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SC Court of Appeals

March 10, 2025

The Honorable Catherine Harrison
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Bernardon et al v. Damiano, Sea Pines Real Estate et al
Appellate Case No. 2025-00384

Dear Mrs. Harrison:

Attached please find for filing a copy of the judgment/order appealed from in case 2022-CP-07-2483, responsive to your instruction of March 4.

Very Truly Yours,

/s/ Michael W. Mogil

Michael W. Mogil

cc: By email to Richardson Plowden, Finn Law Firm and Copeland Stair et al

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
	)	
	)	CIVIL ACTION NO.: 2022-CP-07-02483
ROLAND BERNARDON AND LOUISE BERNARDON,	)	
Plaintiffs,	)	**ORDER**
v.	)	
MARK DAMIANO, ELLERY K. DAMIANO, SEA PINES REAL ESTATE AT THE BEACH CLUB, ROBERT REICHEL, and JOHN P. MCMAHON,	)	
Defendants.	)	

This matter came before the Court upon (a) the Motion and Memorandum in Support of Summary Judgment filed on January 29, 2024, by Defendants Sea Pines Real Estate at the Beach Club and Robert Reichel, and (b) a separately filed Motion and Memorandum in Support of Summary Judgment filed on January 30, 2024, by Defendants Mark and Ellery Damiano (collectively referred to as "Motions for Summary Judgment"). On December 11, 2024, Plaintiffs filed a response in opposition with exhibits thereto ("Plaintiffs' Response").

The parties made detailed oral arguments before the undersigned on December 12, 2024. Present at the hearing were Plaintiffs and their attorney Michael W. Mogil, Esquire. Defendants Sea Pines Real Estate at the Beach Club, Robert Reichel, Mark Damiano, and Ellery K. Damiano were present along with their attorney of record, Diana L. Murray, Esquire and David A. Anderson, Esquire. Davis J. Diethrich, Esquire appeared as counsel for Defendant, John P. McMahon. Plaintiffs' claims against Defendant McMahon are not addressed in this order.

The Court had the opportunity to hear and consider extensive arguments of counsel, as well as the law cited during those presentations. After a review of the materials submitted to the Court and consideration of the arguments made by counsel at the hearing, this Court

ORDERS Defendants' Motions for Summary Judgment are hereby GRANTED.

INTRODUCTION

Viewed in the light most favorable to Plaintiffs, and resolving all doubts in Plaintiffs' favor, the facts underlying the Motions for Summary Judgment are as follows:

In January 2022 Defendants Mark and Ellery Damiano hired Defendant Robert Reichel to act as their agent for the sale of 10 Oyster Catcher Road, in Hilton Head, South Carolina ("10 Oyster Catcher"). Mr. Reichel is part-owner and operator of Defendant Sea Pines Real Estate at the Beach Club. On January 19, 2022, Mr. Reichel listed 10 Oyster Catcher for sale. The advertisement for the property ("MLS listing") identified the home as being 3,372 sq. ft. The MLS listing included the following disclosures: "INFORMATION IS BELIEVED ACCURATE BUT IS NOT WARRANTEED," and "Information Deemed Reliable But Not Guaranteed." (*See* Def.'s Ex. E). The advertised square footage of the home closely mirrored prior sales data, a 2016 appraisal conducted by Coastal Property Appraisals, a second appraisal performed by Coastal Property Appraisals in 2022, and records maintained by the Beaufort County Tax Assessor. (*See* Def.'s Ex. B, C, and D). At all times relevant to this matter, the Plaintiffs relied upon the January 19, 2022, MLS listing, and neither had direct contact with the moving Defendants. (*See* Def's Ex. F, at 10:6-13).

