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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

COURT OF COMMON PLEAS

THE HONORABLE BENTLY D. PRICE, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2023-001575

Atlantic International, Inc., d/b/a Coldwell Banker Commercial Atlantic, John W. True and Aaron B. Rowley, ……...Appellants,

v.

IBYDIT, LLC, 1537 Ben Sawyer Blvd, LLC, Curt Nesbitt, Richard M. McColl, East Islands Real Estate, Inc., and Ashley Hayes, Individually and as Agent for East Islands Real Estate, Inc.…….....Respondents.

RESPONDENTS 1537 BEN SAWYER BLVD, LLC AND RICHARD M. MCCOLL'S INITIAL BRIEF

MARY LEIGH ARNOLD P.A.
Mary Leigh Arnold (SC #419)
749 Johnnie Dodds Blvd, Suite B
Mount Pleasant, SC 29464
P 843.971.6053
Sammie@maryarnoldlaw.com
Attorney for Respondents 1537 Ben Sawyer Blvd LLC and Richard McColl

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I. STATEMENT OF ISSUES ON APPEAL

1. Because Appellants failed to file a motion for reconsideration and did not challenge the trial court's determination that Appellants admitted violations of state law precluded any recovery in their favor, is this the law of the case rendering this appeal moot?

2. Have the Appellants preserved the right to make the argument that "unclean hands" precludes Respondents from recovery?

3. Whether the claim discovery was not completed is sufficient to establish deprivation of a full and fair opportunity to complete discovery in order to avoid summary judgment?

II. STATEMENT OF CASE

Atlantic International Inc. ("Atlantic"), John W. True ("True") and Aaron B. Rowley ("Rowley" and collectively with Atlantic and True, "Appellants") filed suit on September 15, 2020, (Compl., September 15, 2020) immediately followed by an amended Summons and Complaint on October 5, 2020 (Am. Compl., October 5, 2020), against IBYDIT, LLC, ("IBYDIT") 1537 Ben Sawyer Blvd, LLC, ("1537") Curt Nesbitt, ("Nesbitt") Richard M. McColl, ("McColl") East Islands Real Estate, Inc., ("East Island") and Ashley Hayes, ("Hayes" and collectively with IBYDIT, 1537, Nesbit and East Island, "Respondents") Appellants sought to collect real estate commissions against Respondents under causes of action for breach of contract and good faith and fair dealing, quantum meruit, civil conspiracy, fraud and misrepresentation, promissory estoppel and interference with contractual relationship. (Am. Compl., October 5, 2020)

On November 2, 2020, 1537 filed a Motion to Dismiss (Mot. Dis., November 2, 2020) followed by an Answer and Counterclaim to Appellants' Amended Complaint. (Answer, November 2, 2020). IBYDIT and Nesbitt filed an Answer to the Amended Complaint on November 13, 2020. (Answer, November 13, 2020) East Island and Hayes filed a Motion to Dismiss on November 17, 2020 (Mot. Dis., November 17, 2020) along with an Answer. (Answer, November 17, 2020) On November 30, 2020 Appellants filed an Answer to 1537's counterclaim. (Answer, November 30, 2020) The Motions to Dismiss were heard via Webex video on February 4, 2021. The Honorable Diane S. Goodstein entered an Order on April 22, 2021 denying the motions.

On October 5, 2022, 1537 filed a Motion for Summary Judgment with the following exhibits: Exhibit A, Final Order from the South Carolina Real Estate Commission; Exhibit B,

Memorandum Agreements signed by [Appellants]; and Exhibit C, Responses to Requests to Admit. (Mot. Sum Judg., October 5, 2022) On January 23, 2023, East Island and Hayes filed a Motion for Summary Judgment. (Mot. Sum. Judg., January 23, 2023). IBYDIT and Nesbitt filed a Motion for Summary Judgment on May 19, 2023. (Mot. Sum. Judg., May 19, 2023)

Appellants filed a Memorandum in Opposition to 1537's Motion for Summary Judgment on May 25, 2023. No affidavits or any other supporting admissible evidence was submitted by Appellants.

On May 26, 2023, the Respondents filed the following: 1537's Memorandum in Support its Motion for Summary Judgment (1537 Memo. Supp., May 26, 2023); East Island and Hayes' Memorandum in Support of their Motion for Summary Judgment (Memo. Supp., May 26, 2023, with attachments Exhibit 1, Exhibit 2, Exhibit 3, and Exhibit 4); IBYDIT and Nesbitt's Memorandum in Support of their Motion for Summary Judgment. (Memo. Supp., May 26, 2023, Exhibit A, Exhibit B, Exhibit C, Exhibit D, Exhibit E, Exhibit F, and Exhibit G).

