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SC Court of Appeals

FINAL BRIEF OF APPELLANTS
THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley Price, Circuit Court Judge

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Appellate Case No. 2023-001575

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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 Haynes, Individually and as an Agent of East Islands Real Estate, Inc.,……....Respondents

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FINAL BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

This case originated in the Court of Common Pleas for the County of Charleston. Jurisdiction was proper. Appellants Atlantic International, Inc. d/b/a Coldwell Banker Commercial Atlantic, John W. True, and Aaron B. Rowley appealed the court of common pleas' grant of Respondents' motions for summary judgment to the South Carolina Court of Appeals. This Court has jurisdiction over this controversy as the Court of Appeals shall have appellate jurisdiction of cases and controversy that do not lie within the seven classes of cases in which the South Carolina Supreme Court exercises exclusive jurisdiction. The Supreme Court of South Carolina has exclusive jurisdiction over cases involving the (1) death penalty, (2) public utility rates, (3) significant constitutional issues, (4) public bond issues, (5) election laws, (6) an order limiting the investigation by a state grand jury; and (7) an order issued by a family court relating to an abortion

of a minor. Rule 203(d)(1), SCACR. Therefore, the South Carolina Court of Appeals has jurisdiction over this controversy.

STATEMENT OF THE CASE

Appellants Atlantic International, Inc. d/b/a Coldwell Banker Commercial Atlantic, John W. True, and Aaron B. Rowley (collectively the "Appellants") filed their Summons and Complaint with the Charleston County Court of Common Pleas on September 15, 2020. Appellants then filed their Amended Summons and Complaint on October 5, 2020. (R. pp. 9-10, 11-24).

Respondents 1537 Ben Sawyer Blvd, LLC ("Ben Sawyer") and Richard M. McColl ("McColl") filed Motion to Dismiss on November 2, 2020. Respondents Ben Sawyer and McColl then filed their Answer and Counterclaims (JTD) on Appellants' Amended Complaint on November 2, 2020. (R. pp. 30-37). Respondents IBYDIT, LLC ("IBYDIT") and Curt Nesbitt ("Nesbitt") filed their Answer on Appellants' Amended Complaint on November 13, 2020. (R. pp. 38-51). Respondents East Islands Real Estate, Inc. ("East Islands") and Ashley Haynes, individually and as Agent of East Islands, ("Haynes") filed a Motion to Dismiss on November 17, 2020. Respondent East Islands and Haynes then filed an Answer on Appellants' Amended Complaint on November 17, 2020. (R. pp. 52-58). Appellants filed an Answer to Counterclaims of Respondents Ben Sawyer and McColl on November 30, 2020. (R. pp. 59-60).

For the week of February 1, 2021, the case was on Motions Roster Publication.

Respondents East Islands and Haynes filed a Memorandum in support of Motion to Dismiss on January 29, 2021. Appellants filed a Memorandum in Opposition of Respondents Ben Sawyer and McColl's Motion to Dismiss on January 29, 2021. Appellants then filed a Memorandum in Opposition of Respondents East Islands and Haynes' Motion to Dismiss on January 29, 2021. Respondents Ben Sawyer and McColl filed a Memorandum in Support of

Motion to Dismiss and in Reply to Appellants' Opposition on February 2, 2021. The Court denied Respondents Ben Sawyer and McColl's Motion to Dismiss on April 22, 2021.

On July 10, 2021, Respondent McColl passed away. No Notice of Death was filed with the Court. There has been no substitution for Respondent McColl's in this case.

Appellants filed a Motion to Compel on Respondents Ben Sawyer and McColl to serve upon Appellants' counsel responses to discovery on August 16, 2021. (R. pp. 61-71).

For the week of January 31, 2022, the case was on Motions Roster Publication.

Respondents Ben Sawyer and McColl filed a Motion for Summary Judgment on October 5, 2022. (R. pp. 72-73). Respondents East Islands and Haynes filed a Motion for Summary Judgment on January 23, 2023. (R. pp. 97-98).

On April 26, 2023, the case was put on the Motions Roster Publication for May 30, 2023.

