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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable J. Derham Cole

The Honorable G. D. Morgan, Jr.

Appellate Case No.: 2023-001529

Zachary Leland Moody and Kristina L. Moody.....Appellants,

v.

Gabriela B. Lopez a/k/a Gabriela Baltazar Lopez-Gutierrez, 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,

Of Which ServPro of Pickens County d/b/a Blue Moon Enterprises, Inc. and TCT1, LLC d/b/a Keller Williams Western Upstate, ...Respondents.

INITIAL BRIEF OF APPELLANTS

Townes B. Johnson III (SC Bar# 75412)
TOWNES B. JOHNSON III, LLC
PO BOX 9246
GREENVILLE, SC 29604
PH: (864) 757-4899

Attorney for Appellant

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STATEMENT OF ISSUES ON APPEAL

SERVPRO OF PICKENS COUNTY D/B/A BLUE MOON ENTERPRISES, INC.

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B. THE COURT'S FINDING THAT BLUEMOON VIOLATED NO LEGAL DUTY WAS ERRONEOUS.

C. THE COURT'S FINDING THAT BLUEMOON WAS NOT NEGLIGENT IN ITS SUPERVISION OF CAUFIELD WAS ERRONEOUS.

D. THE COURT'S FINDING THAT BLUEMOON WAS NOT VICARIOUSLY LIABLE FOR CAUFIELD'S TORTS WAS ERRONEOUS.

E. THE COURT'S DETERMINATION THAT CAUFIELD WAS ACTING OUTSIDE HIS EMPLOYMENT WAS ERRONEOUS.

F. THE NOTICE AND OPPORTUNITY TO CURE CONSTRUCTION DWELLINGS ACT IS INAPPLICABLE AND THE COURT'S FINDING OTHERWISE WAS ERRONEOUS.

TCT1, LLC D/B/A KELLER WILLIAMS WESTERN UPSTATE

A. THE COURT'S FINDING THAT TCT1 HAD NO LEGAL DUTY TO ENSURE THAT THE DISCLOSURE STATEMENT WAS COMPLETE WAS ERRONEOUS.

B. THE COURT'S FINDING THAT EVEN IF A DUTY EXISTED, TCT1 DID NOT BREACH SAID DUTY WAS ERRONEOUS.

STATEMENT OF THE CASE

On or about April 28, 2020, Plaintiffs/Appellants Zachary Leland Moody and Kristina L. Moody (collectively hereinafter "Appellants") brought this action against Defendants/Respondents ServPro of Pickens County d/b/a Blue Moon Enterprises, Inc. ("BlueMoon") and TCT1, LLC d/b/a Keller Williams Western Upstate ("TCT1")[1] among others. On or about September 15, 2020, Appellants amended their complaint and brought causes of action against BlueMoon for conspiracy, breach of implied warranties, negligence, negligent supervision and equitable indemnification and causes of action against TCT1 for negligence and breach of fiduciary duty.

On September 27, 2022, BlueMoon filed its motion for Summary Judgment. A motion hearing was held on January 4, 2023 before the Honorable J. Derham Cole, and, on July 10, 2023, the Court issued its formal Order granting BlueMoon's motion for Summary Judgment. On July 20, 2023, Appellants filed a motion to Alter or Amend Judge Cole's Order. On August 25, 2023, the Honorable J. Derham Cole denied Appellants' motion and this appeal ensued. Appellants filed its Notice of Appeal as to the BlueMoon Orders on September 19, 2023.

On May 9, 2023, TCT1 filed its motion for Summary Judgment and on July 17, 2023, Appellants filed its cross motion for Summary Judgment. A motion hearing was held on July 27, 2023 before the Honorable G. D. Morgan Jr., and, on August 22, 2023, the Court issued its formal Order granting TCT1's motion for Summary Judgment and denying Appellants' motion for Summary Judgment. On August 31, 2023, Appellants filed a motion to Alter or Amend Judge Morgan's Order. On September 20, 2023, the Honorable G. D. Morgan denied Appellants' motion

[1] At the time of the initial complaint, TCT1 was misidentified as Keller Williams Wester Upstate and the Haro Group of Keller Williams

and this appeal ensued. Appellants filed its Notice of Appeal as to the TCT1 Orders on September 22, 2023.

