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Jul 07 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Judge

Appellate Case 2021-000033
Case No. 2018-CP-32-04329

John Deere Construction & Forestry Company, Respondent,

v.

North Edisto Logging, Inc. and Paul Gunter, Appellants.

FINAL REPLY BRIEF

July 7, 2021

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TABLE OF CONTENTS

Table of Authorities ii

Arguments

1. THE TRIAL COURT ERRED IN CONCLUDING THAT A BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING IS ONLY ACTIONABLE IF THERE IS ALSO A BREACH OF AN EXPRESS TERM OF THE CONTRACT.1
2. THE TRIAL COURT ERRED IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDETNT'S COMPLAINCE WITH THE S.C CLAIM AND DELIVERY STATUTE WAS FORECLOSED BY THE PRESEIZURE HEARING.....3
3. THE TRIAL COURT ERRED IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDENT'S LOAN ORIGATION WAS FORECLOSED BY THE COURT'S RULING ON GOOD FAITH AND FAIR DEALING.....4
4. TO THE EXTENT THAT THE TRIAL COURT GRANTED JUDGMENT IN THE AMOUNT OF \$946,378.65 ALONG WITH INTEREST AND ATTORNEY'S FEES, SUCH A RULING WAS ERRONEOUS.....5
5. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' CLASS ACTION CLAIMS BEFORE A MOTION FOR CLASS CERTIFICATION WAS BEFORE THE COURT.....6

Conclusion6

Certificate of Counsel.....7

TABLE OF AUTHORITIES

CASES

Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660(1993).....5
Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 147 S.E.2d 481(1966).....1
RoTec Svcs., Inc. v. Encompass Svcs. Inc., 359 S.C. 467, 597 S.E.2d 881(S.C. App. 2004).....2
Tharpe v. G.E. Moore Co. 254 S.C. 196, 174 S.E.2d 397 (S.C. 1970).....1

STATUTES

None

OTHER AUTHORITIES

None

ARGUMENT 1

THE TRIAL COURT ERRED IN CONCLUDING THAT A BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING IS ONLY ACTIONABLE IF THERE IS ALSO A BREACH OF AN EXPRESS TERM OF THE CONTRACT.

Respondent forges ahead with the argument that the the implied duty of good faith and fair dealing is a part of some “two for one special” where your first breach of contract is free, as long as it is the duty of good faith. Nothing in the cases says or even suggests such a notion.

In the foundation case in this area, *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 147 S.E.2d 481(1966) the central issue was whether our Supreme Court would recognize the possibility of an implied duty to pursue collection of a group of accounts. The Court concluded :

“Without going into further detail, we are satisfied that under the terms of the contract in the light of surrounding circumstances, including the relationship of the parties and their past dealings, it is, to say the least, fairly arguable that Commercial was **impliedly obligated to pursue the collection of the accounts with reasonable and customary diligence**. Hence, we would not be justified in concluding that the defense and counterclaim are manifestly false and not pleaded in good faith. Since **no provision of the written contract touches on this important subject**, which is necessarily involved in the contractual relations of the parties, evidence as to prior dealings between them would involve no contradiction of the writing and would not violate the parol evidence rule. *Chatfield-Woods Co. v. Harley*, 124 S.C. 280, 117 S.E. 539; *Soulios v. Mills Novelty Co.*, 198 S.C. 355, 17 S.E. (2d) 869.” (Emphasis Added)

Therefore, from the beginning our Supreme Court countenanced an action based solely on a breach of the implied duty of good faith. As noted in the conclusion of the Court's Opinion, no express term of the contract was implicated. However, a violation of the implied duty of good faith, without more was held to be sufficient to create an actionable claim, obviously if proven in further proceedings. Nowhere is there a suggestion that some second breach of an express term is also required.

Later in *Tharpe v. G.E. Moore Co.* 254 S.C. 196, 174 S.E.2d 397 (S.C. 1970), a worker's compensation case, the Court based its conclusion on the implied duty of good faith int the context of

an independent contractor relationship took the form of a duty to “perform it in a workmanlike manner” (Id. At 201). Central to the analysis was the conclusion that a breach of this implied duty to “perform in a workmanlike manner” would, without more, be enough to constitute a breach of contract. Nowhere is there a suggestion that some second breach of an express term is also required.

Taken together, the South Carolina Opinions establish that the duty of good faith and fair dealing is no less, and no more than any other contractual term. The early cases discussed above establish that the duty of good faith and fair dealing is no different from any express term. Breach of a single contract term, whether express or implied is sufficient to support a breach of contract claim.

The import of *RoTec Svcs., Inc. v. Encompass Svcs. Inc.*, 359 S.C. 467, 597 S.E.2d 881(S.C. App. 2004) is that the duty of good faith and fair dealing is no more than any other contract term. There is no “special” cause of action for breach of this implied term. It is simply a breach of contract, just like its express term counterparts. Whether a single term of a contract is breached, or several, it still only gives rise to a cause of action for breach of contract. Whether that single term is express or implied does not impact the actionability of the breach.

