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SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
Case No. 2022-CP-40-02713

Elizabeth and Melvin Ray,

Plaintiffs,

vs,

Sunsetter Properties, LLC; Nancy Warner
agent for Coldwell Banker Residential
Brokerage; and Home Inspection One, LLC,

Defendants.

**ORDER GRANTING DEFENDANT
SUNSETTER PROPERTIES, LLC'S
MOTION TO DISMISS AND FOR
SUMMARY JUDGMENT**

On April 16, 2024, I heard this matter via Webex on a Motion to Dismiss and For Summary Judgment filed by Defendant Sunsetter Properties, LLC (“Sunsetter”).

Demetri K. Koutrakos, Esquire appeared for Sunsetter. Reagan Singletary, Esquire appeared for Plaintiffs Elizabeth and Melvin Ray. Connor E. Johnson, Esquire appeared for Defendant Home Inspection One, LLC.

Sunsetter’s motion was filed on August 9, 2023, and it contained a detailed memorandum of law outlining Sunsetter’s arguments. Sunsetter also submitted two supporting affidavits filed on August 9, 2023.

After hearing and considering the parties’ thorough arguments, the Court grants in full Sunsetter’s motions.

SUNSETTER’S MOTION TO DISMISS

On May 23, 2022, Plaintiffs filed this action against Sunsetter, Home Inspection One, LLC, and Nancy Warner, agent for Coldwell Banker Residential Brokerage (“Warner”). Plaintiffs never served Warner and Warner has not appeared in this case.

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Plaintiffs purported to serve Sunsetter's registered agent, Greg Langjahr, by providing copies of the Summons and Complaint to Langjahr's son. Sunsetter provided an affidavit of Nicolas Langjahr, Greg Langjahr's 17-year-old son, who testified he has nothing to do with Sunsetter, he is not and never was authorized to accept service of legal papers on behalf of Sunsetter, and he never told anyone otherwise.

Service on a limited liability company, such as Sunsetter, is governed by Rule 4(d)(3), SCRCF, which provides that "Service shall be made as follows:"

(d)(3) Corporations and Partnerships. Upon a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

S.C. Code Ann. § 15-9-210 also applies, which provides as follows:

(a) A domestic business or nonprofit corporation's registered agent is the agent of the corporation for service of any process, notice, or demand required or permitted by law to be served, and the service is binding upon the corporation.

(b) The business or nonprofit corporation may be served under Rule 4(d)(8) of the South Carolina Rules of Civil Procedure by registered or certified mail, return receipt requested, addressed to the office of the registered agent, or the office of the secretary of the corporation at its principal office. Service is effective upon the date of delivery as shown on the return receipt. Entry of default and default judgments shall be subject to the conditions of Rule 4(d)(8).

Sunsetter's registered agent is and has always been Greg Langjahr. Mr. Langjahr was never served with the Summons and Complaint. Instead, his 17-year-old son was served, who was not authorized to accept service of process on behalf of Sunsetter.

Sunsetter raised this issue in its Answer filed early in this case. Plaintiffs have done nothing to cure this issue. This substitute service on a limited liability company is improper and not authorized by statute. Service on Sunsetter was therefore improper. *See* 19 Am Jur 2d

Corporations § 1895 (2023) (“Service made on the spouse, minor child, or parent, of a corporate officer has been held invalid. Likewise, service cannot be made on the spouse, or employee of a registered agent or individual with whom a corporation’s registered agent resided . . .”).

Accordingly, under Rules 12(b)(2) and 12(b)(5), SCRCPP, Plaintiffs’ Complaint is dismissed as to Sunsetter.

SUNSETTER’S MOTION FOR SUMMARY JUDGMENT

The Court must consider a few procedural matters before analyzing and ruling on Sunsetter’s motion for summary judgment.

In ruling on these procedural matters, I am mindful that Plaintiffs filed this action on May 23, 2022, almost two years ago. Sunsetter’s detailed motion and supporting affidavits were filed and served on August 9, 2023. As mentioned above, the hearing on Sunsetter’s motion took place on April 16, 2024. Between the filing of the motion and the hearing date, 251 days or eight months and seven days elapsed. Despite the age of this case and the abundance of time Plaintiffs have had to engage in discovery, Plaintiffs contend they need more time for discovery.

“A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact.” *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009); *see also Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (holding that a summary judgment motion heard four months after the action was filed and granted nine months after the action was filed was not premature on grounds that plaintiffs did not have a full and fair opportunity for

discovery and finding the nonmoving party must demonstrate it is not merely engaged in a ‘fishing expedition’ by showing the likelihood that further discovery will uncover additional relevant evidence).