The Court of Appeals consolidated the notices of appeal on October 4, 2023.

STATEMENT OF FACTS

On or about June 17, 2014, BlueMoon, by and through Defendant Scott D. Caufield (hereinafter "Caufield"), obtained a permit to build a residence (hereinafter "Project") for Defendant Gabriela B. Lopez ("Lopez") on the real property located at 221 Foxhound Road, Simpsonville, South Carolina, 29680 (hereinafter "Subject Property"). Caufield was the "Primary qualifying party" and "Qualifying party" (as defined in *South Carolina Code Ann.* § 40-11-20(18) and (20) respectively) for BlueMoon at the time of the construction of the Project. As the "primary qualifying party", Caufield was the qualifying party designated by BlueMoon as the principal individual responsible for directing or reviewing work performed by the licensee in a particular license classification or subclassification. BlueMoon was only able to pull permits and perform work because Caulfield was its qualifying party.

In 2017, Appellants' engaged TCT1's Nate Emery as their agent for the purchase of a home. Thereafter, Appellants went under contract with Lopez for the purchase of the Subject Property. Once under contract, Lopez provided her disclosure statement as required by *South Carolina Code Ann*. § 27-50-10 *et. seq*. In the disclosure statement, Lopez omitted answering Disclosure No. 7 as to whether she had any actual knowledge of any defect, malfunction, damage, condition or characteristics related to the "[f]oundation, slab, fireplaces, wood stove, floors, basement, windows, driveway, storm windows/screens, doors, ceilings, interior walls, sheds, attached garage, carport, patio, deck, walkways, fencing, or other structural components including modifications". Despite TCT1 representing that it specialized "in walking clients through the

process of home buying", TCT1's Nate Emery failed to inform Appellants that the disclosure statement was incomplete or the potential ramifications thereof. Further, TCT1's Nate Emery failed to require that that Lopez completely fill out the disclosure statement.

On April 12, 2017, without any knowledge of Lopez's incomplete disclosure statement, the Appellants purchased the Subject Property from Lopez for the sum of Two Hundred Eighty-Eight Thousand Dollars ($288,000.00). In the summer of 2018, Appellants began experiencing foundation issues and water penetration. Upon investigation, Appellants learned that during the original construction, the contractors failed to waterproof the foundation and front entryway of the Project, failed to install a proper draining system in the front of the Project, used incorrect grout and backfilled the Project with uncompacted dirt that was full of buried stumps, construction debris and other organic matter. As the direct result of the original construction's foundation issues, which were not disclosed to Appellants due to the incomplete disclosure statement, Appellants incurred damage.

ARGUMENT

I. SERVPRO OF PICKENS COUNTY D/B/A BLUE MOON ENTERPRISES, INC.

A. THE COURT'S FINDING THAT BLUEMOON GAVE NO IMPLIED WARRANTY AS A MATTER OF LAW WAS ERRONEOUS.

Pursuant to *South Carolina Code Ann.* § 40-11-420(A), building permits, when required as on the Project, "must be obtained by the sole prime contractor in the name appearing on that entity's contractor's license." *See South Carolina Code Ann.* § 40-11-420(A). In the matter at hand, there is no dispute that BlueMoon, by and through Caufield, obtained the permit to build the Project in its name and under its license. BlueMoon, accordingly, is legally the sole prime contractor for the Project.

