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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 Bentley Price, Circuit Court Judge
Charleston County

Case No. 2020-CP-10-04076
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 Island
Real Estate, Inc., and Ashley Haynes,
individually and as an agent of East Islands
Real Estate, Inc.,

Respondents,

**INITIAL BRIEF OF RESPONDENTS EAST ISLANDS REAL ESTATE, INC. AND
ASHLEY HAYNES**

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Circuit Court correctly determined Appellants had no right to a commission in the underlying real estate transaction where Appellants admitted they had no agency agreement with the Buyer or Seller of the Property and were publicly reprimanded by the South Carolina Real Estate Commission for purporting to represent the Buyer and Seller without an agency agreement?

- II. Whether Appellants arguments on appeal are without merit and unpreserved for appellate review?

STATEMENT OF THE CASE

This matter arises out of a commercial real estate transaction related to the real property located at 1537 Ben Sawyer Blvd., Mt. Pleasant, SC 29464 (“Property”). Appellants initiated this action on September 15, 2020, and filed an Amended Complaint on October 5, 2020, alleging that they were entitled to a commission for the sale of the Property, based upon alleged limited verbal consultation with the buyer, Curt Nesbitt and his entity IBYDIT, LLC (“Buyer”) and the seller, 1537 Ben Sawyer Blvd, LLC and its representative Richard McColl (“Seller”) in or around January 2020. (R. pp. Compl). No written agency agreement as required by S.C. Code §40-57-135(I)(2) was signed by either the Buyer or the Seller with Appellants. (R. pp. Compl.).

However, Appellants allege that they were the “procuring cause” of the transaction, and thus, were still entitled to a commission¹ when the Property closed on July 13, 2020. (R. pp. Compl.).

In addition to suing the Buyer and Seller, Appellants also named a realtor, Ashley Haynes, and his brokerage, East Islands Real Estate, Inc. (“Realtor”), who facilitated closing of the Property pursuant to a written compensation agreement. (R. pp. Compl).

Appellants asserted causes of action against the Buyer and Seller for breach of contract, and quantum meruit. (R. pp. Compl). Appellants also asserted causes of action for civil conspiracy, fraud and misrepresentation, and promissory estoppel against the Buyer, Seller and Realtor collectively. (R. pp. Compl). Appellants asserted an additional claim for interference with a contractual relationship against only the Realtor. (R. pp. Compl).

¹ No agency or commission agreement was entered into by either Appellant agent with the Buyer or Seller, and there is no allegation or evidence that either Buyer or Seller agreed to pay any specific percentage commission to Appellants. Thus, it is unclear how Appellants believe a commission could be calculated.

All defendants timely answered the Amended Complaint. (R. pp. Answers of all Defendants). Thereafter, Seller and Realtor moved to dismiss the Amended Complaint. (R. pp. Motions to Dismiss). These motions were heard on February 4, 2021. The Court denied the motions to dismiss of both the Seller and Realtor. (R. pp. Order denying MTD).

After conducting significant discovery, on October 5, 2022, Seller filed a motion for summary judgment. (R. pp. Seller MSJ). On January 23, 2023, Realtor likewise filed a motion for summary judgment. (R. pp. Realtor MSJ). On May 19, 2023, Buyer filed a motion for summary judgment. (R. pp. Buyer MSJ). In support of the motions for summary judgment, the Realtor, Buyer and Seller filed memoranda in support of their motions for summary judgment, and an affidavit of the Buyer. Appellant filed a memorandum in opposition to the Seller's motion for summary judgment.

All three Respondents asserted as grounds for summary judgment the admission by Appellants that they had no written agency agreement with either Buyer or Seller, and all three Appellants (True, Rowley, and the Broker in Charge) were publicly reprimanded by the South Carolina Real Estate Commission for purporting to represent clients (Buyer and Seller) without a either the Buyer or Seller entering into an agency agreement with the Appellants.

Realtor further argued that there is no statute, caselaw or authority of any kind in South Carolina that allows a competing realtor to commandeer a commission earned by another realtor. (R. pp. Realtor Memo in Supp. Of MSJ). To the extent that a "procuring cause" theory was viable (which it is not), such a cause of action lies solely against the Seller or Buyer. (R. pp. Realtor Memo in Supp. Of MSJ).

On May 30, 2023, the Circuit Court heard the motions for summary judgment. Thereafter, on September 7, 2023, the Circuit Court entered an order granting summary judgment to all

Defendants. (R. pp. Sept. 7, 2023 Order). Appellants did not file a motion to alter or amend the judgment.

On October 3, 2023, Appellants filed their notice of appeal of the September 7, 2023 order granting summary judgment.