Here, Plaintiffs had a full and fair opportunity to participate in discovery before the motion for summary judgment was heard. Plaintiffs filed their Complaint almost two years ago. Sunsetter’s fully supported and briefed motion for summary judgment was filed 251 days before the summary judgment hearing. Plaintiffs had plenty of time to engage in discovery in that period. Plaintiffs have not provided a good reason why the time elapsed was insufficient for them to have developed facts opposing Sunsetter’s motion for summary judgment. In addition, Plaintiffs failed to provide an affidavit as required by Rule 56(f), SCRCPP, explaining why they needed more time for discovery. Rule 56(f), SCRCPP (“Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition . . . the court . . . may order a continuance to permit . . . discovery to be had”); *see also Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) (“Thus, Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery.”).

As a result, the Court finds and concludes that Plaintiffs had a full and fair opportunity to engage in discovery and there is no reason for the Court to delay considering Sunsetter’s motion for summary judgment.

In addition, Plaintiffs filed an opposing affidavit of Plaintiff Elizabeth Ray on Sunday, April 14, 2024, at 10:14 p.m., less than 36 hours before the hearing, which occurred on Tuesday, April 16, at 9:30 a.m. Sunsetter moved to strike this affidavit as untimely.

Under Rule 6(d) SCRCP, “additional or opposing affidavits may be served not later than two days before the hearing.” Rule 6(d), SCRCP. In calculating the time required under the South Carolina Rules of Civil Procedure, “when the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.” Rule 6(a), SCRCP.

The latest Plaintiffs could have served an opposing affidavit was Friday, April 12, 2024. Instead, less than 36 hours before the hearing, late on a Sunday evening, Plaintiffs filed their opposing affidavit. This is unfair and prejudicial.

This opposing affidavit is not timely, and the Court strikes it and refuses to consider it. Out of caution, Sunsetter submitted a reply affidavit. Because I am not considering Plaintiffs’ opposing affidavit, I will not consider Sunsetter’s reply affidavit.

At this point, the Court considers Sunsetter’s motion for summary judgment to be unopposed. Plaintiffs submitted no evidence to contradict Sunsetter’s well-supported motion for summary judgment. Regardless, the Court is mindful of the summary judgment standard.

Summary judgment is appropriate where “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. In determining whether any triable issue of fact exists to preclude summary judgment, the evidence and all inferences that can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. *Strother v. Lexington County Recreation Comm’n*, 332 S.C. 54, 504 S.E.2d 117 (1998).

FACTS

The facts viewed in the light most favorable to the non-moving party, here Plaintiffs, are as follows:

On or about November 16, 2018, Sunsetter purchased 901 Valhalla Drive in Columbia, South Carolina (the “Home”). When Sunsetter purchased the Home, it was vacant and contained a sunroom/porch.

Sunsetter made some repairs and improvements to the Home: new flooring; painting; new light fixtures; replacing windows in the sunroom; replacing faucets; replacing the roof; installing a mini-split HVAC in the sunroom/porch; replacing the kitchen countertop; installing new kitchen appliances; and landscaping. None of this work required a permit, except for replacing the roof, which Sunsetter’s roofing contractor obtained.

On or about March 26, 2019, Sunsetter and Plaintiffs entered into a contract for the sale of the Home to Plaintiffs (“the Contract”). The Contract allowed Plaintiffs to inspect the Home and note any repairs it wanted Sunsetter to make.

Sunsetter provided a Residential Property Condition Disclosure Statement (“Disclosure Statement”) with the Contract. The Disclosure Statement required Sunsetter to disclose whether it had any “actual knowledge or notice” concerning various matters. In the Disclosure Statement, Sunsetter did not note any deficiencies or issues because it did not have actual knowledge or notice of any issues.

In addition, Sunsetter purchased Home Warranty Coverage for Plaintiffs as part of the Contract.

Plaintiffs hired Home Inspection One, LLC to inspect the Home, which it did on April 3, 2019. Home Inspection One, LLC issued an inspection report and then a repair addendum was created. Sunsetter made the repairs noted. The inspection report provides that it does not cover mold and advised Plaintiffs to hire someone else if they were concerned about mold or similar issues.

On the morning of closing, Sunsetter's hired painter had gone to the Home to get his tools and found a water leak in the kitchen ceiling. After investigation, the HVAC condensation line was broken, causing a leak. At closing, the parties agreed that Sunsetter would repair the problem and repair and repaint the kitchen ceiling, which was done.

The closing occurred on May 23, 2019, and Sunsetter conveyed the Home to Plaintiffs.

Exactly three years later, on May 23, 2022, Plaintiffs filed this action against Sunsetter and others. Plaintiffs solely assert a negligent misrepresentation claim against Sunsetter.

ANALYSIS/DISCUSSION

To establish liability for negligent misrepresentation, a plaintiff "must show (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation." *Sauner v. Pub. Serv. Auth.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003).

Plaintiffs have failed to show that Sunsetter made any false representation to Plaintiffs. In their Complaint, Plaintiffs allege:

8. Prior to purchasing the property Defendant Sunsetter Properties, LLC represented to the Plaintiffs in its State of South Carolina Residential Disclosure Statement that he had no knowledge of any defects with the property.