Contractors impliedly warrant that the work undertaken will be performed in a careful, diligent workmanlike manner. *See Kennedy v. Columbia Lumber*, 384 S.E.2d at 736. Privity of contract is not required to bring an implied warranty action in the residential construction context because it is premised on allocating "responsibility for negligently caused defects fairly and certainly between the parties immediately concerned with the risk." *Carolina Winds Owners' Ass'n, Inc. v. Joe Harden Builder, Inc.*, 374 S.E.2d 897, 297 S.C. 74 (S.C. App. 1988). In the matter at hand, BlueMoon was in the best position to oversee the use of its license and risk of appointing Caufield as its primary qualifying party. Further, BlueMoon is imputed with the knowledge that it pulled the permit for the Project and oversaw the performance of the work. *See Equitable Trust Co. of Columbia v. Columbia Nat'l Bank*, 145 S.C. 91, 115, 142 S.E. 811, 817 (1928) (Subject to certain qualifications and exceptions..., it is well settled that, if an officer or agent of a corporation acquires or possesses knowledge of facts, in the course of his employment, and as to matters which are within the scope of his authority, his knowledge is imputable to the corporation.")(citation omitted); *Citizens' Bank v. Heyward*, 135 S.C. 190, 190, 133 S.E. 709, 709 (1925) (recognizing general rule that notice to an agent is notice to principal, particularly in cases of corporations); *18B Am. Jur. 2d Corporations* § 1442 (2004) (A corporation's knowledge is entirely imputed to it from the knowledge possessed by its officers and agents. In accordance with general agency principles, a corporation generally is charged with knowledge of facts that its agents learn within the scope of their employment."); see also *Multimedia Publ'g of South Carolina, Inc. v. Mullins*, 314 S.C. 551, 555, 431 S.E.2d 569, 572 (1993) (A corporate director is chargeable with all matters pertaining to the corporation's affairs, of which he has or should have knowledge in the exercise of the duties required of him as a director."); *Tele-Port, Inc. v. Ameritech Mobile Communications*, 637 N.W.2d 782, 854 (Wisc. Ct. App. 2001) (Knowledge acquired by

an employee of a corporation during his or her employment and concerning something pertinent to the subject matter of that employment, so that the employee therefore becomes an 'agent' of the employer for the purposes of that information, is notice to the corporation for statute-of-limitations purposes, irrespective of whether the employee communicates that knowledge to anyone else in the corporation.").

As such and as the sole prime contractor for the Project, BlueMoon impliedly warranted that the work on the Project would be performed in a careful, diligent workmanlike manner and the Court's finding otherwise was erroneous.

B. THE COURT'S FINDING THAT BLUEMOON VIOLATED NO LEGAL DUTY WAS ERRONEOUS.

As discussed, above, as the sole prime contractor for the Project, BlueMoon owed to duty to construct the residence in a good and workmanlike manner and to accomplish the work undertaken in a manner appropriate to the residential construction industry. *See e.g. Kennedy v. Columbia Lumber*, 384 S.E.2d at 736. As such, the Court's finding that BlueMoon violated no legal duty was erroneous.

C. THE COURT'S FINDING THAT BLUEMOON WAS NOT NEGLIGENT IN ITS SUPERVISION OF CAUFIELD WAS ERRONEOUS.

The three elements of negligent supervision are: (1) the employee is on the premises of the employer or using a chattel of the employer; (2) the employer knows or has reason to know of the ability to control the employee; (3) the employer knows or should know of the necessity and opportunity for exercising control. *See Degenhart v. Knights of Columbus*, 309 S.C. 114, 117, 420 S.E.2d 495, 497 (1992). In the matter at hand, all three elements have been met.