INTRODUCTION

On or about January 11, 2020, Appellants Rowley and the Seller exchanged text messages regarding the sale of the Property to the Buyer's owner, Nesbitt. (R. pp. Am. Compl. ¶13). On January 13, 2020, Rowley allegedly met with the Seller at the Property and emailed a listing agreement (i.e., an agency agreement) for the Property. (R. pp. Am. Compl. ¶¶14-15). Thereafter, Seller declined to sign an agency agreement with Rowley, and Appellants admit that they were never hired by the Seller. (R. pp. Compl, and MOU.).

Thereafter, on January 20, 2020, Appellants allege that Rowley told another agent in his office, True, about the Property, who then passed the Property along to Curt Nesbitt. (R. pp. Am. Compl. ¶¶17-18). Appellants allege that on January 22, 2020, True communicated to Rowley that he believed Nesbitt's entity would purchase the Property for \$1,000,000. (R. pp. Am. Compl. ¶20-22).

Appellants allege that along with True's communication to Rowley, Rowley then suggested a counteroffer of \$1,100,000.00. (R. pp. Am. Compl. ¶23). No response to the "offer" was ever made, and no communication between Rowley and Seller occurred after January 30, 2020. (R. pp. Am. Compl. ¶30). Likewise, no communication between True and Nesbitt occurred after February 11, 2020. (R. pp. Am. Compl. ¶29).

On or about March 2, 2020, Realtor entered into a written compensation agreement with Seller to show the Property to Nesbitt. Multiple impediments existed with respect to a possible transaction, including a need to terminate multiple lessees on the Property in order for the Property to be viable for

Nesbitt. (R. pp. Nesbitt Aff. ¶17). None of the Appellants participated in negotiations regarding an early termination of the current leases, which was a critical contingency to Buyer being able to close on the Property. (R. pp. Nesbitt Aff. ¶17). Ultimately, Buyer and Seller closed on the Property on July 13, 2020 for \$1,100,000.00. (R. pp. Nesbitt Aff ¶17). East Islands and Haynes acted as the broker and agent for the transaction according to a valid written agreement. (R. pp. Compensation Agreement). Realtor received a total of \$44,000.00 in commission for the transaction. (R. pp. Closing Statement).

Despite having no agency relationship with the Buyer or Seller, nor a written agreement demonstrating an agency relationship, this litigation followed.

As a result of Appellants commencement of this lawsuit, Plaintiffs were referred to the South Carolina Real Estate Commission. In Appellants' own stipulation of facts submitted to the South Carolina Real Estate Commission, Appellants expressly admitted that they violated S.C. Code §§ 40-57-135(A)(1) and 40-57-710(A)(5) by claiming to act as realtors for both the Buyer and Seller without any representation agreement. (R. pp. MOU). Thus, Appellants admitted to the Real Estate Commission that at no point did they represent either the Buyer or Seller. (R. pp. MOU).

After the Real Estate Commission's investigation and a hearing on the matter, True, Rowley, and the Broker in Charge of Atlantic International, Inc. received public reprimands from the South Carolina Real Estate Commission for their unlawful acts. (R. pp. Public Reprimand Orders). Specifically, the Real Estate Commission found that neither True nor Rowley obtained agency agreements with the Buyer or Seller. (R. pp. Public Reprimand Orders).

Based upon these admissions by Appellants, and the findings by the Real Estate Commission, the Circuit Court entered summary judgment for all Defendants finding that the absence of an agency relationship, demonstrated by Appellants' violation of the statute governing realtors, barred the Appellants from claiming a commission for the closing of the subject transaction. This appeal followed.

LEGAL STANDARD

An appellate court's review of a grant of summary judgment is subject to the same standard that governs the trial court under Rule 56(c), SCRPC. *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505, 509 (2006). A trial court may properly grant a motion for summary judgment when “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), SCRPC. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24, 25 (1988).

“However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453–54 (Ct. App. 2014) (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). “Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.” *Bradley v. Doe*, 374 S.C. 622, 626, 649 S.E.2d 153, 155 (Ct. App. 2007). Factual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists. *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986).

ARGUMENT

I. The Circuit Court correctly determined Appellants had no right to a commission in the underlying real estate transaction where Appellants admitted they had no agency agreement with the Buyer or Seller of the Property and were publicly reprimanded by the South Carolina Real Estate Commission for purporting to represent the Buyer and Seller without an agency agreement?

The lynchpin of Appellants lawsuit is their argument that, despite violating the statutes governing realtors and admitting a lack of agency with either the Buyer or the Seller, they still have a right to a commission for the real estate transaction as the “procuring cause” of the sale.² This argument, however, is without merit for multiple reasons.

First, to be a “procuring cause,” one must actually have an agency relationship with the Buyer or Seller in the first place. Second, *in pari delicto* bars recovery as the Appellants are not entitled to profit off their illegal acts. Accordingly, the Circuit Court correctly entered summary judgment against Appellants.

a. Appellants were not a “procuring cause” of the real estate transaction.