On May 30, 2023 the trial court held a hearing on all the motions for summary judgment. On September 7, 2023 and Order granting the Summary Judgment in all Respondents' favor was entered. (Order, September 7, 2023). Appellants did not file a Rule 59, SCRCP motion to have the trial court reconsider its decision or request that the trial court specifically rule on any particular issue.

On October 3, 2023, Appellants filed a Notice of Appeal related to the September 7, 2023 Order granting Respondents summary judgment.

III. STATEMENT OF FACTS

A. No Listing Agreement was Executed with Appellants to Market or Sale the Property.

In 2020, 1537 owned real property located at 1537 Ben Sawyer Blvd, Mount Pleasant, S.C. (the "Property") (Memo. Opp., p. 3) In January of 2020, Rowley, a licensed real estate agent with Atlantic communicated with McColl about potentially listing the Property owned by 1537. (1537 Memo Supp., Ex. B; East Island Memo. Sup., Ex. 1) Rowley submitted a written listing agreement to McColl but no listing agreement was executed by 1537. (Def. East Island Memo. Supp., Ex. 1)

Although devoid of a listing agreement, Rowley and True proceeded to act as agents for the sale of the Property. (1537, Memo. Supp., Ex. B) True directly contacted Nesbitt to see if he had any interest in the Property. (IBYDIT Memo. Supp., Ex. A) True advised Nesbitt the Property was not on the market. (IBYDIT Memo. Supp., Ex. A) On January 21, 2020, Nesbitt authorized True to make an offer which was relayed from True to Rowley. (IBYDIT Memo. Supp., Ex. A) True had no buyer representation agreement with IBYDIT. (IBYDIT Memo. Supp., Ex. A) Several days later True reported to Nesbitt that "seller has gone dark" and "seller still won't respond." (Memo. Supp., May 26, 2023, Ex. A) No response was ever given by 1537 to the offer.

B. There was a One Time Showing Agreement Properly Entered into with East Island.

On March 2, 2020, East Islands through Hayes presented 1537 with a One Time Agreement to Show the Property which was executed. (Memo. Supp., May 26, 2023, Ex. 3) East Islands showed the Property to IBYDIT. IBYDIT made an offer that resulted in a buy sale agreement between 1537 and IBYDIT. IBYDIT purchased the Property for the sum of $1,100,000 with commissions paid to East Island in the amount of $44,000 on July 13, 2020. (Memo. Supp., May 26, 2023, Ex. 1, ¶ 18)

C. The Real Estate Commission Determined Appellants Violated the Law.

Appellants, True and Rowley along with the broker in charge for Appellant, Atlantic, were brought before the South Carolina Real Estate Commission ("Commission") on formal charges under S. C. Code Anno. §40-57-10 et. seq., and §40-1-10 et. seq., due to their activities regarding the Property. (Mot. Sum., October 5, 2022, Ex. B) Appellants, True and Rowley along with Atlantic's broker in charge, entered into a Memorandum of Agreement with the Commission in July of 2022 stipulating to the fact that neither a listing agreement nor buyer representation agreement were executed with either 1537 or IBYDIT. (Mot. Sum., October 5, 2022, Ex. B) The Commission entered three separate Orders publicly reprimanding True, Rowley and Atlantic's broker in charge. (Mot. Sum., October 5, 2022, Ex. A)

The Commission concluded as to Atlantic's broker in charge:

> Respondent admits in the MOA, and the Commission concurs, that Respondent's conduct admitted in the MOA constitutes a violation of the following:
>
> a. S.C. Code Ann. § 40-57-135(A)(1) (2017 Supp.) in that Respondent did not adequately supervise associated licensees to ensure compliance with this chapter.
>
> b. S.C. Code Ann. § 40-57-135(A)(5) (2017 Supp.) in that Respondent, in the practice of real estate, demonstrated incompetency in a manner as to endanger the interest of the public.

(Mot. Sum., October 5, 2022, Ex. A)

The Commission concluded as to True the following: "Respondent admits in the MOA, and the Commission concurs, that Respondent's conduct admitted in the MOA constitutes a violation of S.C. Code Ann. § 40-57-135(I)(2) (2017 Supp.) in that Respondent did not obtain an executed buyer's representation agreement before presenting a buyer. (Mot. Sum., October 5, 2022, Ex. A)

Similarly, as to Rowley, the Commission concluded the following: "Respondent admits in the MOA, and the Commission concurs, that Respondent's conduct admitted in the MOA constitutes a violation of S.C. Code Ann. § 40-57-135(I)(2) (2017Supp.) in that Respondent did not obtain an executed listing agreement as required." (Mot. Sum., October 5, 2022, Ex. A)

IV. STANDARD OF REVIEW

A trial court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *Gadson v. Hembree*, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005). To determine whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005).