On May 19, 2023, Respondents IBYDIT and Nesbitt filed their Motion for Summary Judgment. (R. pp. 138-142). On May 25, 2023, Appellants filed their memorandum in opposition to Respondents Ben Sawyer's and McColl's Motion for Summary Judgment. On May 26, 2023, Respondents Ben Sawyer and McColl filed their memorandum in support of their Motion for Summary Judgment. (R. pp. 74-96). On May 26, 2023, Respondents IBYDIT and Nesbitt filed their memorandum in support of their Motion for Summary Judgment. (R. pp. 143-187). That same day, Respondents East Islands and Haynes filed their memorandum in support of their Motion for Summary Judgment. (R. pp. 99-137).

On May 30, 2023, the Court was scheduled to hear Respondents East Islands' and Haynes' Motion for Summary Judgment and Respondents Ben Sawyer's and McColl's Motion for Summary Judgment. The Court heard each of them, as well as Respondents IBYDIT's and Nesbitt's Motion for Summary Judgment. (R. pp. 188-211).

On June 13, 2023, the Respondents jointly filed a Motion for Continuance beyond the June 20, 2023 scheduled week of trial, to await the determination of their Motions for Summary Judgment. The court granted the Motion for Continuance the next day.

On September 7, 2023, the Honorable Bentley Price, granted summary judgments in favor of all Respondents. (R. pp. 2-8). No depositions have been taken. There has been no mediation between the parties.

STANDARD OF REVIEW

The trial court granted summary judgment in favor of the Respondents. (R. pp. 2-8). "When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S. E.2d 1, 3 (2006). Summary judgment is improper when there is a genuine issue as to any material fact; and so, the moving party would not be entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). A trial court may not grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," show that there is a genuine issue as to any material fact. *Bovain v. Canal Ins.*, 383 S.C. 100, 678 S.E.2d 422, 424 (2009); Rule 56, SCRCP (2020). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Robinson v. Est. of Harris*, 378 S.C. 140, 144, 662 S.E.2d 420, 422 (Ct. App. 2008) (citing *Moore v. Weinberg*, 373 S.C. 209, 215-216, 644 S.E.2d 740, 743 (Ct. App. 2007)). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); *Young v. S.C. Dep't of Corr.*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the non-moving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). The Appellant was the non-moving party before the Court, and therefore all reasonable inferences must be viewed in the light most favorable to him. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

FACTS

Appellants True and Rowley are commercial real estate agents working for the broker Appellant Atlantic International, Inc. d/b/a Coldwell Banker Commercial Atlantic. Respondents Ben Sawyer and McColl are the sellers of the property at the center of this dispute, 1537 Ben Sawyer Boulevard, Mount Pleasant, South Carolina 29464 (the "Property"). Respondents IBYDIT and Nesbitt are the buyers of the Property. Respondent Haynes is a commercial real estate agent working for the broker Respondent East Islands.

ARGUMENT

I. The trial court erred when it granted summary judgment as to all Respondents, as Respondents engaged in conduct that precludes them from recovery under the equitable doctrine of unclean hands.

The theory of interference with a contractual relationship is that the parties to a contract have a property right therein, which a third person has no more right to maliciously deprive them of, or injure them in, than he would have to injure their property. *Chitwood. v. McMillian*, 189 S.C. 262, 266, 1 S.E.2d 162, 163 (1939). Such an injury without sufficient justification, amounts to a tort which the injured party make seek compensation by an action in tort for damages. *Crandall Corp. v. Navistar Int'l Trasnp. Corp*., 302 S.C. 265, 395 S.E. 2d 179 (1990). A cause of action for

tortious interference with prospective economic advantage is recognized in South Carolina as intentional inference with prospective contractual relations. *D.R. Horton, Inc. v. Wescott Land Co.,* 398 S.C. 528, 730 S.E.2d 340 (Ct. App. 2012).

A. The actions of Respondents Haynes and East Islands constituted an intentional interreference with Appellants' contractual relationship.