ARGUMENT 2

THE TRIAL COURT ERRED IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDETNT'S COMPLAINCE WITH THE S.C CLAIM AND DELIVERY STATUTE WAS FORECLOSED BY THE PRESEIZURE HEARING

Respondent's assertion that Appellants have only claimed that Respondent's claim and delivery affidavit is defective "in some way" is simply disingenuous.

The affidavit is defective in form. Specifically, the affidavit does not aver that it is made subject to the penalties of perjury, or that the affiant would be competent to testify in court as to the matters contained in the affidavit, or that the substance of the affidavit would in fact be the affiant's testimony in a hearing before the court. Moreover, the affiant does not even allege the existence of any authorization to testify on behalf of the Plaintiff. No employment relationship is stated and it is impossible to determine whether the affiant works for the Plaintiff or for some other entity.

The affidavit is defective in substance. It states a wholesale value from sources unknown and not even hinted at. A statement of the actual value is required by S.C. Code § 15-69-30(5). In this case, the actual value would be the fair market value resulting from a commercially reasonable sale. Plaintiff's use of the lower wholesale value is a self-serving attempt, made in bad faith, to lower the value of the bond required by S.C. Code § 15-69-50.

The trial court's order is clearly controlled by the error of concluding that the order for immediate possession precluded any review of these issues. Appellants do not seek, or even desire the return of the equipment. The gravamen of Appellants' cause of action is that Respondent violated South Carolina Law related to the claim and delivery process and that respondent was negligent in failing to insure that their counsel followed proper procedure on their behalf.

ARGUMENT 3

THE TRIAL COURT ERRED IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDENT'S LOAN ORIGINATION WAS FORECLOSED BY THE COURT'S RULING ON GOOD FAITH AND FAIR DEALING.

The trial court's ruling on this issue is also controlled by its erroneous conclusion that a breach of the duty of good faith and fair dealing is not actionable without an additional breach of an express term of the contract.

A proper construction of the duty of good faith and fair dealing is that it is bad faith for a dealer to take tens of thousands of dollars from a customer, purportedly for a warranty backed by Respondent, then remit none of the money to Respondent and create a different set of documents with different prices to hide these facts. This remains bad faith even if the dealer honors some minor warranty claims out of its own pocket.

An apt analogy is a customer who visits an agent of a nationally known fire insurance company and gives the agent a premium check. If the agent cashes the check and pockets the money rather than remitting it to the insurer, betting that there will be no large claims, this is bad faith. Even if the agent paid a claim for a kitchen grease fire out of his own funds, this would still be bad faith, would still be actionable, and the customer would have been damaged by paying for protection from the nationally known company and actually only having gotten the protection of the agents assets.

Respondent also had a duty to take reasonable steps to insure that its dealer, using its name, did not engage in bad faith behavior. The failure to do so was negligent and the grant of summary judgment on this issue should be reversed.

ARGUMENT 4

TO THE EXTENT THAT THE TRIAL COURT GRANTED JUDGMENT IN THE AMOUNT OF \$946,378.65 ALONG WITH INTEREST AND ATTORNEY'S FEES, SUCH A RULING WAS ERRONEOUS

Respondent's argument that it has been granted judgment on its claims, including attorney's fees and interest is surprising in light of the Conclusion to the trial court's order which says : "Defendant has failed to show that there is a genuine issue as to any material fact **on their counterclaim causes of action**" (Order filed 12/08/20 p.6) (Emphasis added) (R. p. 6)

The trial court failing to adopt the portions of Respondent's proposed order that granted a more expansive judgment (R. p. 186-197) suggests an intention not to grant this relief.

The records of the Lexington County Clerk also do not substantiate that an complete judgment was entered/ The docket page from the Clerk's website shows the Judgment Tab greyed out, meaning there is no information entered there. The box for the Judgment Number on the docket page is also empty. (R. p. 355).

It is also curious that Respondent asserts it has been granted a judgment for attorney's fees when the trial court order does not address any of the factors established in *Blumberg v. Nealeco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660(1993). No affidavit of attorney's fees was before the court, and the order states no amount for any such award.

To the extent the trial court granted judgment on Respondent claims, after acknowledging the conflicting testimony of the commercial reasonableness of the sale, this ruling was erroneous.

ARGUMENT 5

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' CLASS ACTION CLAIMS BEFORE A MOTION FOR CLASS CERTIFICATION WAS BEFORE THE COURT

In addition to being premature, Respondent's brief makes it clear that this ruling is dependent on the trial courts rulings on the issues discussed under Arguments 1, 2, and 3 above. Since these ruling should be reversed, the ruling on this issue must fall as well and should be remanded for hearing once there is a motion for class certification before the court.

CONCLUSION

For the foregoing reasons, the Order of the Circuit Court should be reversed and the case remanded to Lexington County, for further proceedings on Appellant's Counterclaims and Respondent's claim for a deficiency balance..

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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