Caufield was using BlueMoon's chattel, their general contractor's license, when the permit was pulled for the construction of the Appellants' home. BlueMoon had the means to control

Caufield's conduct as they could have certainly revoked their license from him and, accordingly, BlueMoon knew or should have known of the ability to control his pulling of permits. *See, e.g., Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E.2d 495 (1992) (even assuming defendant had ability to control agent by enforcing Field Agent Contract which prohibited operation of independent real estate business that caused plaintiff's harm, no facts tended to show defendant knew or should have known of necessity to exercise control). Lastly, Caufield using BlueMoon's license to pull permits for other projects was easily foreseeable and, accordingly, BlueMoon knew or should have known of the necessity and opportunity for exercising control. BlueMoon must use reasonable care to prevent the misuse of chattels entrusted to employees for their use and, in this instance, it did not. *See e.g. Restatement (Second) of Torts* § 317 comment b (1965). The Court's July 10, 2023 Order as it relates Appellants' causes of action for Negligent Supervision, therefore, wholly erroneous.

D. THE COURT'S FINDING THAT BLUEMOON WAS NOT VICARIOUSLY LIABLE FOR CAUFIELD'S TORTS WAS ERRONEOUS.

Under principles of vicarious liability, an employer is liable for the torts of its employees committed in the scope of the employment. As this Court recognizes: "This doctrine [of *respondeat superior*] has its foundation or origin in the consideration of public policy, convenience, and justice. It was designed to protect innocent third parties from the acts of agents to whom the principal has entrusted the means of committing an injury." See *Falconer v. Beard-Laney, Inc.*, 215 S.C. 321, 330, 54 S.E.2d 904, 908-09 (1949). In assessing liability under a theory of *respondeat superior*, the courts look to two factors: (1) whether the tortfeasor was a servant (an employee, as opposed to an independent contractor) and (2) whether the tort was committed by the servant acting within the scope of his employment. *See Anderson v. West*, 270 S.C. 184, 187,

241 S.E.2d 551, 553 (1978); *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 226-27, 317 S.E.2d 748, 752-53 (Ct. App. 1984).

In the matter at hand, the first factor is undisputed by BlueMoon - at all relevant times herein Caulfield was an employee of BlueMoon. The second factor is indisputable by BlueMoon. Caulfield was an agent of BlueMoon expressly authorized to be able pull permits on BlueMoon's behalf using BlueMoon's general contractor's license - and the **only** licensed agent to be able to do so – and pulled the permit in question for the construction of Appellants's home. The standard for assessing whether a servant is acting within the scope of his employment in his commission of a tort was fully explained in *Crittenden*: Under the [test adopted by the Supreme Court], it is not necessary to find the particular act creating liability was within the servant's authority. Nor is it necessary that the assault should have been made as a means or for the purpose of performing the work the servant was employed to do. "If the servant is doing some act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority." On the other hand, if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, his conduct falls outside the scope of his employment. *See Crittenden*, 288 S.C. at 115-16, 341 S.E.2d at 387 (*citations omitted*). In the matter at hand, the permit was held by BlueMoon itself (not by Caulfield) and obtained by an authorized agent of BlueMoon using BlueMoon's property – BlueMoon's general contractor's license. Accordingly, it is without question that it was in the furtherance of BlueMoon's business – because, legally, it was BlueMoon's business. See *Falconer v. Beard-Laney, Inc.*, 215 S.C. 321, 330, 54 S.E.2d 904, 908-09 (1949) (*citations omitted*) ("*Where one is found in the possession of the property of another, apparently using it in the business of such other, he is presumed to be the agent or servant of the owner and acting within the course of his*

employment."). This is true even if that business was against Jeff's Smith instructions, unknown to Jeff Smith or different from BlueMoon's typical services. *See Carroll v. Beard-Laney, Inc.*, 207 S.C. 339, 35 S.E.2d 425 (S.C. 1945) ("*The fallacy of appellant's position is, I think, that it conceives that the moment a servant does any act in violation of his master's instructions or in failure of the proper performance of his duties, he deviates from the course of his employment and the master is not liable for his torts in the performance of such acts."*).

As Caufield was a servant and the torts were committed by Caufield acting within the scope of his employment at BlueMoon, BlueMoon is vicariously liable for his actions and the Court's finding otherwise was erroneous.

