STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

MIKELL R. SCARBOROUGH, MASTER IN EQUITY

APPELLATE CASE NO. 2023-000599

Marc K. Knapp Appellant,

v.

James Douglas Jenkins, IV, Peter Barnwell Jenkins, and Alicia J. Roy, Respondents.

APPELLANT'S FINAL BRIEF

October 10, 2023

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1. Did Judge Scarborough improperly dismiss the action pursuant to SCRCP Rule 12 (b)(6)?
2. Did the trial court err in granting Respondent's Motion for Summary Judgment under SCRCP Rule 56?

STATEMENT OF THE CASE

Marc K. Knapp (hereinafter "Knapp") filed this action on April 28, 2022 in the Charleston County Court of Common Pleas asserting causes of action against James Douglas Jenkins, IV, Peter Barnwell Jenkins, and Alicia J. Roy (hereinafter collectively "Jenkins") for Declaratory Judgment, Specific Performance, and Breach of Contract. (R.pp. 23-42) Prior to filing his action, Knapp filed a *lis pendens* on March 24, 2022 and then filed another *lis pendens* on April 14, 2022.

Jenkins filed a Motion to Dismiss pursuant to 12(b)(6) of the *South Carolina Rules of Civil Procedure* on June 22, 2022. (R.p. 89)- Jenkins then filed a Motion to Cancel Lis Pendens on July 12, 2022. (R.p.90)

Knapp filed Plaintiff's Response and Memorandum in Opposition to Defendants' Motion to Dismiss on July 18, 2022. (R.pp. 92-94) Knapp then filed Plaintiff's Response and Memorandum in Opposition to Defendants' Motion to Cancel Lis Pendens on August 16, 2022. (R.pp. 95-96)

This action was referred to the Master-in-Equity by consent of the parties on September 21, 2022. On October 11, 2022 the Defendants filed an Answer and Counterclaims, alleging Breach of Contract, Breach of Contract Accompanied by a Fraudulent Act, Violation of the South Carolina Unfair Trade Practices Act, and Tortuous Interference with Contract. R.pp. 43-

54) And on December 2, 2022 Jenkins filed Defendants' Amended Motion to Dismiss and/or for Summary Judgment. (R.p. 97)

Knapp filed his Opposition to Defendant's Motion to Dismiss and Summary Judgment on December 9, 2022. (R.pp. 92-94) Knapp filed Plaintiff's Answer to Defendants' Answer and Counterclaims on December 11, 2022. (R.pp. 87-88)

The Master-in-Equity heard Jenkins's Motion to Dismiss on December 12, 2022, granting Jenkins's Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP by Form 4 Order filed on December 12, 2022.(R.p. 1) The Form 4 Order provided that it ended the case and that a formal order was to follow.

Knapp timely filed Plaintiff's Motion Pursuant to Rule 59, SCRCP on December 18, 2022, (R. pp. 253-256) wherein Knapp moved the Court to alter or amend its judgment that dismissed Knapp's action pursuant to Rule 12(b)(6), SCRCP.

The Court then filed an Order Granting Summary Judgment as to Plaintiff's Claims and Cancelling Lis Pendens on January 24, 2023. (R. pp. 6-15) And also on January 24, 2023, Jenkins filed Defendants' Motion for an Award of Fees, Costs, and Sanctions. (R.pp. 259-260)

Knapp filed Plaintiff's Supplement to Motion Pursuant to Rule 59, SCRCP on January 29, 2023 (R.pp. 270-276) to respond to the variance between the grounds for the Court's December 12, 2022 Form 4 granting dismissal pursuant to Rule 12(b)(6) and the Court's Order dated January 24, 2023 (R. pp. 6-15) Granting Summary Judgment as to Plaintiff's Claims and Cancelling Lis Pendens.

On March 7, 2023 Knapp filed Plaintiff's Notice of Motion and Motion for Protective Order Limiting Discovery and also filed Plaintiff's Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction. (R. pp. 277-279)

David K. Haller, attorney for Jenkins, responded to Knapp's Motion for Protective Order Limiting Discovery and Motion to Dismiss for Lack of Subject Matter Jurisdiction by letter to the Court dated February 13, 2023 and filed February 13, 2023. (R.p. 281)

The Court issued its Form 4 Order on March 13, 2023, denying Knapp's Motion to Dismiss for Lack of Subject Matter Jurisdiction and denying Knapp's Motion to Reconsider Pursuant to Rule 59(e), SCRCP. (R.p. 3)

