

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

W. Jeffery Young, Circuit Court Judge

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Case No. 2012-213055

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**RECEIVED**

SEP 26 2013

**SC Court of Appeals**

Frewil, LLC .....Respondent,

v.

Madison Price and Carter Smith.....Appellants

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INITIAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUE ON APPEAL

1. Did the lower Court commit reversible error by granting summary judgment to Respondent, when the record supports the decision, there were no genuine issues of material facts, and Appellants' counterclaims were properly addressed?

## STATEMENT OF THE CASE

On December 3, 2010, Respondent, Frewil, LLC ("Frewil") commenced this action by filing a Summons and Complaint and serving the same upon Appellants, Madison Price ("Ms. Price") and Carter Smith ("Ms. Smith"). (Summons and Complaint). The Complaint alleges Appellants breached a rental agreement with Respondent. *Id.* On February 10, 2011, Appellants filed and served an Answer and Counterclaim denying the allegations of the Complaint and asserting that Respondent misrepresented material facts, breached the rental agreement by fraud, and violated the South Carolina Residential Landlord Tenant Act. (Answer and Counterclaim). Respondent filed and served its Reply to the Counterclaims on March 14, 2011 denying the same and asserting various affirmative defenses. (Reply to Counterclaim).

Respondent filed for Summary Judgment on January 4, 2012 supporting the Motion by an Affidavit and letter from its owner, an Affidavit of its agent, Appellants' discovery responses, and the subject rental agreement. (Motion for Summary Judgment and Exhibits thereto). On July 11, 2012, Appellant filed several Affidavits in Opposition to Summary Judgment (Affidavit of Madison Price; Affidavit of Carter Smith; Affidavit of Martha Smith; and Return Affidavit Against Summary Judgment).

On July 25, 2012, The Honorable W. Jeffery Young heard oral argument on the Motion for Summary Judgment. (Hearing Transcript). Judge Young signed an Order

granting Respondent's Motion for Summary Judgment on August 15, 2012. (Order Granting Plaintiff's Motion for Summary Judgment). On August 20, 2012, Respondent served the Appellants with the Order Granting Summary Judgment. (Letter and Email Evidencing Service of Order).

On September 27, 2012, Appellants filed a Notice of Appeal with the South Carolina Supreme Court (Notice of Appeal). Respondent moved to dismiss the appeal on the grounds that it was not timely nor made to the proper Court. (Motion to Dismiss Appeal). On October 24, 2012, Appellant filed a Motion for Extension of Time to File Initial Brief and Designation of Matter. (Motion for Extension). The Court denied Respondent's Motion to Dismiss on November 20, 2012, but nonetheless, the Court later dismissed the appeal on April 1, 2013 for Appellants' failure to timely file their Initial Brief and Designation of Matter (Order Denying Motion to Dismiss; Order Dismissing Case). On April 4, 2013, Appellants' moved to reinstate the appeal, which the Court granted on August 26, 2013 and directed Respondent to file and serve its Initial Brief and Designation of Matter within thirty days (Motion to Stay Remittur; Order Granting Motion to Reinstate Appeal; Letter Providing Respondent's Deadlines).

This appeal is a result of Judge Young's August 15, 2013 Order that granted Respondent's Motion for Summary Judgment. (Order Granting Plaintiff's Motion for Summary Judgment). The value at issue has yet to be determined as Respondent's Motion and Judge Young's Order were directed only at liability. (Motion for Summary Judgment; Order Granting Summary Judgment).

## STATEMENT OF FACTS

This case concerns a residential rental agreement for an apartment in downtown Charleston. (the Contract). Frewil was the landlord, and Ms. Smith and Ms. Price were the tenants. Id. Ms. Smith and Ms. Price do not contest that they entered into a contract to rent 132-15 Smith Street, Charleston, South Carolina 29403 (hereinafter “the Property”) from Frewil for one year for a total of \$24,300.00 payable in monthly installments of \$2,025.00 beginning August 1, 2009 and ending July 31, 2010 (hereinafter “the Contract”). Compare (Complaint at ¶ 7) with (Answer and Counterclaim ¶ 8).

