

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

Circuit Court Case No. 2009-CP-26-5743

Hotel and Motel Holdings, LLC,

Respondent,

v.

BJC Enterprises, LLC, Wendy J. Bellamy, Americana, Inc.,
a/k/a Americana Motel of Myrtle Beach, Inc., Mozingo & Wallace
Architects, LLC, Kersi S. Shroff, and Shroff Management, Inc.,

Defendants.

BJC Enterprises, LLC, Wendy J. Bellamy, Americana, Inc.,
a/k/a Americana Motel of Myrtle Beach, Inc.,

Appellants,

v.

First Palmetto Savings Bank, F.S.B., Jack Jones,
Donald D. Godwin, and Bhupendra Patel,

Respondents.

**INITIAL BRIEF OF RESPONDENT FIRST PALMETTO SAVINGS BANK,
F.S.B.**

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court correctly grant summary judgment to Respondent First Palmetto Savings Bank, F.S.B. ("First Palmetto") on the third-party claims brought by Appellants BJC Enterprises, LLC ("BJC"), Wendy J. Bellamy, and Americana, Inc. ("Americana") (collectively, "Appellants") for breach of contract, breach of contract accompanied by fraud, and civil conspiracy in this action following BJC's' default on a loan made by First Palmetto?

STATEMENT OF THE CASE

This appeal stems from third-party claims raised by the defaulting borrower and guarantor following the filing of a foreclosure action. On or about January 14, 2005, BJC borrowed the principal sum of \$5,573,146.62 from First Palmetto to purchase Emerald Shores, an oceanfront hotel, and its first row parking lot (the "Loan"). (Amended Answer, Counterclaims and Third-Party Complaint (hereinafter "Answer") ¶ 15, R. at ____). First Palmetto filed the instant foreclosure action on June 11, 2009. (Complaint, R. at ____).

After foreclosure proceedings were commenced, First Palmetto sold the loan documents evidencing the Loan to Hotel and Motel Holdings, LLC ("H & M") for \$5,000,000.00 on June 30, 2009. (J. Jones Dep. [Ex. C], p. 111, lines 3-14, R. at ____). On September 11, 2009, H & M was substituted as plaintiff in this foreclosure action. (Order of Substitution, R. at ____). In response to the foreclosure complaint, Appellants answered and filed an Amended Answer, Counterclaims and Third-Party Complaint on June 9, 2010. (Answer, R. at ____).

The Third-Party Complaint alleged the following causes of action against First Palmetto: breach of contract, fraud, breach of contract accompanied by a fraudulent act, civil conspiracy, conversion, intentional infliction of emotional distress/outrage, and violation of the South Carolina Unfair Trade Practices Act. (Answer, R. at ____). First Palmetto answered on July 23, 2010, asserting the following defenses to the allegations of the Third-Party Complaint: (1) general denial; (2) improper third-party complaint; (3) failure to state a claim; (4) equitable defenses; (5) failure to mitigate; (6) failure to plead acts in furtherance of civil conspiracy claim; (7) good faith; (8) lack of proximate cause;

(9) intervening events; (10) absence of public impact with respect to unfair trade practices claim; (11) failure to plead fraud with particularity; and (12) statute of limitations. (First Palmetto Answer, R. at ____).

By Order entered October 15, 2010, the causes of action for conversion, interference with contractual relationship, intentional infliction of emotional distress, breach of fiduciary duty, fraud, and violation of the South Carolina Unfair Trade Practices Act were stricken as improper third-party claims under Rule 14, SCRCP.¹ (10/15/10 Order, R. at ____). At that time, the remaining claims asserted against First Palmetto were breach of contract, breach of contract accompanied by a fraudulent act, and civil conspiracy.

On May 2, 2011, First Palmetto moved for summary judgment on the remaining claims. (Motion, R. at ____). As set forth fully in its memorandum in support, First Palmetto argued that there was no evidence showing it breached any contract with the Appellants with respect to its handling of the Loan and the events surrounding the ultimate default, foreclosure action, and assignment to H & M. (Memo, R. at ____). First Palmetto further argued there could be no breach of contract accompanied by a fraudulent act in the absence of a breach of contract, and that Appellants had not alleged any fraudulent act given the Loan's undisputed history. (Memo, R. at ____). With respect to civil conspiracy, First Palmetto argued that the Third-Party Complaint failed to state a claim because it did not identify any special damages separate and apart from its damages for its other claims. (Memo, R. at ____).