Appellant timely served his Notice of Appeal on April 11, 2023. (R.pp. 329-348)

FACTS

Knapp lives in Charleston County and is the owner of a utilities contracting business that constructs and repairs sewer lines for commercial customers in Charleston County and surrounding areas. The Jenkins own a 6.07 acre tract of undeveloped land on Wadmalaw Island, South Carolina (the "Jenkins Tract") and entered into a contract with Knapp (the "Contract") to sell the Jenkins Tract to him on January 5, 2022. (See Exhibit D to the Complaint) (R. pp. 30-38). Pursuant to the terms of the Contract, Knapp agreed to purchase the Jenkins Tract for $285,000 (the "**Purchase Price**") contingent on (i) Mr. Knapp obtaining a purchase money loan for the lower of the Purchase Price or appraised value, (ii) the real estate appraising at least equal to the Purchase Price, and (iii) receipt of a preliminary or final septic permit. (See Exhibit D to the Complaint) (R. pp. 30-38) Pursuant to the terms of the Contract, Jenkins agreed to convey to Knapp marketable title to the Jenkins Tract by general warranty deed free of all encumbrances and liens and subject to all easements, reservations, rights of way, restrictive covenants of record and to all government statutes, ordinances, rules, permits, and regulations, provided they do not make the title unmarketable or adversely affect the use/value of the Jenkins Tract in a material way. (See Exhibit D to the Complaint) (R. pp. 30-38). The Contract also provided that the

Jenkins Tract would be conveyed in "As-Is" condition despite there being no improvements on the Jenkins Tract.

STANDARD OF REVIEW

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct.App. 2001). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the Appellant, would entitle the Appellant to relief on any theory, then dismissal under Rule 12(b)(6) is improper. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995). "The question is whether, in the light most favorable to the Appellant, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). The complaint should not be dismissed merely because the court doubts the Appellant will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987). *Doe v. Marion*, 373 SC 390, 645 SE2d 245 (2007).

With respect to summary judgment, the relief is only appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). *Moseley v. Oswald*, 376 SC 257, 656 SE2d 380 (2008)

ARGUMENT

I. THE TRIAL COURT IMPROPERLY DISMISSED THE ACTION PURSUANT TO SCRCP RULE 12(b)(6).

On December 12, 2022, the Honorable Mikell R. Scarborough entertained various motions between the parties. The hearing commenced at 2:11 P.M. and lasted approximately forty-eight minutes, ending at 2:58 P.M. See Transcript for Hearing for December 12, 2022, p. 1 and p. 47. (R.pp. 283-294) The crux of the hearing occurred in its final minute, when Judge Scarborough stated, "All right. I'll grant that. I'll do a form 4 just stating that I granted the motion – the 12(b)(6) motion to dismiss pursuant to the terms of the contract..." See Transcript for Hearing for December 12, 2022, p. 47. (R.p. 294) Soon thereafter at 3:49 P.M., the court issued a SCRCP Form 4CE which stated unambiguously, "This matter came before the Court on Respondent's 12(b)(6) Motion to Dismiss." The SCRCP Form 4CE also indicates a formal order to follow. Furthermore, the SCRCP Form 4CE clearly specifies that "this order 'ends' the case." R.p. 1)

Then, nearly one and one-half months later, on January 24, 2023, the court issued the "Order Granting Summary Judgment as to Appellant's Claims and Cancelling Lis Pendens." (R.p. 6-20) A salient fact that Respondent's attorney failed to present the proposed Formal Order to Appellant's counsel prior to submitting to the court for its review on January 9, 2023. (R.p. 280) The Formal Order goes way beyond the scope of the matters before the court during the December 12, 2022, forty-eight-minute hearing and encompasses findings, as well as rulings not detailed within the hearing's transcription. A cursory review of the hearing transcript revealed no one present uttered the phrase, "summary judgment." Neither the court, nor any party, stated the word "summary."

"Judgment" was said once by Respondent's trial counsel after "declaratory" –as in "declaratory judgment."(Dec. 12, 2022 Tr. P6, line 10) (R.p. 284). Further perplexing, ambiguous, and directly contrary to the SCRCP Form 4CE, issued December 12, 2022, contemporaneously within moments of the conclusion of the proceeding before the court that day, is that the Formal Order issued forty-three days later specifically grants summary judgment and revives the matter to allow for the Respondent to further prosecute counterclaims and request fees and costs.