On January 21, 2022, following their review of the MLS listing, Plaintiffs made an offer of $2,200,000.00 for the purchase of 10 Oyster Catcher with the assistance of their agent, Peter Geary. (*Id.* at 17:20-18:1) Plaintiffs did not request an appraisal prior to making an offer, nor did they request copies of prior appraisals or inspections. *Id*. They did not view the home in-person. *Id*. Plaintiffs testified they made no effort to verify the square footage of the home prior to extending their offer. *Id*. Plaintiffs' January 21 offer was not accepted, but on January

22, 2022, they offered to match the bid that was accepted by the Damianos, and requested to be the number one backup with no contingencies should that deal fall through. (*Id.* at 21:2-16; Def.'s Ex. G).

In the time between Plaintiffs' initial offer, which was rejected, and their subsequent offer submitted February 6, the property was under contract by another couple, Stuart and Claudia Mills. In the duration of the Mills' diligence period Mr. Reichel was informed by their mortgage agent that there was some confusion regarding the square footage of the home. (*See* Def.'s Ex. H). As a result, Mr. Reichel agreed to add "home heated square feet is approximately 2600 sq. ft." to the "remarks" section of the MLS listing. *Id*. Records reflect Plaintiffs' real estate agent, Peter Geary, pulled the updated MLS listing at 11:16 a.m. on February 5, 2022. (*See* Def.'s Ex. I).

Plaintiffs testified Mr. Geary did not provide them with a copy of the updated listing, and they did not review or rely upon it. (*See* Def.'s Ex. F, at 36:9-14; 37:23-25). A report regarding the potential square footage issue was never prepared, and the home was not completely measured. At all times relevant to this transaction, the MLS listing included the following disclosures: "INFORMATION IS BELIEVED ACCURATE BUT IS NOT WARRANTEED," and "Information Deemed Reliable But Not Guaranteed."

Plaintiffs were granted their request to be the number one backup for the purchase of the property when the Mills' contract fell through in early February. On February 6, Plaintiffs submitted a second offer for the purchase of 10 Oyster Catcher, "as-is" and with no right to terminate. (*See* Def.'s Ex. J). Plaintiffs made no effort to verify the square footage of the residence through their agent, or otherwise, prior to making their second offer to purchase the residence. (*See* Def.'s Ex. F, at 27:6-28:21). Plaintiffs did not request an appraisal, or copies

of prior appraisals or inspections. *Id*. They did not view the home in-person. *Id*. Plaintiffs' second offer was accepted, and they closed on their purchase on February 25, 2022. *Id*. In the duration of time between the second offer and closing, the extent of Plaintiffs' diligence was viewing the home through the internet, a Facetime call that their realtor testified he could not recall, and a property inspection where they did not request the home be measured. *Id*. Two days *after* closing, on February 27, 2022, Roland Bernardon e-mailed his agent, Peter Geary, to verify the square footage of 10 Oyster Catcher. (*See* Def.'s Ex. M). In response, Mr. Geary offered the square footage was consistent with the MLS and previous MLS listings for the home. *Id.* On March 2, 2022, Morgan Stanley conducted an appraisal of 100 Oyster Catcher. The appraiser noted the home to be 2,462 sq. ft. and valued it at $2,100,000.00. (*See* Def.'s Ex. K).

On December 30, 2022, Plaintiffs filed suit against Rob Reichel, Sea Pines at the Beach Club, Mark Damiano, and Ellery Damiano, alleging fraud in the inducement (as to all Defendants), unjust enrichment (as to all Defendants), breach of contract (as to all Defendants), rescission (as to all Defendants), and breach of fiduciary duty (as to Defendant Sea Pines Real Estate at the Beach Club and Robert Reichel). (*See* Plts.' Complaint). In support, Plaintiffs claim the information presented in the January 19, 2022, MLS listing for 10 Oyster Catcher was a material component of their decision to contract for purchase, and that representations regarding the size of the home therein were false. (*See* Plts.' Complaint, at ¶ 13).

ANALYSIS

A. Standard of Review

In ruling on a summary judgment motion, this Court must determine whether a genuine issue of material fact exists. *See* Rule 56(c) SCRCP. Summary judgment is appropriate when there is no issue of genuine material fact, and the moving party is entitled to judgment as a matter of law. *Id*. Further, even "when there is no dispute as to evidentiary facts, but only as to conclusions or inferences to be drawn from them, summary judgment must be denied." *Id*.