The elements of intentional interference with prospective contractual relations are: (1) the intentional interference with the plaintiff's potential contractual relations; (2) for an improper purpose or by improper methods; and (3) causing injury to the plaintiff. *Brown v. Stewart*, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001). As an alternative to establishing an improper purpose, the plaintiff alleging intentional interference with prospective contractual relations may prove the defendant's method of interference was improper under the circumstances. *Eldeco, Inc. v. Charleston Cnty. Sch. Dist*., 372 S.C. 470, 642 S.E.2d 726 (2007). Allegations must present facts that give rise to some reasonable expectation of benefits from alleged lost contracts. *United Educ. Distribs., LLC v. Educ. Testing Serv.,* 350 S.C. 7, 564 S.E.2d 324 (Ct. App. 2002). The elements of interference with a contractual relationship, are (1) a contract, (2) knowledge of the contract by a tortfeasor, (3) intentional procurement by the tortfeasor of the contract's breach, (4) absence of justification, (5) damages. *Id*.

Respondents Haynes' and East Islands' conduct amounted to a tortious interference with Appellants' business relationship. Appellants were negotiating a deal for the Property that is subject of this litigation. Appellants brought Respondents Nesbitt and IBYDIT and Respondents McColl and Ben Sawyer together as buyer and seller of this Property.

The contract between Appellants and Respondents Nesbitt and IBYDIT and Respondents McColl and Ben Sawyer was breached due to the Respondents East Islands' and Haynes' conduct. The interference by Respondents East Islands and Haynes was without justification. 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.

Respondents East Islands and Haynes rested the entirety of their argument in favor of motion for summary judgment on the LLR findings, arguing that Appellants' claims are precluded as a result of the LLR complaint. However, Appellants would have obtained the proper signed agency agreement but for the Respondents East Islands' and Haynes' tortious interference.

B. The Doctrine of Unclean Hands precludes the Respondents East Islands and Haynes from recovery in this action.

The unclean hands doctrine derives from the equitable maxim that 'he who comes into equity must come with clean hands.' *Straight v. Goss*, 383 S.C. 180, 678 S.E.2d 443 (Ct. App. 2009). This maxim closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the opposing party. *Id*. Appellants would have obtained a signed agency agreement but for Respondents East Islands' and Haynes' harmful conduct. This precludes Respondents East Islands and Haynes from being granted summary judgment due to their bad acts, yet summary judgment was granted in their favor.

II. The trial court's grant of all Respondents' motions for summary judgment was premature, as discovery was incomplete, and Appellants had not yet had an opportunity to complete any depositions.

The trial court erred in granting summary judgment before Appellants had a full and fair opportunity to complete discovery, where Appellants were not dilatory in pursuing discovery, depositions were not yet completed, and even though delay was not attributable to Respondent, it was not solely attributable to Appellants. *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001).

Our Supreme Court has held: "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." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006), Because summary judgment is a drastic remedy, *it* must not be granted until the opposing party has had a "full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). Furthermore, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson v. S. Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C.1975); *see also Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) ("an extreme remedy to be cautiously invoked").

The Court in *Baughman* ruled summary judgment was premature because (1) plaintiffs demonstrated a likelihood that further discovery would uncover additional relevant evidence, and (2) plaintiffs were not dilatory in seeking discovery. *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001) citing their decision in *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

Here, Appellants raised the concern with the trial court that discovery was incomplete, and depositions had not yet taken place. During the hearing to hear Respondents East Islands' and Haynes' motion for summary judgment and Respondents McColl's and Ben Sawyer's motion for summary judgment, Appellants' counsel stated:

> "MR. COBB: […] I want to let the Court know, depositions have not been completed in this case. Discovery is still outstanding. We currently have a motion that's currently outstanding against Mr. Rick McColl and Respondent 1537 Boulevard [sic] – excuse me – Ben Sawyer Boulevard. (R. p. 201, lines 8-13).

Appellants were not dilatory in pursuing discovery and getting depositions completed. Without affording Appellants an opportunity to complete discovery and to take the depositions of all parties involved, Appellants were unable to fully develop their complaint against Respondents. To provide the trial court with the necessary evidence to prove the elements of Appellants' claims, the completion of discovery and depositions were necessary.