The burden of clearly establishing the absence of a genuine issue of material fact is upon the party seeking summary judgment. *McCall v. State Farm Mut. Auto. Ins. Co*., 359 S.C. 372, 376, 597 S.E.2d 181, 183 (Ct. App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the non-moving party's case, the non-moving party cannot simply rest on mere allegations or denials contained in the pleadings. *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). Rather, the non-moving party must come forward with specific facts showing a genuine issue for trial. *Peterson v. W. Am. Ins. Co*., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999).

V. ARGUMENT

A. THE UNDISPUTED VIOLATIONS OF STATE LAW BY APPELLANTS IS THE LAW OF THE CASE AND BARS THEIR ASSERTED CAUSES OF ACTION.

The Appellants did not file a Rule 59, SCRCP motion following the entry of the September 5, 2023 Order. Appellants did not and have not challenged or raised issue with the trial court's ruling that "[t]he violation of these statutory provisions [S.C. Code Anno. §40-57-135 and §40-57-370] entitles Defendants to judgment as a matter of law on all causes of action asserted by Plaintiffs." (Order, p. 5) Additionally, Appellants have not challenged the trial court's determination that "[i]n pari delicto, precludes Plaintiffs from any recovery under any cause of action." (Order, p. 6)

The failure to challenge court rulings renders them the law of the case. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two[-]issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."), *abrogated on other grounds by Repko v. Cnty. of Georgetown, 424 S.C. 494, 818 S.E.2d 743 (2018); Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) ("A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case." (*quoting, Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004)); *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 398, 593 S.E.2d 183, 189 (Ct. App. 2004) ("[A]ny unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed."); *Amick v. Hagler*, 286 S.C. 481, 486, 334 S.E.2d 525, 528 (Ct. App. 1985) (finding the appellant waived an argument because she "did not take exception to [a certain] aspect of the order [on appeal] or mention it in her brief"). The unchallenged rulings that the violations of specific statutory law and the doctrine of *in pari delicto* preclude Appellants recovery

is the law of the case. The trial court's grant of summary judgment in favor of Respondents as to all of Appellants' causes of action, should be affirmed.

B. THE DOCTRINE OF UNCLEANS IS UNAVAILABLE TO APPELLANTS AND DOES NOT DEFEAT SUMMARY JUDGMENT.

Appellants argue the trial court erred when granting summary judgment in favor of Respondents due to the doctrine of unclean hands. (App. Brief., pp. 5-7) This argument is not applicable and flawed for multiple reasons.

1. Any issue of uncleans hands is unpreserved.

Appellants did not assert the doctrine of unclean hands in either their Amended Complaint or Answer to 1537's counterclaim. Likewise, Appellants did not raise this principle in their "Memorandum in Opposition to Defendant's 1537 Ben Sawyer Motion for Summary Judgment." Appellants did not seek a ruling from the trial court as to the effect or impact, if any, of the doctrine of unclean hands on the motions for summary judgment. The first time this issue has been raised by Appellants is now, before this court.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (stating an issue raised to but not ruled on by the trial court must be raised in a Rule 59(e), SCRCP, motion in order to preserve the issue for appeal). Appellants' failure to raise the issue before the trial court, precludes them from raising it now. The trial court's grant of summary judgment should be affirmed.

2. There is no claim of unclean hands as to 1537 or McColl.

Appellants' conflated argument as to unclean hands is directed only towards Respondents, East Island and Hayes.[1] Appellants do not make any claim that the other Respondents, such as 1537 or McColl, engaged in any activity that could be claimed to rise to a level of unclean hands. There being to claim of unclean hands as to 1537 or McColl, this argument fails as to them and the grant of summary judgment in their favor must stand.

3. No supporting facts and mere speculation do not create issues of fact.

"To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture." *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) (Hearn, J., concurring in part and dissenting in part)

Appellants have provided nothing but bald assertions and conjecture that "Appellants would have obtained a signed agency agreement but for Respondents East Islands' and Haynes' harmful conduct." (App. Brief, p. 7) No affidavits pursuant to Rule 56(e), SCRCP or other admissible evidence was submitted to support this contention. No affidavits or other admissible evidence was submitted in opposition to the motions for summary judgment. The suggestion they would have received a contract is pure conjecture by Appellants. It in fact, is inconsistent with Appellants' admissions before the Commission that no contract was obtained from either 1537 or IBYDIT. This bald conjecture is insufficient to withstand summary judgment and the trial court properly granted summary judgment in Respondents favor.

4. The statement a contract existed is misleading, if not false.

[1] "Respondents Haynes' and East Islands' conduct amounted to a tortious interference with Appellants' business relationship." (App. Brief, p. 6); "The interference by Respondents East Islands and Haynes was without justification." (App. Brief, p. 7); and "Appellants have suffered damages as a result of Respondents East Islands' and Haynes' conduct, including, but not limited to, the loss of commission on the Property that Appellants would have been able to successfully sell but, for Respondents East Islands' and Haynes' interference." (App. Brief, p. 7)

Appellants make the affirmative statement "[t]he contract between Appellants and Respondent Nesbitt and IBYDIT and Respondents McColl and Ben Sawyer was breached due to Respondents East Islands' and Haynes' conduct." (App. Brief, p. 7) This is a mistaken statement.