9. However, the Plaintiff's learned after closing on the property in May of 2019 that the Defendant failed to disclose material defects to the property including water leaks, mold and mildew issues, plumbing deficiencies, and that reconstruction was done to the home without the County inspecting it to determine if these improvements were up to code.

10. Upon information and belief, Defendant Sunsetter Properties, LLC knew or should have know that these deficiencies prior to selling the property to the Plaintiffs. Yet, it failed to disclose this information to the Plaintiff prior to closing.

In responding to an interrogatory requesting Plaintiffs identify the claimed false representations, Plaintiffs responded as follows:

Sunsetter properties had a duty to the plaintiff not to make false representations to the Plaintiff about the home. Sunsetter indicated that the hot water heater was replaced when it had not been replaced. Sunsetter properties did not seek permits for the sunroom which was an add on to the property, and did not have it inspected upon completion. Plaintiff is now experiencing leaks to the roof as a result. There is mold in the home also which required complete remediation. The representation was made in writing. Plaintiff did not learn of the misrepresentation for months if not years after she closed on the home. The Plaintiff reserves the right to supplement this request at a later date if necessary.

In summary, Plaintiffs identify three alleged false representations: (1) “Sunsetter properties did not seek permits for the sunroom which was an add on to the property, and did not have it inspected upon completion,” (2) “hot water heater was replaced when it had not been replaced,” and (3) “There is mold in the home.”

When Sunsetter purchased the Home, the sunroom/porch was already there. Sunsetter did not add the sunroom/porch to the Home as alleged by Plaintiffs. As a result, Sunsetter was not required to obtain a permit for an addition to the Home made by prior homeowners. Plaintiffs’ contention that Sunsetter made this representation and that it was false is without merit. Furthermore, it is impossible to have been made and was never made. Plaintiffs submitted no evidence to the contrary.

Regarding the allegation that a hot water heater was replaced when it had not been replaced, Sunsetter made no such representation. As Plaintiffs admit, all communications were made in writing. Neither the Contract nor the Disclosure Statement says anything to this effect. Plaintiffs submitted no evidence to the contrary.

Finally, as to mold being in the Home, the Disclosure Statement did have a question regarding mold and other issues, and Sunsetter responded as follows:

VI. BURIED, UNBURIED, OR COVERED PRESENCE OF THE FOLLOWING: LEAD BASED PAINT, LEAD HAZARDS, ASBESTOS, RADON GAS, METHANE GAS, STORAGE TANKS, HAZARDOUS MATERIALS, TOXIC MATERIALS, OR ENVIRONMENTAL CONTAMINATION

A. Describe any known property environmental contamination problems from construction, repair, cleaning, furnishing, intrusion, operating, toxic mold, methamphetamine production, lead based paint, lead hazards, asbestos, radon gas, methane gas, formaldehyde, corrosion-causing sheetrock, storage tanks, hazardous materials, toxic materials, environmental contamination, or other: None

Sunsetter says it answered “none” because it had no knowledge of any toxic mold in the Home. Mr. Langjahr clearly states in his affidavit that he absolutely had no knowledge or notice of any mold, toxic or otherwise, in the Home. Plaintiffs have submitted no evidence to the contrary. *See Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285 (S.C. Ct. App. 1993) (“To be actionable, the representation must . . . be false when made.”); *Calland v. Carr*, No. 9:14-cv-0420-DCN, 2015 U.S. Dist. LEXIS 59175, at *12 (D.S.C. May 6, 2015) (court granted summary judgment to sellers as buyers “have failed to put forth sufficient evidence that the [Sellers] knew of current problems with the house when they filled out the disclosure statement on November 22, 2010,” with mold being raised as one of the issues).

To the extent there existed toxic mold in the Home on the date of the sale, Plaintiffs had the opportunity to inspect the Home to determine if that was the case, something they opted not to do, even though the home inspector they hired advised them to do so. *See Byrn v. Walker*, 275 S.C. 83, 88, 267 S.E.2d 601, 603 (1980) (“It is generally held that one has no right to rely on representations as to the condition, quality or character of property . . . where the parties stand on an equal footing and have equal means of knowing the truth.”).

There are no genuine issues of material fact. Plaintiffs have not provided evidence that Sunsetter made a false representation to Plaintiffs and that they justifiably relied on any representation made by Sunsetter.

Sunsetter is, therefore, alternatively entitled to summary judgment in its favor.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

- A. The Court grants in full Sunsetter's Motion to Dismiss for lack of proper service and lack of personal jurisdiction;
- B. Alternatively, the Court grants in full Sunsetter's Motion for Summary Judgment; and
- C. Plaintiffs' claims against Sunsetter are dismissed with prejudice and forever ended.

[Judge's electronic signature appears on the following page]



Richland Common Pleas

Case Caption: Elizabeth Ray , plaintiff, et al vs Sunsetter Properties Llc , defendant,
et al

Case Number: 2022CP4002713

Type: Order/Summary Judgment

So Ordered

Jocelyn Newman