¹ On June 7, 2011 and out of an abundance of caution, First Palmetto filed a Motion to Strike and Dismiss the third-party claims specific to First Palmetto. (Motion, R. at ____). That Motion was granted by order dated July 25, 2011 as to all third-party claims except breach of contract. Appellants have not appealed this order. (7/25/11 Order, R. at ____).

A hearing was held on May 12, 2011, and the trial court granted First Palmetto's motion for summary judgment by order dated June 1, 2011. (6/1/11 Order, R. at ____). The trial court found there was no evidence that First Palmetto breached any contract with Appellants, and thus their claims for breach of contract and breach of contract accompanied by fraud failed. With respect to the civil conspiracy claim, the trial court determined that Appellants failed to plead special damages and granted summary judgment. Appellants moved to reconsider, and the trial court denied that motion by order dated July 25, 2011. (7/25/11 Order, R. at ____). Appellants served a Notice of Appeal on August 26, 2011.

FACTS

With respect to First Palmetto, the facts of this case are not complicated. On or about January 14, 2005, BJC borrowed the principal sum of \$5,573,146.62 from First Palmetto to purchase Emerald Shores, an oceanfront hotel, and its first row parking lot. (Answer ¶ 15, 2005 Note, R. at ____). In connection with this loan transaction, BJC pledged the Emerald Shores property, and Bellamy and Americana pledged certain real property located behind Emerald Shores, including the Rainbow Court Motel (collectively, the "Mortgaged Property"). (Answer ¶ 20, 2005 Mortgages, R. at ____). Additionally, Bellamy executed and delivered a Guaranty to First Palmetto guaranteeing BJC's obligations under the Loan. (W. Bellamy Dep. p. 26, lines 7-9), R. at ____). The Loan matured in January 2007, and it was renewed for 12 months. (B. Hutto Dep. p. 66 line 24 to p. 67, line 3, 2007 Note and Mortgages, R. at ____). In connection with the January 2007 renewal, Bellamy executed and delivered a Guaranty to First Palmetto, again guaranteeing BJC's obligations under the Loan. (W. Bellamy Dep. p. 41, lines 1-10, R. at ____).

In January 2008, the Loan matured and it was again renewed by note dated January 17, 2008, which renewal extended the maturity date of the Loan until January 17, 2009. (B. Hutto Dep. p. 67, lines 7-13, 2008 Note and Mortgages, R. at ____). In connection with the January 2008 renewal, Bellamy executed and delivered a Guaranty to First Palmetto, once again guaranteeing BJC's obligations under the Loan. (W. Bellamy Dep. p. 47, lines 5-11, R. at ____).

When the Loan matured on January 17, 2009, the Note was not paid in full and therefore was in default. (W. Bellamy Dep. p. 50 line 23 to p. 51, line 7, R. at ____). Thereafter, First Palmetto filed a foreclosure action on February 2, 2009, but dismissed the action without prejudice on February 13, 2009 based upon an agreement that First Palmetto would forbear from exercising its rights under the loan documents if BJC paid the taxes and made an interest payment of \$150,000.00 by May 31, 2009. (W. Bellamy Dep. p. 92 line 15 to p. 93 line 4; p. 102, lines 12-16, R. at ____). BJC failed to make the May 31, 2009 payment, and First Palmetto filed the foreclosure action on June 11, 2009. (Complaint, R. at ____).

STANDARD OF REVIEW

Summary judgment is warranted when there is no genuine issue of material fact and it appears that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCPP; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Material facts are those identified by controlling substantive law as essential elements of claims and defenses. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A court must view the facts and inferences reasonably drawn from them in the light most favorable to the non-moving party. *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

If a motion has been properly made and supported in accordance with Rule 56, the non-moving party may not rest on its pleadings but must come forward with specific facts showing that there is a genuine issue for trial. Rule 56(e), SCRPC; *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004).