In 2009, the South Carolina Supreme Court held "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *See Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). However, on August 23, 2023, the South Carolina Supreme Court explicitly overruled *Hancock* and its "scintilla of evidence" standard. *See Kitchen Planners v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023) (To the extent what we said in *Hancock* is inconsistent with our decision today, *Hancock* is overruled."). The Court stated:

> We now clarify that the "mere scintilla" standard does not apply under Rule 56(c). Rather, the proper standard is the "genuine issue of material fact" standard set forth in the text of the Rule…[I]t is not sufficient for a party to create an inference that it is not reasonable or an issue of fact that is not genuine.

See id., 440 S.C. at 463, 892 S.E.2d at 300.

Henceforth, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id*. 381 S.C. at 463, 892 S.E.2d at 301 (*quoting Bethea v. Floyd*, 177 S.C. 521, 529, 181 S.E. 721, 724 (1935)). "In determining whether any triable issue of fact exists,

the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." *See McNair v. Rainsford*, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998)) (*quoting Lanham v. Blue Cross & Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 361-62, 563 S.E.2d 331, 333 (2002)). "[W]hen the evidence is susceptible of only one reasonable interpretation, summary judgment must be granted." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403 489 S.E.2d 647, 648 (Ct. App. 1997).

B. Fraud in the Inducement to Enter Contract (Count 1 as to Defendants)

1. Plaintiffs' Fraud in the Inducement Claim Fails as a Matter of Law because Plaintiffs Cannot Justifiably Rely on Statements Made in the MLS Listing.

Plaintiffs' fraud in the inducement claims fail as a matter of law because they cannot meet the burden of demonstrating fraud. A party asserting a claim for fraud must establish "(1) a representation, (2) its falsity, (3) its materiality, (4) knowledge of its falsity or 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." *See First State Sav. & Loan v. Phelps*, 299 S.C. 441, 446-47, 385 S.E.2d 821, 824 (1989); *Moorehead v. First Piedmont Bank & Trust*, 273 S.C. 356, 359, 256 S.E.2d 414, 416 (1976); *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 388 S.C. 572, 586, 527 S.E.2d 371, 378 (Ct. App. 2000); *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). The right to rely must be determined in light of the plaintiff's duty to use reasonable prudence and diligence under the circumstances in identifying the truth with respect to the representations made to him. *Florentine Corp., Inc. v. PEDA I, Inc.*, 287 S.E. 382, 386, 339 S.E.2d at 114; *Parks v. Morris Homes Corp.*, 245 S.E.

461, 467, 141 S.E.2d 129, 132 (1965) (emphasis added).

To establish a claim of fraud in the inducement, a plaintiff must prove the nine elements of fraud as well as the following three elements: "(1) that the alleged fraudfeasor made a false representation relating to a present or preexisting fact; (2) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him." *See Darby v. Waterboggan of Myrtle Beach, Inc*., 288 S.C. 579, 584, 344 S.E.2d 153, 155 (Ct. App. 1986). "There is no right to rely, as required to establish fraud, where there is no confidential or fiduciary relationship and there is an arm's length transaction between mature, educated people." *Florentine Corp. v. PEDA, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985). "Failure to prove any element of fraud or misrepresentation is fatal to the claim." *O'Shields v. Southern Fountain Mobile Homes, Inc.*, 262 S.C. 276, 281, 204 S.E.2d 50, 52 (1974). Each one of the elements of fraud must be proven by clear, cogent, and convincing evidence. *See First State Sav. & Loan*, 299 S.C. at 447, 385 S.E.2d at 824; *Lundy v. Palmetto State Life Ins. Co.*, 256 S.C. 506, 510, 183 S.E.2d 335, 337 (1971). Fraud cannot be presumed. *See Foxfire Village, Inc. v. Black & Veatch, Inc*, 304 S.C. 366, 374, 404 S.E.2d 912, 917 (Ct. App. 1991).