Appellants argue that because Appellant True allegedly introduced the *Buyer* to the Property, that his brokerage is somehow entitled to a commission under a “procuring cause” theory—despite the Seller being the party responsible for the payment of the real estate commissions.³

² While Realtor is not named in the breach of contract/“procuring cause” causes of action, the “procuring cause” theory is the basis of Appellants’ claims to a commission of which Appellants alleged Realtor interfered. In other words, demonstrating Appellants’ lack of a right to a commission in the first instance is a complete defense to all causes of action asserted against Realtor.

³ Appellants cite no evidence, nor does any evidence exist, that Appellant Rowley had discussions with the *Seller* regarding Nesbitt or his entity. Indeed, the record shows that the Seller declined to hire Rowley on or about January 13, 2020, but Rowley portrayed to the public that he was in fact representing the Seller for several weeks after the Seller declined to hire Rowley.

Under South Carolina law, a “broker is entitled to his commissions, if, *during the continuance of his agency*, he is the efficient or procuring cause of the sale, though the actual agreement for the sale is made by the owner without the aid of the broker; and the broker will be regarded the procuring cause if his intervention is the foundation upon which the negotiation resulting in the sale is begun.” *Hobbs v. Hudgens*, 223 S.C. 88, 94, 74 S.E.2d 425, 427 (1953) (quoting *Goldsmith v. Coxe*, 80 S.C. 341, 61 S.E. 555, 557 (1908)(emphasis added).

Moreover, The *Hobbs* court explained the rationale for “procuring cause” as “to prevent an owner from taking advantage of the efforts of a broker, whom he has *engaged* as selling agent, and yet defeat his right to commissions by dealing directly with the prospective purchaser produced by him. *Hobbs*, 80 S.C. at 94, 74 S.E.2d at 427 (emphasis added).

Thus, a broker can only claim to be a “procuring cause” when that broker already had an agency relationship with the owner. *Id.* Here, no such agency existed—by Appellants’ own admissions.

Furthermore, the *Hobbs* court held that actions by an owner to cut a valid agent out of a transaction must occur before the broker’s agency terminates. *Id.* (“It is conceded that whatever agency was created by the request that plaintiff contact Graham had terminated prior to February 6, 1950, the date of Kimbrell's telephone call. Therefore, any inference from the allegations of the complaint that the defendant Hudgens employed plaintiff to sell the property or obtain a purchaser goes out of the case.”).

Here, it is indisputable as a matter of law that an agency relationship never existed between the Seller and Appellants or the Buyer and Appellants, as there was no written agency agreement signed as required by S.C. Code § 40-57-370. Appellants admitted as much to the South Carolina Real Estate Commission, and the South Carolina Real Estate Commission held that no such agreement was

in place. (R. pp. Public Reprimand Orders). Not only was there no activity engaged in by the Seller prior to termination of the broker's agency (as required by *Hobbs*), but there was never any agency agreement at all.

In the absence of a valid agency between the seller or buyer and Plaintiffs, Plaintiffs have no ability to claim to be the procuring cause of the transaction.

Similarly, the passage of time between Plaintiffs' last communications with the Buyer and Seller and the consummation of the transaction, along with the effort needed to close the transaction defeats the procuring cause claim.

Plaintiffs allege that they attempted to consummate a transaction on January 22, 2020 (R. pp. Am. Compl. ¶22). The Property closed on July 13, 2020. (R. pp. Am. Compl. ¶34). Similarly, extensive negotiations and contingencies needed to be completed before Buyer was able to close. (R. pp. Nesbitt Aff.). It is undisputed that neither Rowley nor True was involved in any of the due diligence or lease workouts that ultimately made the closing possible. (R. pp. Nesbitt Aff.).

It is well established that a significant passage of time precludes a claim of procuring cause. *Stone v. Moloney–Bennett Belting Co.*, 159 Ill.App. 366, 370 (Ill.App.Ct.1911) (holding that even though the broker first showed the property to the ultimate lessee, the broker's complete inactivity for four months demonstrated abandonment and the ultimate transaction resulted from entirely new and independent negotiations); *Printing Mart–Morristown v. Sharp Elecs. Corp.*, 563 A.2d 31, 38–39 (N.J.1989) (“[A] broker does not earn his commission by the mere introduction of a buyer to the owner, but he must be the efficient procuring cause of the contract between seller and purchaser”) (internal quotation marks and citations omitted); *Cantell v. Hill Holliday Connors Cosmopulos, Inc.*, 772 N.E.2d 1078, 1083 (Mass. App. Ct. 2002) (“Mere introduction of a prospect to a property does not earn a broker's commission”).