E. THE COURT'S DETERMINATION THAT CAUFIELD WAS ACTING OUTSIDE HIS EMPLOYMENT WAS ERRONEOUS.

"If there is doubt as to whether the servant in injuring a third party was acting at the time within the scope of his employment, the doubt will be resolved against the master, at least to the extent of requiring the question to be submitted to the jury for determination." *See Crittenden*, 288 S.C. at 115-16, 341 S.E.2d at 387. In the matter at hand, Jeff Smith's affidavit, alone, establishes that doubt as he, the owner of BlueMoon, cannot conclusively say that BlueMoon's funds were not used for the construction of the Project. As such, the question regarding whether Caufield was acting within the scope of his employment at BlueMoon, is a question of fact to be determined by the jury and the Court's grant of Summary Judgment, therefore, was erroneous.

F. THE NOTICE AND OPPORTUNITY TO CURE CONSTRUCTION DWELLINGS ACT IS INAPPLICABLE AND THE COURT'S FINDING OTHERWISE WAS ERRONEOUS.

The South Carolina Notice and Opportunity to Cure Construction Dwellings Act requires that a claimant serve a written notice of claim on the contractor no less than ninety days before filing an action against a contractor. BlueMoon has consistently maintained that it was not the contractor for the Project. BlueMoon is accordingly judicially estopped from taking a contrary position. See Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997) (Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation.). The Court's fallback to South Carolina Notice and Opportunity to Cure Construction Dwellings Act is therefore erroneous.

G. CONCLUSION

Appellants respectfully asks that this Court reverse the findings of the lower Court and remand the matter back for the entry of an Order consistent with this Court's findings.

II. TCT1, LLC D/B/A KELLER WILLIAMS WESTERN UPSTATE

A. THE COURT'S FINDING THAT TCT1 HAD NO LEGAL DUTY TO ENSURE THAT THE DISCLOSURE STATEMENT WAS COMPLETE WAS ERRONEOUS.

South Carolina law is clear: "The real estate licensee, whether acting as the listing agent or selling agent, is not liable to a purchaser if: (2) the real estate licensee did not know or have reasonable cause to suspect the information [in the South Carolina Residential Property Condition Disclosure Statement] was false, incomplete, or misleading." *See South Carolina Code Ann.* § 27-50-70. It follows, therefore, that, according to *South Carolina Code Ann.* § 27-50-70, a real estate licensee, while acting as a selling agent (as defined by *South Carolina Code Ann*. § 27-50-10(9))

as TCT1's Nate Emery was in this matter, **can be** liable if the real estate licensee knew or had reasonable cause to suspect the information in the South Carolina Residential Property Condition Disclosure Statement was false, incomplete, or misleading.

A real estate brokerage firm that provides services through an agency agreement for a client is bound by the duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting as set forth in *South Carolina Code Title 40, Chapter 57. See South Carolina Code Ann.* § 40-57-350. A buyer's agent (as defined by *South Carolina Code Ann*. § 40-57-30(5)), such as TCT1's Nate Emery in this matter, shall: 1) promote the interests of buyer by "disclosing to the buyer all material adverse facts concerning the transaction which are actually known to the licensee except as directed otherwise in [*South Carolina Code Ann.* § 40-57-350]"; and 2) exercise reasonable skill and care in discharging the licensee's agency duties. *See South Carolina Code Ann.* § 40-57-350(E)(1)(b)(iii) and § 40-57-350(E)(1)(c). It cannot be that a buyer's agent's lack of knowledge about a material adverse fact can arise from the agent's own incompetence, own failure to exercise reasonable skill, failure to use any diligence and failure to use reasonable care in reviewing the South Carolina Residential Property Condition Disclosure Statement which obviates the agent's obligation to disclose material adverse facts his client.