Here, Plaintiffs allege Defendants committed fraud in the inducement by creating a MLS listing that incorrectly represented and overstated the square footage of 10 Oyster Catcher. In support, Plaintiffs point to subsequent appraisals and inspections which were not in the possession of Defendants at the time of the listing. Plaintiffs admit they solely relied upon the January 19, 2022, MLS listing for the property, which contained two prominent statements: "INFORMATION IS BELIEVED ACCURATE BUT IS NOT WARRANTEED," and "Information Deemed Reliable But Not Guaranteed." They argue these disclaimers are

"standard form disclosures, not inserted by Mr. Reichel," that they presume are intended to address instances where information is inputted in error.

The Court finds that the Plaintiff's argument regarding authorship or intent behind the MLS listing disclaimer – which stated "INFORMATION IS BELIEVED ACCURATE BUT IS NOT WARRANTEED," and "Information Deemed Reliable But Not Guaranteed" – does not diminish their purpose, which is to notify Plaintiffs of the need to conduct their own due diligence. *See Schnellman v. Roettger*, 368 S.C. 17, 21, 627 S.E.2d 742, 745 (Ct. App. 2006)

Plaintiffs' argument regarding the authorship or assumed intent behind the MLS listing disclaimer requires this Court to go beyond *Schnellmann v. Roettger* and impose additional analysis not mandated by the Supreme Court. The Court sees no reason to do so. Neither *Schnellmann*, nor its progeny evaluate the authorship or intent behind the authors of these disclaimers. *Id*. Had the Supreme Court intended to incorporate these ingredients into their analysis it would have done so. Rather, the Supreme Court was guided by the legion of cases that hold, "there is no liability for causal statements, representations as to matters of law, or matters which plaintiff could ascertain in the exercise of his own diligence." *Schnellmann, id*. at 21, 627 S.E.2d at 745; *AMA Management Corp. v. Strasburger*, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992); *Harrington v. Mikell*, 321 S.C. 518, 419 S.E.2d 627 (Ct. App. 1996); *King v. Oxford*, 282 S.C. 307, 318 S.E.2d. 125 (Ct. App. 1984). So, too, must this Court be guided.

This Court finds that Plaintiffs' cause of action for fraud in the inducement fails because Plaintiffs' reliance on the square footage noted in the MLS listing was not reasonable. Plaintiffs, through a simple investigation, could have easily discovered the actual square footage of the house. *Id.*; *Schnellmann v. Roettger*, 368 S.C. 17, 627 S.E.2d 742 (Ct. App.

2006). In *Schnellmann*, plaintiffs filed suit against a listing agent when they purchased a property identified in the MLS as 3,350 sq. ft., and learned, after closing, the property was only 2,987 sq. ft. *See Id*. at 20, 744. A summary appraisal revealing the lower square footage was obtained prior to the closing, but the report was not requested by the Schnellmanns. *Id*. The Court found:

> The Schnellmanns could have discovered the misstatement by simply requesting a copy of the appraisal or by having someone come in to measure the property. They were informed via the MLS listing that the measurements were not precise. The Schnellmanns viewed the house, and proceeded with the purchase without finally determining the exact square footage. In light of the evidence presented, we agree with the trial court's conclusion that if the Schnellmanns relied on the approximation of the square footage contained in the listing, such reliance was unreasonable as a matter of law. *Id.* (emphasis added).

There is no difference in kind between Plaintiffs claims and those reviewed by the court in *Schnellmann*. Plaintiffs here, like the plaintiffs in *Schnellmann*, were presented with a MLS which contained two disclosures providing the information therein "is believed accurate but is not warranted," and "deemed reliable but not guaranteed." Despite these disclosures, the Plaintiffs chose not to have the home measured, and they chose not to ask agents, or any other professionals involved in the transaction, to measure the property. They also chose not to ask for prior appraisals, or inspections. They chose not to see the home in-person. Their decision not to see the home in-person was a temerarious choice, as Mrs. Bernardon testified, she would have perceived the home's size:

Q: So you know a 3,300 square foot house?