The trial court must rule based “on the record the parties have actually presented, not on one potentially possible.” *Spencer v. Miller*, 259 S.C. 453, 456, 192 S.E.2d 863, 865 (1972). To that end, when “faced with a [summary judgment motion] that is supported by evidence, [a party] cannot defeat the motion by relying upon the mere allegations of his [pleadings] but must disclose the facts he intends to rely on by affidavit or other proof.” *Shupe v. Settle*, 315 S.C. 510, 516, 445 S.E.2d 651, 655 (Ct. App. 1994). This showing must be based on evidence that would be admissible at trial. *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002).

ARGUMENTS

I. THE TRIAL COURT CORRECTLY FOUND THERE IS NO EVIDENCE SUPPORTING THE APPELLANTS’ BREACH OF CONTRACT CLAIM AGAINST FIRST PALMETTO.

Appellants do not allege any particular provision or provisions of the loan documents that have been breached. Instead, they assert that First Palmetto breached its duty of good faith and fair dealing.²

In South Carolina, a covenant of good faith and fair dealing is implied in every contract. *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966). That duty of good faith and fair dealing does not expand the terms of the contract as written. Instead, “the law will imply an agreement to do those

² Appellants’ argument relating to the alleged breach of contract by First Palmetto only includes two citations: one defining the elements of a breach of contract claim and the other providing that every contract contains an implied duty of good faith and fair dealing.

things that according to reason and justice should be done to carry out the purpose for which the contract was made.” *Columbia East Assocs. v. Bi-Lo, Inc.*, 299 S.C. 515, 520-21, 386 S.E.2d 259, 262 (Ct. App. 1989). There is no breach of the implied covenant of good faith by conduct that the law permits. *See Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (holding “there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do”). Moreover, a claim for breach of the covenant of good faith and fair dealing cannot stand if the party seeking damages has not performed under the contract. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) (“[O]ne who seeks to recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready, and willing to perform it.”) (citation omitted).

It is uncontested that Appellants were in default under the loan documents in January 2009 and again when they failed to make the \$150,000 payment as of May 31, 2009. Because Appellants were in breach of their duties under the parties’ agreement, Appellants’ claim for breach of the implied covenant of good faith and fair dealing fails as a matter of law. *Id.*

In addition, the Appellants do not address the trial court’s ruling that there was no breach of the implied covenant of good faith and fair dealing because there was no showing that First Palmetto had anything to do with Appellants’ failure to make the May 31, 2009 payment. (6/1/11 Order at 2-3, R. at ____). The evidence shows that First

Palmetto told Bellamy in no uncertain terms that payment was due on May 31, 2009. (*Id.* at 3, W. Bellamy Dep. p. 101, lines 11-22, R. at ____).

Appellants do not cite these principles, nor do they acknowledge the defaults. They allege only that First Palmetto was “intentionally failing to disclose its ongoing negotiations and plans to sell the BJC loan to Jack Jones for his benefit and to the detriment of its own customer, BJC.” To support this claim, Appellants reference several events, each of which is addressed separately below.

A. First Palmetto did not breach the implied covenant of good faith and fair dealing by mailing a letter to the address of record on the loan documents.

First, Appellants argue that First Palmetto breached its implied obligation of good faith and fair dealing because it was aware of Bellamy’s suicide attempt when it made an offer to renew the loan and sent it to an address where First Palmetto knew Third-Party Plaintiffs would not receive it. These arguments were not raised by Appellants until their Motion to Reconsider. (Motion at 3; 7/25/11 Order at 4-5, R. at ____). Accordingly, these arguments are not preserved for this Court’s review. *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999) (holding issue not preserved for appellate review where it was raised for the first time in a Rule 59(e), SCRCPC motion).

To the extent this notice argument is considered, whether or not First Palmetto was aware of Bellamy’s suicide attempt has nothing to do with whether First Palmetto breached its agreement with Appellants. First Palmetto sent the notice to the address of record under the loan documents. (*See* Hutto letter dated 11/24/08, 2005 Mortgage, 2008 Mortgage Modifications, R. at ____). There is absolutely no evidence to suggest that First Palmetto knew or should have known mail would not be received at that address.