In addition to the buyer's agent's obligations as set forth in *South Carolina Code Ann.* § 40-57-350(E), TCT1 was also a "transaction broker" (as defined in *South Carolina Code Ann*. § § 40-57-30(33)) with respect to Appellants' purchase of the Subject Property. *See South Carolina Code Ann*. § § 40-57-30(33). As a transaction broker, TCT1 had the duty to: 1) use skill, care and diligence in the transaction and 2) disclose material adverse facts that affect the transaction, or the value or condition of the real property and that are not readily ascertainable. *See South Carolina Code Ann.* § 40-57-350(L)(2)(c) and (d). Unlike a buyer's agent obligations as set forth in *South*

Carolina Code Ann. § 40-57-350(E), a transaction broker is not afforded the "actually known" exception to disclosing material adverse facts. *See South Carolina Code Ann.* § 40-57-350(L)(2)(d).

Further, *assuming arguendo* that no duty arose from the obligations set forth in South Carolina Code of Laws, which Appellants denies, pursuant to the Affidavit of Zachary Leland Moody, TCT1's Nate Emery voluntarily undertook the duty of "walking clients through the process of home buying". S*ee Wright v. PRG Real Estate Mgmt., Inc.,* 426 S.C. 202, 212, 826 S.E.2d 285 (S.C. 2019) ("'While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken.). In that instance, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder and summary judgment is improper. *Id*. Additionally, the question of whether there was a breach of duty is a question of fact and, thus, summary judgment was improper. *See Estate of Cantrell by Cantrell v. Green*, 397 S.E.2d 777, 302 S.C. 557 (S.C. App. 1990) ("*The defendant's breach of the duty of care is a question of fact*.")

The Court's finding, therefore, that there was no legal duty for TCT1 to ensure that the disclosure statement was complete is clearly erroneous.

B. THE COURT'S FINDING THAT EVEN IF A DUTY EXISTED, TCT1 DID NOT BREACH SAID DUTY WAS ERRONEOUS.

As set forth above, TCT1 had the duty to exercise reasonable skill, the duty to use diligence, the duty to use reasonable care and the duty to disclose material adverse facts to Appellants. *See South Carolina Code Ann.* § 40-57-350. In the matter at hand, the simple fact is that had TCT1's Nate Emery exercised reasonable skill, used any diligence or used any reasonable care at all, as required by *South Carolina Code Ann.* § 40-57-350, he would have discovered that the South Carolina Residential Property Condition Disclosure Statement was incomplete and been required

to disclose that material adverse fact to Appellants in accordance with *South Carolina Code Ann.* § 40-57-350(L)(2)(d). Instead, TCT1's Nate Emery breached his duty to exercise reasonable skill, use diligence and use reasonable care with regard to the transaction and failed to disclose material adverse facts to Appellants resulting in damages to Appellants. Further, it cannot be argued that material adverse facts were not disclosed to Appellants by TCT1 when they were not informed that the South Carolina Residential Property Condition Disclosure Statement regarding their transaction was incomplete when the only testimony is that but for the failure to disclose that would not have purchased the Subject Property.

The Court's finding, therefore, that even if there were a legal duty owed by TCT1 to Appellants, that TCT1 did not breach said duty is clearly erroneous.

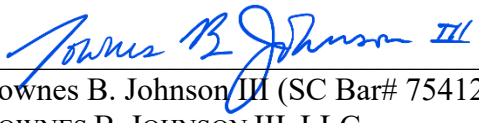
C. CONCLUSION

Appellants respectfully asks that this Court reverse the findings of the lower Court and remand the matter back for the entry of an Order consistent with this Court's findings.

CONCLUSION

For the foregoing reasons, Appellants respectfully ask that this Court reverse the findings of the lower Court as to both BlueMoon and TCT1 and remand the matter back for the entry of an Order consistent with this Court's findings.

Respectfully submitted,



Townes B. Johnson III (SC Bar# 75412)
TOWNES B. JOHNSON III, LLC
PO BOX 9246
GREENVILLE, SC 29604
PH: (864) 757-4899

Attorney for Appellant

February 21, 2024
Greenville, SC