A: I know what to expect with a 3,300 square foot house.

Q: What do you mean, what to expect?

A: In other words, how comfortably my family can be, how we can put a

couch here or put a chair there or be able to live with that.

Q: Do you believe if you had seen the home in person that you would have known you weren't in a home that's 3,300 square feet since you can perceive it?

A: I mean, if I would have – yes. I think that it would have felt smaller to me.

(*See* Def.'s Ex. F, at 45:7-18).

As a matter of law, Plaintiffs cannot establish the eighth requisite requirement of fraud. The principle of the eighth requirement to demonstrate fraud, the right to rely upon representations, is closely bound up with a duty on the part of the plaintiff to use some measure of protection and precaution to safeguard his own interest. *Thomas v. Am. Workmen*, 197 S.C. 178, 182, 14 S.E.2d 886, 888 (1941). *See Schnellmann v. Roettger*, 368 S.C. 17, 23, 627 S.E.2d 742, 745 (Ct. App. 2006) (*quoting Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 348 565 S.E.2d, 309, 314 (Ct. App. 2002). This includes casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own, like those made in the MLS listing here. *See West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000).

Though not binding, this was principle was affirmed again in *Alpha Contracting Services, Inc. v. Household Finance Corp., II*, where the court ruled against a finance company that purchased a residence without measuring and later learned it was 1,000 sq. ft. less than the amount represented in the MLS. *Alpha Contracting Services, Inc. v. Household Finance Corp.*, II, No. 2011-UP-289, 2011 WL 11734662, at *2 (S.C. Ct. App. June 13, 2011). In *Alpha Contracting Services*, the court found:

> Like the purchasers in *Schnellman*, Alpha failed to take its own measurements of the home's square footage. Therefore, Alpha's reliance on the square footage indicated in the MLS listing was unreasonable as a matter of law. Alpha cannot obtain

> compensation from Respondents if it has not exercised its own due diligence. *Id.*

In keeping with the court's decisions in *Schnellmann* and *Alpha Contracting Services*, This Court finds these Plaintiffs cannot claim to have reasonably relied upon statements made in the MLS listing. Because the Plaintiffs have not satisfied at least one of the elements of fraud – reasonably reliance, they are precluded from recovery for this cause of action.

Accordingly, Defendants' motion for summary judgment on the fraud in the inducement claim against Sea Pines Real Estate at the Beach Club, Robert Reichel, Mark Damiano, and Ellery Damiano is GRANTED.

C. Unjust Enrichment (Count 2 as to Defendants)

1. Plaintiffs' Unjust Enrichment Claims Fail as a Matter of Law

Also known as quantum meruit, a claim for unjust enrichment requires three elements: (1) plaintiff conferred a benefit to defendant, (2) defendant knowingly and voluntarily accepted the benefit, and (3) it was unjust for defendant to retain that benefit without paying its value. *See Williams Carpet Contractors, Inc. v. Shelly*, 734 S.E.2d 117 (Ct. App. 2012). "[I]f the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract, which has not been abandoned or rescinded, the plaintiff may not recover under quantum meruit." *Swanson v. Stratos*, 350 S.C. 116, 121 564 S.E.2d 117, 119 (Ct. App. 2002). "Absent an express contract, recovery under quantum meruit is based on quasi-contract." *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 616, 703 S.E.2d at 221, 225 (2010). "[I]t is a defense to an action in quantum meruit that there is an express contract covering the issue of compensation for services or materials furnished. *Swanson*, 350 S.C. at 122, 564 S.E.2d at 120 (citing 66 Am. Jur.2d *Restitution and Implied Contracts* § 81 (2001). The normative function of an unjust enrichment claim permits the court

to craft an agreement where there was none when a party retains money or benefit which, in justice, equity, and good conscience belongs to someone else. This may only occur when there is no contract outlining the tasks Plaintiff is seeking compensation for.