Contrary to the unambiguous language of the contract, however, Ms. Smith and Ms. Price do allege that Frewil represented to them that the Property included a washer, dryer, and dishwasher. Compare (the Contract) with (Affidavit of Carter Smith; Affidavit of Madison Price). It is important to note that Ms. Smith and Ms. Price do not allege in their Affidavits that the Contract is ambiguous, and that they acknowledge these alleged representations about the appliances were made prior to them inspecting the Property and prior to them signing the Contract. Id. The Contract contains a merger clause. (the Contract ¶ 22 § C).

After signing the Contract, but prior to fully moving in the Property, Ms. Smith and Ms. Price informed Frewil that they would be vacating the Property because it did not have a washer, dryer, or dishwasher. (Affidavit of Carter Smith; Affidavit of Madison Price). Frewil offered to remedy the situation or rent Ms. Smith and Ms. Price another property, but that never materialized. Id. Frewil then wrote Ms. Smith and Ms. Price to inform them that it would be retaining their security deposit and applying the

deposit towards their outstanding balance pursuant to the Contract and the South Carolina Residential Landlord Tenant Act. (Affidavit of David Abdo; Affidavit of Carl Dietz; Letter). Frewil then mitigated its damages by later renting the Property to third-parties, but unfortunately, it was for a much lower price. (Affidavit of David Abdo).

- I. **The Circuit Court was correct granting summary judgment to Respondent because the record supports the decision, there were no genuine issues of material facts, and Appellants' counterclaims were properly addressed.**

### STANDARD FOR SUMMARY JUDGMENT

“When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the circuit court under Rule 56(c), SCRPC.” Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 628 S.E.2d 902, 910 (S.C. Ct. App. 2006). In Circuit Court, “[s]ummary 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.” Christina G. deBondt v. Carlton Motor Cars, Inc., 536 S.E.2d 399, 403 (S.C. Ct. App. 2000). While the moving party bears the burden of demonstrating that there is not a genuine issue of material fact, once that burden has been met, the nonmoving party may not rest on the mere allegations contained in the pleadings. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Instead, the nonmoving party must come forward with specific facts showing that evidence exists to support its position, and that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). All evidence must be viewed in the light most favorable to the nonmoving party. Perini Corp. v. Perini Const., Inc., 915 F.2d 121, 123-33 (4th Cir. 1990). In cases where the material facts are not in

dispute, a trial court may resolve disputed legal questions on summary judgment. Thompson Everett, Inc. v. Nat'l Cable Adver., L.P., 57 F.3d 1317, 1323 (4th Cir. 1995).

### ANALYSIS

Even when viewed in light most favorable to Ms. Smith and Ms. Price, the Circuit Court did not commit reversible error when it granted summary judgment in favor of Frewil as to liability for its breach of contract claim because Ms. Smith's and Ms. Price's only material defense/counterclaim, which is for misrepresentation/fraud, fails as a matter of law.

The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. Fuller v. E. Fire & Cas. Ins. Co., 124 S.E.2d 602, 610 (S.C. 1962). The construction of a clear and unambiguous contract is a question of law for the court. Gardner v. Mozingo, 358 S.E.2d 390, 392 (S.C. 1987). "In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone." Silver v. Aabstract Pools & Spas, Inc., 658 S.E.2d 539, 542 (S.C. 2008).

Although parol evidence is admissible to prove facts that constitute fraud, [t]he general rule is that all conversations and parol agreements between the parties prior to or contemporaneous with the written agreement are considered to have been merged therein so that they cannot be given in evidence for the purpose of changing the contract of showing an intention or understanding different from that expressed in the written agreement." Allen-Parker Co. v. Lollis, 185 S.E.2d 739, 742 (S.C. 1971). With regards

to fraud and misrepresentation, our Courts are clear as to the following nine elements and the effect of not being able to prove the same:

Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence. In order to prove fraud, the following elements must be shown: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. A complaint is fatally defective if it fails to allege all nine elements of fraud.