III. The trial court erred when it granted summary judgment as to all Respondents, as there are genuine issues of material facts in controversy, which require a finding of a trier of fact.

In determining whether any triable issues of fact exist to preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Padgett v. S.C. Ins. Rsrv. Fund*, 340 S.C. 250, 531 S.E.2d 305 (Ct. App. 2000).

In Appellants' complaint, they pled causes of actions of (1) breach of contract / breach of good faith and fair dealing, (2) quasi contract/ quantum meruit, (3) civil conspiracy, (4) fraud and misrepresentation, (5) promissory estoppel, and (6) interference with a contractual relationship.

There are numerous material facts in controversy that require a trier of fact, which include, but are not limited to:

(1) whether Appellants would have gotten a signed agency agreement but for Respondents' bad acts;

(2) whether Appellants and Respondents Ben Sawyer and McColl had a verbal contract;

(3) whether Appellants materially relied on the assurances of Respondents McColl and Ben Sawyer;

(4) whether Appellants brought Respondents Ben Sawyer and McColl and Respondents Nesbitt and IBYDIT together to facilitate the purchase and sale of the Property;

(5) but, for Respondents Haynes' and East Islands' interference, whether a contract would have been signed;

(6) whether Respondents conspired with one another to cut Appellants out of the purchase and sale; and

(7) whether Respondents conspired to save the buyers and sellers a one percent (1%) difference in commission fee and ensure the commission be paid to Respondents Haynes and East Islands.

Each of these facts is material to the causes of action pled by Appellants. The determination of such facts, by a trier of fact, is necessary to a determination on the merits of the case. With material facts remaining in controversy, the trial court erred in granting summary judgment in favor of Respondents.

IV. The trial court erred when it heard Respondents Nesbitt's and IBYDIT's Motion for Summary Judgment, as Appellants did not have sufficient time to defend their Motion.

The trial court held a hearing on Tuesday May 30, 2023, to hear the motions for summary judgment of Respondents Nesbitt and IBYDIT and Respondents East Islands and Haynes.

Respondents Nesbitt and IBYDIT filed their memorandum in support of their own motion for summary judgment on Friday May 19, 2023. (R. pp. 138-142, 143-187). Respondents Nesbitt's and IBYDIT's motion was not scheduled to be heard on May 30, 2023. However, over the objections of Appellants, the trial court heard their motion and arguments in favor thereof, even though Appellants had not yet filed their memorandum in opposition to Respondents Nesbitt's and IBYDIT's motion, nor had Appellants prepared their opposition to Respondents Nesbitt and IBYDIT's motion.

The record is as follows:

"MR. LESEMANN: Your Honor, good morning. Ellis Lesemann on behalf of the buyer.

MR. COBB: Your Honor, I'm sorry. I want to object to Mr. Lesemann speaking. He has a separate motion for summary judgment on behalf of the buyers that are defendants, but that motion is not in front of the Court today. I just want to make sure that, if he's speaking about his motion, which he did file a memorandum in this court on Friday, that's not timely nor (indiscernible).

THE COURT: Why do you care? We're here. I'm here. We're all here.

MR. COBB: Because I haven't – I have not filed my – I have not filed my memorandum in opposition. There is (indiscernible) between all three sets of defendants, Your Honor. So that's the main reason why we care.

THE COURT: All right. Well, let's hear what he has to say (R. p. 197, line 16-p. 198, line 7).

The trial court erred in allowing Respondents Nesbitt's and IBYDIT's motion and argument to be heard at this hearing for the other parties' motions. This error deprived Appellants proper notice and time to defend Respondents Nesbitt's and IBYDIT's motion and arguments. The court then granted Respondents Nesbitt's and IBYDIT's motion for summary judgment.

CONCLUSION

For all the foregoing reasons, the lower court erred in granting Respondents' Motions for Summary Judgment. Accordingly, Appellants respectfully request that the lower court's Order be overturned.

Respectfully submitted,

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