Plaintiffs' unjust enrichment claims are supported by their contention that, "Sea Pines Real Estate and Defendant Rob Reichel were unjustly enriched by the commissions earned despite not disclosing material information to the Bernardons, or their agent." (*See* Def.'s Ex. N, at ¶ 22). In support, Plaintiffs argue their reliance on the contents of MLS listing led to the purchase of 10 Oyster Catcher, which caused Mr. Reichel and Sea Pines at the Beach Club to receive a commission from the funds tendered at the closing. (*See* Plt.'s Memo at p. 9-10).

Here, the evidence reflects there was no fiduciary or contractual relationship between Plaintiffs and Robert Reichel or Sea Pines Real Estate at the Beach Club, who never spoke, met, or corresponded with them. Further, there is no provision in the contract between Plaintiffs and Defendants that deals with Rob Reichel's or Sea Pines Real Estate at the Beach Club's commissions. Instead, the parties' contract contains a broker disclaimer outlining the very issue they appeal to this Court for relief from:

> **12. BROKER DISCLAIMER**
> Seller and Purchaser agree that as brokers, as listed on page 7 of this Contract, are acting only as real estate agents or brokers in this transaction and as such have no responsibility for and make no oral or written representations concerning the condition of the premises...Seller and Purchaser acknowledge that the brokers: (1) give no guarantee or warranty of any kind, express or implied, as to the physical condition of the property...(3) give no guaranty or warranty concerning any inspection or report concerning the Property or the accuracy of any published square footage of the Property…The Selling Agent, or the transaction broker providing services to Purchaser, recommends that the Purchaser obtain professional inspections of the Property.

(*See* Def.'s Ex. J, ¶ 12) (emphasis added). This Court finds that the plain language of this

clause clearly indicates Plaintiffs understanding that the agents involved in the transaction not be held accountable for statements or representations outside of the parties' agreement, specifically statements regarding the published square footage of the property. It also demonstrates their awareness that the brokers involved in the transaction were retained for services solely within their scope of expertise. *See M&M Group, Inc. v. Holmes*, 379 S.C. 468, 666 S.E.2d 262 (Ct. App. 2008) (the intention of contracting parties can be discerned from the scope and effect of the language used). These provisions, coupled with the fact that the contract between the parties was not rescinded or abandoned, bars the cause of action against Rob Reichel and Sea Pines Real Estate at the Beach Club. *See Strickland v. Coastal Design Associates, Inc.*, 294 S.C. 421, 424, 365 S.E.2d 226, 228; *See also* 66 Am.Jur.2d Restitution and Implied Contracts, Section 83 (1973).

To the extent Plaintiffs seek to recover damages through a quasi-contract claim, I would agree that South Carolina law permits parties to pursue quasi-contractual claims; however, that avenue is only available when there is no valid contract between parties, or there is some question as to whether a contract is enforceable or applies to dispute. *See Boldt Co. v. Thomason Elec. & Am. Contractors Indem. Co.*, 820 F.Supp.2d 73, 707 (D.S.C.2007) (adopted by court in *56 Leinbach Investors, LLC v. Magnolia Paradigm, Inc.*, 411 S.C. 466, 479, 769 S.E.2d 242, 249 (Ct. App. 2014). Here, there is a valid contract between Plaintiffs and Damiano Defendants which, for the reasons discussed above and in addressing Plaintiffs' fraud in the inducement claims, disposes of Plaintiffs' cause of action against the moving Defendants.

There is no evidence in support of Plaintiffs' claim for unjust enrichment. Accordingly, Defendants' motion for summary judgment on the unjust enrichment claim

against Sea Pines Real Estate at the Beach Club, Robert Reichel, Mark Damiano, and Ellery Damiano is GRANTED.