Ardis v. Cox, 431 SE 2d 267, 269 (S.C. Ct. App. 1993) (internal citations omitted).

Moreover, our Courts have held “that one cannot complain of fraud in the misrepresentation of the contents of a written instrument signed by him when the truth could have been ascertained by reading the instrument, and one entering into a written contract should read it and avail himself of every opportunity to understand its content and meaning.” Jones v. Cooper, 109 S.E.2d 5, 12 (S.C. 1959).

In the case at bar, there is no disputing the existence of the Contract. (The Contract). There is also no allegation that the Contract is ambiguous. (Affidavit of Carter Smith; Affidavit of Madison Price). There is a merger clause in the Contract, and there is no provision in the Contract that states the Property will be equipped with a washer, dryer, and dishwasher. (The Contract). There is also no dispute that Frewil suffered at least some damage as a result of Ms. Smith’s and Ms. Price’s decision to vacate the Property and not pay rent. (Affidavit of David Abdo; Affidavit of Carl Dietz; Letter). Since there is no dispute as to the existence of the Contract or damages, it is proper for this Court to affirm the Circuit Court’s grant of summary judgment in favor of Frewil, so long as Ms. Smith’s and Ms. Price’s contentions about the appliances do not become part of the Contract, which might excuse their breach.

Ms. Smith and Ms. Price take issue with Frewil's breach of contract claim on the basis that Frewil represented that the Property would include a washer, dryer, and dishwasher. (Answer and Counterclaim; Affidavit of Carter Smith; Affidavit of Madison Price). They couch this issue in the form of counterclaims for misrepresentation of material fact as well as breach of contract accompanied by a fraudulent act. (Answer and Counterclaim). However, their defenses/counterclaims are fatally flawed because they lack the ability to prove the necessary elements – specifically their ignorance of the falsity of the representations and that their reliance on the representations was reasonable.

In applying the law of our State to the facts as Ms. Smith and Ms. Price allege in their Affidavits, it is clear that they cannot meet their burden of proof. (Affidavit of Carter Smith; Affidavit of Madison Price). For example, they cannot be found to be in ignorance of the lack of a washer, dryer, and dishwasher in the Property when they both toured the Property prior to signing the Contract. Id. Similarly, their reliance on Frewil's alleged representations cannot be reasonable because they had ample time to review the Contract prior to signing it, which would have revealed that there was no provision in it for the Property to have a washer, dryer, and dishwasher. Id. Furthermore, their situation falls squarely into the law of our State that holds "one cannot complain of fraud in the misrepresentation of the contents of a written instrument signed by him when the truth could have been ascertained by reading the instrument, and one entering into a written contract should read it and avail himself of every opportunity to understand its content and meaning." Jones v. Cooper, 234 S.C. 477 (1959). Finally, and for good reason, neither Ms. Smith nor Ms. Price make an allegation in their Affidavits with regards to Frewil's alleged violation of the South Carolina Residential Landlord Tenant Act because

Frewil complied with it when it informed them that their security deposit would be retained and applied to their outstanding balance. (Answer and Counterclaim; Affidavit of Carter Smith; Affidavit of Madison Price; Letter).


Even when viewed in light most favorable to Ms. Smith and Ms. Price, the Circuit Court was correct in granting summary judgment to Respondent because the record supports the decision, there were no genuine issues of material facts, and Appellants' counterclaims were properly addressed.

### CONCLUSION

For the foregoing reasons, as well as any ground appearing on the record as provided by SCACR 220(c), the Court of Appeals should affirm The Honorable W. Jeffery Young's Order Granting Frewil Summary Judgment as to liability for breach of contract, and remand this case for a determination of Frewil's damages.

Respectfully submitted,

September 24, 2013

  
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