permit. Here, Blue Moon did not contract with anyone to construct the residence and did not undertake to build the residence. As such, there is no legal duty on which to base a negligence claim against Blue Moon.

Plaintiffs' additional claim for "negligent supervision" must also fail. Plaintiffs offer no evidence that Blue Moon had any knowledge that its license was being used. The testimony of Kristina Moody herself established that a building permit can be pulled in the City of Simpsonville Building Department using a builder's license without that builder having knowledge of it. Mrs.

Moody testified that she was able to pull a permit for repairs from the City of Simpsonville using Creasy's license:

**Q. ·Okay· So on the City of Simpsonville permit application, even though Mr. Creasy's contact information on there, you were able to submit that permit with just your signature, correct?**

A. ·Correct.

**Q. ·And nothing was required directly from Mr. Creasy for you to be able to obtain that permit, correct?**

A. ·Correct.

Therefore, the fact that a permit was pulled using Blue Moon's license without its knowledge does not in itself establish liability.

Finally, there is no basis for vicarious liability on the part of Blue Moon for Caufield's actions because there is no evidence that Caufield was acting on behalf of his employer when he constructed the Home. While vicarious liability is not specifically plead, an employer is vicariously liable for injuries to a third party that result from torts the employee commits **within the scope of employment**. Froneberger v. Smith, 406 S.C. 37, 52, 748 S.E.2d 625, 633 (Ct. App. 2013) (Discussing doctrine of *respondent superior*, emphasis added). Here, Plaintiffs offer no evidence that Caufield was furthering the business of Blue Moon when the permit was pulled, as there is no evidence that Blue Moon received any benefit from the construction of the Home or that it had any knowledge of the construction of the Home. As such, Blue Moon is entitled to judgment as a matter of law as to the Plaintiffs' claims for negligence.

**III. There is no evidence to support a claim for civil conspiracy against Blue Moon as a matter of law.**

Plaintiffs have no evidence that Blue Moon participated in a civil conspiracy. Under South Carolina law, "[a] civil conspiracy . . . consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage." Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 8, 344 S.E.2d 379, 382 (S.C. Ct. App. 1986) (citations

omitted). "A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint." Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 682 S.E.2d 871, 874 (S.C. 2009). According to South Carolina civil conspiracy law, when the plaintiffs "merely reallege[ ] the prior acts complained of in [their] other causes of action as a conspiracy action but failed to plead additional acts in furtherance of the conspiracy, [they were] not entitled to maintain [their civil] conspiracy cause of action." Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 538 S.E.2d 15, 31 (S.C. Ct. App. 2000).

Plaintiffs offered no evidence to dispute that Caufield is the only person affiliated with Blue Moon to have any knowledge of construction of the Home. Plaintiffs allege that Caufield is a co-conspirator with Blue Moon. A corporation cannot conspire with itself, and Caufield cannot conspire with himself as an employee of Blue Moon. In Broyhill v. Resolution Mgmt. Consultants, 401 S.C. 466, 476, 736 S.E.2d 867, 872 (Ct. App. 2012), the Court of Appeals held that where Plaintiff presented no evidence that members of a corporation acted outside of their corporate capacity and thus, there was no conspiracy with the corporation. Here we have the opposite; there is no evidence that Caufield acted in his official capacity on behalf of Blue Moon. Plaintiff presented no evidence to dispute Blue Moon's assertion that (1) it had no knowledge of the construction of the Home; and (2) that it received no benefit from the construction of the Home, only harm. Thus, there is no evidence that anyone from Blue Moon, apart from Caufield who was acting on his own accord, acted in concert with any other defendant for any purpose.

Importantly, there is no evidence that Blue Moon (or even Caufield) ever acted *for the purpose of harming the Plaintiffs*. A civil conspiracy specifically requires that the acts be committed *for the purpose of injuring the Plaintiff*. Lee v. Chesterfield, 344 S.E.2d at 382 (emphasis added). The Plaintiffs did not even seek to purchase the Home until three (3) years after

construction was completed. Compl. at ¶24 and 30. Thus, there is no evidence that the Home was constructed for the purpose of harming the Plaintiffs.

Finally, because Plaintiffs allege no acts other than those that form the basis for their other causes of action, they have no claim for civil conspiracy. Plaintiffs must plead particular acts to further the conspiracy. Kuznik v. Bees Ferry Assocs., 538 S.E.2d at 31. Plaintiffs plead nothing more than alleged deficient construction of the Home in support of their claim for conspiracy. See Compl., generally. This does not support this cause of action. For these reasons, Blue Moon is entitled to judgment as a matter of law as to Plaintiffs' claims for conspiracy.

**IV. Plaintiffs have no claim for equitable indemnity as they are not subjected to a claim by a third party because of Blue Moon.**

Because Plaintiffs have not actually or potentially incurred liability to a third party in this matter, the claim of Equitable Indemnification is not applicable. "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993). "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999). The damages in an indemnity claim are generally attorney's fees, costs, and potential liability. Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) (Claim for attorney's fees, costs, and potential liability held to be a claim for indemnity, regardless of how plead.). Plaintiffs allege that they are exposed to "damages" – not liability or litigation. *Compl.* ¶ 62.