D. Breach of Contract and Rescission (Count 3 and 4 as to all Defendants)

1. Plaintiffs' Breach of Contract Claims Fail as a Matter of Law, and They Have Abandoned Their Claims for Rescission.

a. There is no contract, express or implied, between Plaintiffs and Rob Reichel, or Sea Pines at the Beach Club.

The necessary elements of a contract are an offer, acceptance, and valuable consideration. *See Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). Under the Statute of Frauds, contracts for sale of real property must be reduced to a signed writing in order to be enforceable. S.C. Code Ann. § 32-3-10(4) (2007). To satisfy the Statute of Frauds, "every essential element of the contract must be expressed in a writing signed by the party to be compelled." *Fici v. Koon*, S.C. 341, 346, 642 S.E.2d 602, 604 (2007). "The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be use to contradict, vary, or explain the written instrument." *Iseman v. Hobbs*, 290 S.C. 482, 351 S.E.2d 351 (Ct. App. 1986). "The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491-92, 732 S.E.2d 205, 209 (Ct. App. 2012). A breach of contract claim warranting rescission of the contract must be so substantial and fundamental as to defeat the purpose of the contract. *See Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 143, 382 S.E.2d 915, 917 (1989).

Here, there is no evidence that a contract between Plaintiffs and Rob Reichel, or Sea Pines Real Estate at the Beach Club exists. As a result, Plaintiffs' breach of contract claim

fails. *See Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752. ("Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract) (*quoting Bob Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994)). Applying the same reasoning, Plaintiffs' cause of action for rescission also fails. *See Davis v. Cordell*, 237 S.C. 88, 98, 115 S.E.2d 649, 654 (1960) ("there can be no rescission of a nonexistent contract").

There is no evidence in support of Plaintiffs' claim for breach of contract against Robert Reichel or Sea Pines Real Estate at the Beach Club. Accordingly, Defendants' motion for summary judgment on the breach of contract claim against Robert Reichel and Sea Pines Real Estate at the Beach Club is GRANTED.

b. Plaintiffs' Claim that the Damiano Defendants Breached the Parties' Contract also fails as a matter of law.

Plaintiffs' breach of contract claims against the Damiano Defendants rests on their contention that "material errors in the listing [of the home]" resulted in a "breach of contract." Plaintiffs and Damiano Defendants aver that they entered into a contract for the sale of 10 Oyster Catcher; however, the parties' agreement does not contain provisions regarding the square footage of the property. (*See* Def.'s Ex. J) The parties' contract also includes an integration clause which provides, "This Contract constitutes the entire agreement between the parties hereto and may only be modified in writing." (*Id.*).

This Court finds that Plaintiffs' breach of contract claims against the Damiano Defendants fail for multiple reasons. First, the parties' contract contained no provisions regarding the home's square footage. *See Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 480, 642 S.E.2d 726, 731 (2007) (Finding when there is no breach there can be no recovery). The second, Plaintiffs' argument that material errors in the MLS listing, an extrinsic

document, is unavailing because the parties' agreement contains an integration clause. Further, the Appellate Court has examined cases with similar facts and found square footage representations in MLS listings are not considered part of the contract for the sale of a home. *See Alpha Contracting Services, Inc., v. Household Finance Corp.*, II, 2011 WL 11734662, at *5 (Ct. App. 2011) (*quoting Gilliland v. Elmwood Props.*, 301 S.C. 295, 302, 391 S.E.2d 577, 587 (1990) (holding square foot representations in MLS listings are not part of a contract when the contract has no provisions regarding square footage and the parties' agreement contains an integration clause).

There is no evidence in support of Plaintiffs' claim for breach of contract against Mark Damiano or Ellery Damiano. Accordingly, Defendants' motion for summary judgment on the breach of contract claim against Mark Damiano and Ellery Damiano is GRANTED.

c. Plaintiffs Have Abandoned Their Claim for Rescission.