Thus, First Palmetto performed as directed by the loan documents, and there is no violation of the implied covenant of good faith and fair dealing. *See Adams*, 320 S.C. at 277, 465 S.E.2d at 85.

B. First Palmetto did not breach the implied covenant of good faith and fair dealing in its handling or sale of the Loan.

Second, Appellants argue First Palmetto breached its implied covenant of good faith and fair dealing in its dealings with Jones. As an initial matter, Appellants have not previously argued these events were in violation of the implied covenant of good faith and fair dealing. Because this is a new argument, it is not preserved for review by this Court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) (holding an argument must have been raised to and ruled on by the trial court to be preserved for appellate review). Moreover, even if considered, the argument fails on its merits.

1. Nothing in the loan documents prevented First Palmetto from selling or assigning the Loan.

Appellants attempt to state that there was some breach of the implied covenant of good faith and fair dealing based on the sale of the Loan following the May 31, 2009 default. Even assuming the sale of the Loan was for no consideration and not an arm's length transaction, which First Palmetto denies, such allegations are of no consequence because the loan documents did not prohibit First Palmetto from selling or assigning the loan documents. (*See* 2005, 2007, and 2008 Notes and Mortgages, R. at ____). First Palmetto performed its obligations under the loan documents when it loaned money to BJC. First Palmetto does not breach its obligations under the loan documents if it sells or assigns its rights under the loan documents to a third party.

Appellants cannot (and do not even allege) that the loan documents prohibit First Palmetto from selling or assigning the loan documents, nor was there any requirement of

notice prior to sale or assignment of the Loan. Furthermore, it is undisputed that the sale and assignment of the loan documents was for substantial consideration— \$5,000,000.00 (paid partly in cash and partly with a new loan)— which represents only a nominal discount on the Loan which had a principal balance of \$5,029,708.41. Thus, this argument fails, because First Palmetto was acting within its rights under the loan documents. *See Adams*, 320 S.C. at 277, 465 S.E.2d at 85.

2. Nothing about First Palmetto's contacts with Jones evidences any breach of the implied covenant of good faith and fair dealing.

Appellants further contend that First Palmetto somehow breached the terms of the loan documents in its dealings with Jones between January and June 2009. The timing of these events is important because the Loan fell into default in January 2009. Therefore, Appellants cannot prevail on a claim for breach of the implied covenant of good faith and fair dealing because they had not performed their contractual obligations with respect to the Loan. *See Swinton Creek Nursery*, 334 S.C. at 487, 514 S.E.2d at 135.

In addition, there was nothing improper about First Palmetto's dealings with Jones. As found by the trial court, "there is no evidence that Bank had any contractual duty to not disclose information about the loan to potential buyers once the loan was in default." (6/1/11 Order at 4, R. at ____).

In South Carolina, there is no fiduciary relationship between a bank and its customer. *See Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986). In addition, First Palmetto did not owe a duty of confidentiality to Appellants. Although South Carolina courts have not addressed this specific issue, courts in other jurisdictions have held that a bank does not owe a duty of confidentiality to a borrower where the borrower is in default of its loan obligations and the bank is

marketing the loans for sale. *See, e.g., Hopewell Enters. v. Trustmark Nat'l Bank*, 680 So.2d 812, 817 (Miss. 1996); *Schoneweis v. Dando*, 435 N.W.2d 666, 672-73 (Neb. 1989); *Graney Dev. Corp. v. Taksen*, 400 N.Y.S.2d 717, 720 (N.Y. Sup. Ct. 1978).

Appellants contend that First Palmetto breached its implied obligation of good faith and fair dealing when it advised BJC and its members that it was negotiating a workout of the loan while simultaneously negotiating the sale of the loan. Appellants appear to assert that these actions are mutually exclusive such that the sale of the loan could not constitute a workout. They also appear to assert that such negotiations were done without their knowledge. The evidence, however, does not support this assertion, and in fact, Bellamy admitted that she was present during discussions between First Palmetto and Jones regarding the sale of the loan. (W. Bellamy Dep. p. 140, lines 1-22, R. at ____). Furthermore, there is nothing within the loan documents prohibiting First Palmetto from negotiating and consummating the sale of the Loan. This fact, coupled with the knowledge and acquiescence of Appellants in the sale of the Loan, compels a finding that First Palmetto has not breached its implied obligation of good faith and fair dealing by negotiating the sale of the loan documents.