The Appellant believes the court erred in granting the Respondent's Motion to Dismiss. In *Toussaint v. Ham*, the Supreme Court of South Carolina held:

> A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint and the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the Appellant to any relief on any theory of the case. *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987). See also 5 C. *Wright & A. Miller*, Federal Practice and Procedure § 1357 (1969) (The question is whether in the light most favorable to Appellant, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. The complaint should not be dismissed merely because the court doubts that Appellant will prevail in the action.) *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

Later in *Baird v. Charleston County*, the Supreme Court of South Carolina provide further clarity and guidance:

> Under Rule 12(b)(6), SCRCP, a Respondent may make a motion to dismiss based on a failure to state facts sufficient to constitute a cause of action. Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995). The 12(b)(6) motion may not be sustained if the facts alleged and inferences therefrom would entitle the Appellant to any relief on any theory. Id. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999).

In the underlying action, the parties entered into a real estate contract where Appellant agreed to purchase from Respondent a tract of land. The Respondent's realtor drafted the

initial proposal; and then after negotiations and multiple iterations, finalized and circulated the real estate contract for execution by the parties. See Exhibit D to the Complaint. (R.pp. 29-38) Item 4 of the contract dictated the terms of conveyance. The agreement also contained, in Item 8 an "As-Is" clause even though the property was a vacate, unimproved parcel. As standard within the real estate industry, the contract required the Respondent to convey to the Appellant marketable title to the property. The discovery of evidence of a possible cemetery located on the parcel of land during the due diligence period created an ambiguity between the terms of conveyance contained within Item 4 of the contract and the "As-Is" clause within Item 8.

Respectfully, the December 12, 2022, SCRCP Form 4CE Order is founded on a ruling that did not meet the standard of review for a motion to dismiss under SCRCP 12(b)(6).(R.p. 1) The Appellant brought a Declaratory Judgment action seeking court intervention to reconcile the ambiguous terms contained within the Contract drafted by Respondent's agent. (R.pp. 23-28) Generally, in considering a Rule 12(b)(6), SCRCP, motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the face of the Complaint. *Doe v. Greenville County School Dist.*, 375 S.C. 63, 66, 651 S.E.2d 305, 307 (2007); *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). A Rule 12(b)(6) motion is addressed solely to the sufficiency of the allegations in the Complaint. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987). A motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the Complaint and must presume all well-pled facts to be true. *Gressette v. S.C. Elec. & Gas Co.*, 370 S.C. 377, 379, 635 S.E.2d 538, 538-39 (2006). "[U]nder our current pleading rules only ultimate facts are required to be stated in pleadings. Ultimate facts are those which the

evidence upon trial will prove, and not the evidence which will be required to prove those facts." *Brown v. Inv. Mgmt. & Research, Inc.*, 323 S.C. 395, 400 n. 3, 475 S.E.2d 754, 756 n. 3 (1996).

If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the Appellant, would entitle the Appellant to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Clearwater Tr. v. Bunting*, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006); *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). "Furthermore, the complaint should not be dismissed merely because the court doubts the Appellant will prevail in the action." *Spence v. Spence*, 368 S.C. 106, 116-17, 628 S.E.2d 869, 874 (2006). "The question is whether, in the light most favorable to the Appellant, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). Further, dismissal under Rule 12(b)(6) is inappropriate if the pleadings raise novel questions of law. *Chestnut v. AVX Corp.*, 413 S.C. 224, 228, 776 S.E.2d 82, 84 (2015); *Madison v. Am. Home Prod. Corp.*, 358 S.C. 449, 451, 595 S.E.2d 493, 494 (2004). All pleadings shall be so construed as to do substantial justice to all parties, Rule 8(f), SCRCP.

The Court erred in granting the Respondents' motion to dismiss pursuant to Rule 12(b)(6), SCRCP, because the conflicting provisions of Item 4 and Item 8 of the Contract raise a novel question of law insofar as the conflict of the "As-Is" provision and the Respondents' contractual duty to convey marketable title of a parcel of unimproved land to the Appellant. (R.pp. 32, 37) In addition, when the pleadings, and all attachments thereto, are viewed in the light most favorable to the Appellant and with every doubt resolved in

his behalf, the complaint states a valid claim for relief and therefore dismissal pursuant to Rule 12(b)(6), SCRCP should not have been ordered, even where the Court doubts the Appellant could prevail in the action.

The mere fact that the epicenter of the controversy between the parties is an ambiguous agreement drafted by the Respondent's agent is sufficient intrinsic evidence to afford the Appellant ample insulation from the Respondent's Motion to Dismiss.