Defendants expressly moved for summary judgment on Plaintiffs' claim for rescission, however; Plaintiffs did not reference those claims in opposition or address any of Defendants' arguments, therefore Plaintiffs' claim for rescission is deemed abandoned, and summary judgment on those claims is GRANTED in favor of Sea Pines at the Beach Club, Robert Reichel, Mark Damiano, and Ellery Damiano.

E. Breach of Fiduciary Duty (Count 5 as to Sea Pines Real Estate at the Beach Club and Robert Reichel)

1. Rob Reichel and Sea Pines Real Estate at the Beach Club Were Not Plaintiffs' Fiduciaries

"A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith with regard to the interest of one imposing the confidence." *Davis v. Greenwood Sch. Dist. 50*, 365

S.C. 629, 635, 620 S.E.2d 65, 68 (2005). To establish a claim for breach of fiduciary duty, a plaintiff must show (1) the existence of a duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from general wrongful conduct of the defendant. *See generally Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) (discussing the elements of a breach of fiduciary duty claim).

When a real-estate broker is engaged to represent the interests of a seller in a real estate transaction, the broker stands in the position of a fiduciary for the seller. *See* Am. Jur. 2d, Brokers § 110; Real estate agents occupy a fiduciary relationship with their clients and are under a legal obligation to give loyal service to the principal. *See Hamby v. St. Paul Mercury Indemn. Co.*, 217 F.2d 78, 80 (4th Cir.1954); *Designer Showrooms, Inc. v. Kelley*, 304 S.C. 478, 481, 405 S.E.2d 417, 419 (Ct. App. 1991).

It is an uncontroverted fact that Rob Reichel and Sea Pines Real Estate at the Beach Club were not Plaintiffs' agents. Plaintiffs attest they did not meet, correspond, or speak with Mr. Reichel or an agent, employee, or assign of Sea Pines Real Estate at the Beach Club at any time relevant to this matter. (*See* Def.'s Ex. F, 18:1-20:7) Further, there is no evidence Plaintiffs entrusted Mr. Reichel with special confidences. *See O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992) ("a fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the one reposing confidence"). Against this background, it cannot be said that Rob Reichel and Sea Pines Real Estate at the Beach Club owed a fiduciary duty to the Plaintiffs. *See Harrington v. Mikell*, 321 S.C. 518, 522, 469 S.E.2d 627, 629 (Ct. App. 1996) (holding that defendant as agent of seller owed no fiduciary duty to buyer); *see also Lengel v. Tom Jenkins Realty, Inc.*, 286 S.C. 515, 518, 334 S.E.2d 834, 836 n.1 (Ct. App. 1985)

(recognizing a real estate agent employed by a seller is the seller's agent and no fiduciary duty exists between the seller's agent at the buyer).

The Plaintiffs have supplied no evidence to suggest that Rob Reichel or Sea Pines Real Estate at the Beach Club were Plaintiffs fiduciaries, or that they held themselves out in that fashion. It follows then that they could not have breached a fiduciary duty owed to Plaintiffs. As a result, Plaintiffs breach of fiduciary duty claims fail as a matter of law and summary judgment is GRANTED to Robert Reichel and Sea Pines Real Estate at the Beach Club.

CONCLUSION

I conclude there are no genuine issues of material fact, and the Plaintiffs have failed to prove all of the essential elements of each of the causes of action against the moving Defendants. Defendants Sea Pines Real Estate at the Beach Club, Robert Reichel, Mark Damiano, and Ellery Damiano are entitled to summary judgment under Rule 56(c) of the South Carolina Rules of Civil Procedure.

AND IT IS SO ORDERED.

_____
ROBERT J. BONDS
PRESIDING JUDGE

This ____ day of_____, 2024
Beaufort, South Carolina

Beaufort Common Pleas

Case Caption: Roland Bernardon , plaintiff, et al VS Mark Damiano , defendant, et al

Case Number: 2022CP0702483

Type: Order/Summary Judgment

So Ordered

s/ Robert Bonds, 2770