By Appellants' admissions in discovery there never existed a contract with either 1537 and IBYDIT. (Mot. Sum Judg. October 5, 2022). Additionally, by the admissions before the Commission there was no contract between 1537 and IBYDIT. (Order, p. 5) And by virtue of Appellants' failure to appeal the trial court's ruling there was no contract, the law of the case concludes there was no contract. Appellants' present argument there was a contract is disingenuous.

C. APPELLANTS HAD A FULL AND FAIR OPPORTUNITYT TO COMPLETE DISCOVERY PRIOR TO THE HEARING.

The trial court acted within its discretion to hear the motions for summary judgment. It is insufficient to attempt to obstruct the prosecution of pending motions for summary judgment by appearing at the hearing and claiming depositions have not been taken.

Rule 56(f), SCRCP, provides parties with a mechanism for notifying the circuit court in advance of a scheduled hearing of the party's need for additional time in which to complete discovery before defending a motion for summary judgment. Rule 56(f), SCRCP, specifically provides that a non-moving party may submit an affidavit stating the reasons he cannot present by affidavit facts essential to justify his opposition. Appellants did not comply with Rule 56 (f), SCRCP.

Moreover, this case was filed by Appellants in September of 2020. The parties have engaged in discovery. 1537's Motion for summary judgment was filed in October of 2022. The hearing was not scheduled for another seven (7) months. There is nothing any Respondent did

that precluded or obstructed Appellants from noticing depositions if they so choose. And contrary to the statement by Appellants, there was no pending motion to compel. As the docket reflects the motion to compel was resolved on February 1, 2022, approximately fifteen months prior to the hearing.

Appellants presented nothing to demonstrate the likelihood that further discovery would uncover additional relevant evidence. *See Baughman v. American Tel. & Tel. Co*., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Likewise, Appellants have offered no reason why three (3) years was insufficient time to take depositions or seven (7) months was insufficient time to develop opposition to the motion for summary judgment. Appellants had a full and fair amount of time to complete discovery, and summary judgment should be affirmed. *See Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479-80, 465 S.E.2d 765, 771 (Ct. App. 1995) (holding summary judgment was appropriate because the nonmoving party "advance[d] no good reason why four months was insufficient time under the facts of this case to develop documentation in opposition to the motion for summary judgment"); and *Bayle v. S.C. Dep't of Transp*., 344 S.C. 115, 128, 542 S.E.2d 736, 743 (Ct. App. 2001) (holding the circuit court did not err in granting summary judgment because the record did not demonstrate that further discovery was necessary). Appellants had ample time to conduct any discovery they desired and develop opposition to the motions for summary judgment. Appellants dilatory conduct does not provide for a basis to defeat summary judgment.

D. NO SPECIFIC FACTS ARE SHOWN BY APPELLANTS TO DEFEAT SUMMARY JUDGMENT.

"Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" *Grimsley v. S.C.*

Law Enf't Div., 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015)(*quoting Town of Hollywood v. Floyd*, 403 S.C. 466[1], 477, 744 S.E.2d 161, 166 (2013) "[T]the nonmoving party must then come forward with specific facts showing there is a genuine issue for trial." *Smith v. Jones* (*In re Estate of Smith*), 419 S.C. 111, 796 S.E.2d 158 (S.C. App. 2016)

Appellants have presented no evidence. Appellant failed in demonstrate the existence of a genuine issue of material fact as to any asserted claim. Rather, Appellants have set for a list of queries they contend are material facts in controversy. (App. Brief, p. 10)

The queries do not create genuine issues of material fact to support any claim and they are not reasonable. The queries do not point to specific facts. Each of the queries in some way relates to the concept of a speculative contract. Here, the non-existence of a contract is firmly established and the law of the case. Firmly established is the failure of Appellants to obtain a written agreement as required by S.C. Code Anno. §40-57-135 and §40-57-370. Clearly determined and admitted is Appellants' violation of the law. Having only throw out speculative allegations, Appellants could not overcome the motions for summary judgment.

VI. CONCLUSION

For the foregoing reasons, the appeal should be dismissed as moot. In the alternative, the trial court should be affirmed and the court should grant such other and further relief as is deemed just and proper.

MARY LEIGH ARNOLD P.A.
s/Mary Leigh Arnold (SC #419)
749 Johnnie Dodds Blvd, Suite B
Mount Pleasant, SC 29464
P 843.971.6053
Sammie@maryarnoldlaw.com
Attorney for Respondents 1537 Ben Sawyer Blvd LLC and Richard McColl