The only claim brought against Plaintiffs is a counterclaim filed in this action by Creasy. See Ans. and Countercl. Of Creasy Construction, LLC and Harry James Creasy and Cross-cl. Of

Creasy Construction, LLC (“Creasy Claim”). To recover in equitable indemnity the claimant must prove: “(1) the indemnity defendant [] is at fault in causing the damages of the third party []; (2) the plaintiff has no fault for those damages; and (3) the plaintiff incurred expenses that were necessary to protect his interest in defending the third-party’s claims. Fountain v. Fred’s, Inc., 436 S.C. 40, 871 S.E.2d 166 (S.C. S.Ct. 2022) citing Inglese v. Beal, 403 S.C. 290, 299, 742 S.E.2d 687, 692 (Ct. App. 2013). No allegations of the Creasy Claim against Plaintiffs is based on any conduct by Blue Moon, but instead these claims are based on the actions of Kristina Moody. Creasy Claim. at ¶¶ at 70 -103. Furthermore, the Creasy Claim was asserted **after** Plaintiffs filed their equitable indemnity claim in their initial complaint. The Plaintiffs assert no indemnity action against any party in their response to the Creasy Claim other than a counterclaim against Creasy. See Pl.’s Reply to Defs. Creasy Constr., LLC, and Harry James Defs.’ Countercl. As such, Plaintiffs have no claim for indemnity against Blue Moon in this action

**V. Plaintiffs failed to comply with South Carolina’s Notice and Opportunity to Cure Construction Dwellings Act which bars their claim for completed repairs.**

While Blue Moon did not construct the Home, if it had, Plaintiffs’ claims for money spent are barred because the Plaintiffs failed to comply with the requirements the South Carolina Notice and Opportunity to Cure Construction Dwellings Act (“Right to Cure Act” or “Act”) before completing repairs. The Right to Cure Act, found at S.C. Code Ann. §§ 40-59-810-860, gives contractors the right to cure alleged “Construction defect[s]”<sup>1</sup> in a “dwelling.”<sup>2</sup> The Act specifically requires a “claimant”<sup>3</sup> to “serve”<sup>4</sup> “a written notice of claim on the contractor” no less

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<sup>1</sup> As defined by the Right to Cure Act “Construction defect” includes a “deficiency in or a deficiency arising out of the design, specifications, surveying, planning, supervision, or observation of construction or construction of residential improvements...” § 820(3).

<sup>2</sup> As defined by the Right to Cure Act a “Dwelling” includes a single family residence and includes the “systems and improvements that are part of a single or multifamily unit at the time of construction.” §820(4).

<sup>3</sup> Under the Act a “Claimant” means a homeowner, including a subsequent purchaser, who asserts a claim against a contractor concerning a defect in the design, construction, condition or sale of a dwelling. §820(2)

<sup>4</sup> The Act requires service by certified mail. §820(5)

than ninety days before filing an “action”<sup>5</sup> against a contractor or subcontractor arising out of the construction of a dwelling meeting specific requirements of the Act. §840(A)-(B). In Grazia v. S.C. State Plastering, LLC 390 S.C. 662 (S.Ct. 2010), the Court recognized that a mechanism for a stay exists to allow compliance with the statute, namely giving the contractor the opportunity to cure the defects, after an action has been commenced.

Here repairs were performed without giving the requisite written notice to Blue Moon prior to filing this action. Former South Carolina Supreme Court Justice, Jean Hofer Toal, ruled at the trial level that where a homeowner fails to comply with the requirements of the Act **before** proceeding with the repairs, any action for damages must be dismissed because after the repairs are completed compliance with the act is impossible. See, McIntire v. Sequest Development Co., Inc., C/A No. 2016-CP-10-1833 (January 17, 2017), rev’d on other grounds Op. No. 2019-UP-413, 2019 S.C. App. Unpub. LEXIS 429 \* | 2019 WL 7369272 (S.C. Ct. App. Nov. 5, 2019) cert. denied 2019 S.C. App. Unpub. LEXIS 429, 2019 WL 7369272 (S.C. Ct. App., Dec. 31, 2019). The reasoning is that it would be impossible to comply with the Act even under the provision allowing a stay because the repairs had been completed.

Here, Plaintiffs did not present any evidence to the court that they complied with the act. Plaintiffs freely admit that they performed the Drew repairs in the amount of \$42,500.00 prior to filing this lawsuit and without giving Blue Moon notice before proceeding with them. See Moody Dep. at P. 78, Ll. 10 – P. 79 L. 8. Thus, their claim for these damages must be dismissed. Plaintiffs presented no evidence to the Court of compliance with the act prior to completing the repairs to the Home performed by CAP Construction in the amount of \$109,805.00. These repairs were made in 2021 after the commencement of this action. However, the Plaintiffs gave no notice to

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<sup>5</sup> Under the Act an “Action” includes a civil lawsuit for damages. §820(1).

Blue Moon or its counsel (or to any defendant to Blue Moon's knowledge) pursuant to the Act prior to proceeding with the repairs. As such, the Plaintiffs have once again proceeded with repairs in a manner that makes compliance with the Act impossible. Thus, their claims for the \$109,805.00 paid to CAP Construction are also dismissed.

### **CONCLUSION**

For the reasons set forth above,



Greenville Common Pleas

**Case Caption:** Zachary Leland Moody , plaintiff, et al vs. Gabriela B Lopez ,  
defendant, et al  
**Case Number:** 2020CP2302297  
**Type:** Order/Summary Judgment

IT IS SO ORDERED!

s/J. Derham Cole 2053