Accordingly, Appellants cannot maintain a cause of action under a procuring cause theory. Therefore, they cannot maintain any cause of action premised on entitlement to a real estate commission.

b. No cause of action exists in South Carolina allowing a competing real estate broker to commandeer another’s commission based upon a “procuring cause” theory.

While no procuring cause claim can be made by the Appellants, to the extent a claim for procuring cause did exist, there is no legal basis to assert such a claim against another real estate broker. A claim for procuring cause is necessarily brought *only* against the parties to the transaction, i.e. those who would be paying the commission. *See, Hobbs*, 80 S.C. at 94, 74 S.E.2d at 427.

Appellants cite no case law, statute, contract, or any legal rationale to support their attempt to commandeer the commission that Realtor earned—by providing professional services to close the transaction—and putting it in their own bank account.

Accordingly, as a matter of law, Appellants have no claim to a commission related to the sale of the Property, and there is no legal merit to Appellants’ attempt to commandeer the commission earned by East Islands and Haynes.

c. The Circuit Court correctly held that *in pari delicto* bars Appellants from seeking compensation.

In addition to Appellants’ failure to establish any entitlement to a commission with respect to the real estate transaction, as the Circuit court held, Appellants claims also fail based upon the doctrine of *in pari delicto*.⁴

⁴ Realtor notes that Appellant did not mention or object to the Circuit Court’s decision holding *in pari delicto* barred their claims. Thus, this decision is the law of the case, and defeats Appellants’ appeal on all counts. *See Buckner v. Preferred Mut. Ins. Co.*, 255 S .C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (holding an unappealed ruling, right or wrong, is the law of the case).

The doctrine of *in pari delicto* is “[t]he principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.” Black’s Law Dictionary 794 (7th ed. 1999); and, *Myatt v. RHBT Financial Corp.*, 635 S.E.2d 545, 370 S.C. 391 (S.C. Ct. App. 2006). The doctrine of *in pari delicto* is grounded in the “general principle that a person cannot base a cause of action upon an illegal or immoral act, transaction or contract.” 4 S.C. Jur. *Action* § 21 (1991 & Supp. 2015). “It has been succinctly stated that no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.” *Id.*, and *Lauren Proctor & Trans-Union Nat’l Title Ins. Co. v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 326, 778 S.E.2d 888, 892, n. 10 (2015) (stating that “the doctrine of *in pari delicto* is well-established and still recognized by our appellate courts”).

Here, Appellants admitted, and the South Carolina Real Estate Commission determined, that Appellants violated the S.C. Code Ann. §40-57-135 in failing to obtain the necessary agency agreements relating to a purchase and sale of the Property. Pursuant to S.C. Code Ann. §40-57-370(E), this violation conclusively precludes an agency relationship with the Appellants.

As all the causes of action asserted by Appellants are based upon the argument that they are entitled to a commission for the sale of the Property for which they had no agreements with the Seller or the Buyer, Appellants cannot now seek to profit off of their violation of the law and the efforts of Realtor to properly perform real estate brokerage services.

Accordingly, the Circuit Court correctly granted summary judgment.

II. Appellants remaining arguments are without merit, and not preserved for appellate review.

In their first issue on appeal, Appellants argue, confusingly, that Realtor was not entitled to Summary Judgment based upon the doctrine of unclean hands, alleging that Realtor “interfered with

Appellant's contractual relationship." (App. In. Brief at Sec. I.). This argument is without merit and not preserved for appeal.

As an initial matter, it is indisputable that Appellants never had a contractual relationship with the Seller or Buyer. (R. pp. MOUs). Thus, there was no contract with which Realtor could have interfered.

Furthermore, the doctrine of unclean hands "precludes a *plaintiff* from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the *defendant*." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n. 2, 531 S.E.2d 287, 292 n. 2 (2000) (emphasis added).

Here, Realtor is not seeking any recovery and no counterclaim was filed by Realtor. Given that Realtor is a *defendant* in the action, unclean hands is not applicable to the Realtor.⁵ Appellant has not cited, and Realtor is unaware of any authority, suggesting that unclean hands can be applied to bar a defendant in an action from mounting its defense. Accordingly, Appellants' first argument on appeal is without merit.

Additionally, Appellants second and third arguments on appeal are also without merit, and unpreserved for appeal.

"If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Here, the Circuit Court's decision was based upon Appellants' admitted violation of S.C. Code Ann. §40-57-135, which precludes an agency relationship pursuant to S.C. Code Ann. §40-

⁵ Realtor denies that any improper acts were committed by Realtor.

57-370(E). Appellants did not file a motion to alter or amend judgment related to the arguments they now raise on appeal. Accordingly, those arguments are abandoned. *Id.*

CONCLUSION

For the reasons stated herein, Respondents East Islands Real Estate, Inc., and Ashley Haynes respectfully request that the Circuit Court's grant of summary judgment be affirmed.