Appellants have cited no case law in support of their argument that there was anything inappropriate about First Palmetto's dealings with Jones. Here, the relationship between First Palmetto and Appellants was that of bank and borrower. Appellants concede they were in default at the time of these contacts; therefore, there is no evidence showing any breach of the implied covenant of good faith and fair dealing.

II. THE TRIAL COURT CORRECTLY FOUND THAT APPELLANTS' CLAIM FOR BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT FAILS AS A MATTER OF LAW.

Breach of contract accompanied by a fraudulent act is a cause of action that sounds in contract. *Peeples v. Orkin Exterminating Co.*, 244 S.C. 173, 178, 135 S.E.2d 845, 847 (1964); *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 144, 494 S.E.2d 449, 455 (Ct. App. 1997). "There is no cause of action distinct from breach of contract for breach of contract accompanied by a fraudulent act." *Smith v. Canal Ins. Co.*, 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980). "In order to recover punitive damages for breach of contract, the plaintiff must show the breach was accomplished with a fraudulent intention and was accompanied by a fraudulent act." *Thompson v. Home Security Life Ins.*, 271 S.C. 54, 55, 244 S.E.2d 533, 534 (1978). A fraudulent act is an act characterized by dishonesty in fact, unfair dealing, or unlawful appropriation of another's property by design. *Foxfire Village, Inc. v. Black & Veatch, Inc.*, 304 S.C. 366, 375, 404 S.E.2d 912, 918 (Ct. App. 1991).

As argued above, Appellants have failed present any evidence showing a breach of contract and specifically a breach of the implied covenant of fair dealing. Therefore, this claim fails as a matter of law, and the trial court correctly granted summary judgment in First Palmetto's favor.

III. THE TRIAL COURT CORRECTLY FOUND THAT APPELLANTS FAILED TO STATE A CLAIM FOR CIVIL CONSPIRACY.

On appeal, Appellants allege that First Palmetto joined with H & M, Jones, Donald Goodwin, Bhupendra Patel and caused them to default on the Loan. Appellants did not, however, allege facts sufficient to state a cause of action for civil conspiracy.

Moreover, they do not address the trial court's finding that they failed to allege special damages in their brief.

If a claim for civil conspiracy merely re-alleges or incorporates acts previously alleged to support other claims and fails to allege additional acts in furtherance of the conspiracy, the claim fails to state a cause of action under South Carolina law. *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981); *Vaught v. Waites*, 300 S.C. 201, 208-09, 387 S.E.2d 91, 95 (Ct. App. 1989).

The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se. . . . Because the quiddity [i.e., the essence] of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action.

Pye v. Estate of Fox, 369 S.C. 555, 567-68, 633 S.E.2d 505, 511 (2006) (citations omitted). "Special damages must be properly pled, or the claim for civil conspiracy will be dismissed." *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 168, 708 S.E.2d 218, 223 (Ct. App. 2011). A plaintiff is not entitled to proceed on a conspiracy claim if the damages claimed for the alleged conspiracy overlap with or are subsumed by the damages sought for other causes of action. *Parkman v. Univ. of S.C.*, 44 Fed. Appx. 606, 620 (4th Cir. 2002).

In this case, Appellants have merely incorporated the allegations of their other third-party claims into their claim for civil conspiracy, and they have not alleged any additional acts in furtherance of the conspiracy. (Answer, R. at ____). In addition, Appellants have not alleged any special damages arising from the alleged conspiracy that are different from or in addition to the damages they claim under their other causes of

action. (Answer, R. at ____). Accordingly, the trial court correctly granted summary judgment as to this cause of action.

CONCLUSION

First Palmetto does not deny that Bellamy has had a difficult time over the past several years, but that fact alone does not make the Appellants' third-party claims viable given the facts of this case and the Appellants' default under the loan documents. Unlike the Appellants, First Palmetto fully performed its obligations under the parties' agreements. Therefore, for all of the above reasons, this Court must affirm the trial court's order granting summary judgment to First Palmetto.

Respectfully submitted,

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