II. THE TRIAL COURT PREMATURELY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

Appellant maintains the Court never granted the Respondent's Motion for Summary Judgment pursuant to SCRCP Rule 56 as the Court ruled from the bench at the December 12, 2022, (R. p. 294, line 23-25, line 1-4) hearing and issued a SCRCP Form 4CE void of any mention of "summary judgment" or SCRCP Rule 56. However, in arguendo, Appellant contends that if in fact granted, the court did so improperly as a perfunctory review of the case reveals the existence of a genuine issue of material fact.

In *Hancock v. Mid-South Management Co., Inc.*, Chief Justice Toal opined that the Standard of Review in similar matters as follows:

> Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). *Hancock v. Mid-South Management Co., Inc.*, 381 SC 326, 673 SE2d 801 (2009).

The Supreme Court of South Carolina, provided further clarity in *Hoard v. Roper Hospital, Inc.* holding summary judgment is a drastic remedy and should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues. *Cunningham ex rel.*

Grice v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003) and when reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court under Rule 56(c), SCRCP, and summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). *Hoard v. Roper Hosp Inc.*, 387 SC 539, 694 SE2d 1 (2010).

The general rule states that "[w]hen the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to the plain, ordinary, and popular meaning." *ERIE Ins. Co. v. Winter Const. Co.*, 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011). It would appear that in making its Order, the Court did not construe the Contract's language according to its plain, ordinary, and popular meaning. At the hearing on the Respondent's motion to dismiss, paragraph 4 and paragraph 8 of the Contract were read by the Court and the Court found that the "As Is" provision controlled and by its operation nullified the Respondent's obligation to convey marketable title. (R.pp. 32, 37) Based on the Court's reading of the Contract the requirement that the Seller convey marketable title was not in conflict with the "As-Is" provision. And the Contract is unclear as to whether the "As-Is" provision is limited to matters involving improvements to the property subject to the Contract or also contemplates applying to title matters. The ambiguity reveals itself in Item 8 as it specifically makes reference to the property being sold "...subject to normal wear without repair or replacement..." which appears to imply that "As-Is" is limited to the condition of improvements on the real estate subject to the Contract. This is material to the determination of contractual ambiguity because the real estate being sold subject to the Contract is unimproved.

The term "As-Is" is reasonably susceptible to more than one interpretation when Item 8 is read in conjunction with Item 4 of the Contract. (R.pp. 32, 37) "Whether a contract is ambiguous must be determined from the entire contract and not from any isolated clause of the agreement." *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). "A contract is ambiguous when the terms of the contract are susceptible to more than one interpretation." *South Carolina Dept. of Natural Res. v. Town of McClellanville,* 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). "Whether a contract is ambiguous is a question of law for the court." *Auten v. Snipes*, 370 S.C. 664, 669, 636 S.E.2d 644, 646 (Ct. App. 2006). "The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe." *Hann v. Carolina Cas. Inc. Co.,* 252 S.C. 518, 524, 167 S.E.2d 420, 422 (1969). (Cited precedent taken from *Pee Dee Stores, Inc. v. Doyle*, 672 S.E.2d 799, 803 (S.C. App. 2008).

The Court erred in finding that the Contract was unambiguous because when read in its entirety, there is uncertainty in the application of the words used in the Contract to the object those words describe. There is no language in the Contract that electing to sell the subject property "As-Is" nullifies the Respondent's contractual obligation to convey marketable title. However, the Contract does use language in Item 8 that would indicate "As-Is" relates to improvements, specifically: the use of the terms "repair and replacement" which would seem to indicate the "As-Is" provision is meant to apply to improvements only and does not relate back to Item 4 and the Respondent's obligation to convey marketable title. (R.pp. 37, 32) The inherent nature of an ambiguous contract creates a genuine issue of material fact *per se.* Therefore, the Court caused reversible error granting Respondent's Motion for Summary Judgment within the Formal Order dated January 24, 2023. (R.pp. 6-14)

CONCLUSION

Based on the forgoing, Appellant respectively requests this Court to vacate the trial court's Form 4 Order dated December 12, 2022, and the subsequent formal Order filed January 24, 2023 and remand this matter to the trial court. Additionally, Appellant prays that the judgments be reversed, and the matter remanded for any other reason appearing in the record of the case.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief is in compliance with Rule 211 (b) SCACR, and that no changes were made from the Initial Reply Brief of Appellant other than the correction of obvious typographical errors and misspellings. .

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