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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas,

Robert Bonds, Circuit Court Judge

Case No. 2022-CP-07-2484

Appellate Case No. 2025-00384

Roland Bernardon and Louise Bernardon,

Appellants

v.

Mark Damiano, Ellery K. Damiano, Sea Pines Real Estate at the Beach Club, Robert Reichel, and John McMahon,

of whom Mark Damiano, Ellery K. Damiano, Sea Pines Real Estate at the Beach Club, Robert Reichel are

Respondents

SUPPLEMENT TO RECORD ON APPEAL

Submitted by:

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INDEX TO SUPPLEMENT TO RECORD ON APPEAL

STATE OF SOUTH CAROLINA **COUNTY OF BEAUFORT**	)	**IN THE COURT OF COMMON PLEAS** **FOURTEENTH JUDICIAL CIRCUIT**
ROLAND BERNARDON AND LOUISE BERNARDON **Plaintiff (s)** **v.** **MARK DAMIANO, ELLERY K. DAMIANO, SEA PINES RESORT LLC, SEA PINES REAL ESTATE AT THE BEACH CLUB, ROBERT REICHEL and JOHN P. MCMAHON,** **Defendants**	)	**CIVIL ACTION NO.: 2022-CP-07-02483** **MOTION TO ALTER, AMEND AND RECONSIDER ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS**

TO THE DEFENDANTS ROBERT REICHEL AND SEA PINES REAL ESTATE AT THE BEACH CLUB, COUNSEL RICHARDSON PLOWDEN, AND THE HONORABLE COURT:

Plaintiffs Roland Bernardon and Louise Bernardon, through their undersigned counsel, move the Honorable Court to reconsider, alter, and amend the Order granting Defendants' Motions for Summary Judgment entered by the Honorable Robert Bonds on December 16, 2024.

Plaintiffs aver and shall show unto the Honorable Court that there are genuine issues of material fact which if found in favor of the Plaintiffs defeat summary judgment on one or more of Plaintiffs causes of action against all party Defendants and which will cause Plaintiffs to prevail under their Complaint at trial.

Plaintiffs will support this Motion with a Memorandum of Law in Opposition prior to the hearing in this matter addressing the Form 4 Order and any further Order entered as contemplated therein. This Motion is brought pursuant to SCRCP Rule 59 (e) and Rule 60 as applicable.

WHEREFORE, Plaintiffs respectfully request that the Honorable Court reconsider, alter and amend its Order granting Defendants Motions for Summary Judgment, and for such other relief as the Honorable Court deems just and proper.

December 16, 2024
Hilton Head Island, SC

Respectfully Submitted,
Mogil Law Firm

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STATE OF SOUTH CAROLINA **COUNTY OF BEAUFORT**	**IN THE COURT OF COMMON PLEAS** **FOURTEENTH JUDICIAL CIRCUIT**
ROLAND BERNARDON AND LOUISE BERNARDON **Plaintiff (s)** **v.** **MARK DAMIANO, ELLERY K. DAMIANO, SEA PINES RESORT LLC, SEA PINES REAL ESTATE AT THE BEACH CLUB, ROBERT REICHEL and JOHN P. MCMAHON,** **Defendant(s)**	**CIVIL ACTION NO.: 2022-CP-07-02483** **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO ALTER, AMEND AND RECONSIDER**

Plaintiffs Roland Bernardon and Louise Bernardon, through undersigned counsel, respectfully submit this memorandum in support of their motion to alter, amend and reconsider the Honorable Court's Order granting summary judgment to the Defendant parties on all claims and causes of action entered December 17, 2024, as supplemented by the full form Order drafted by Defendants' counsel as instructed by the Court and entered December 30, 2024.

Plaintiffs refer the Court to the memoranda filed by both parties addressing the motions for summary judgment and the exhibits thereto. The underlying memoranda state the narrative of facts relevant to this lawsuit and are not restated in full herein.

Plaintiffs have plead, and the discovery to date demonstrates, that there are genuine issues of material fact and reasonable inferences that a trier of fact could draw from the fact record that if accepted in a light favorable to the Plaintiffs, support all of Plaintiffs' causes of action herein.

I. Breach of Fiduciary Claim against Defendants Reichel and Sea Pines.

The gravamen of Defendants' argument against Plaintiffs claims for breach of fiduciary duty, as restated in the Order, appears to be their interpretation that any duty owed by Mr. Reichel, and his company, was owed only to his clients, the sellers Mark and Ellery Damiano. Plaintiffs argue that not only is this interpretation incorrect under the applicable statute, which creates a fiduciary duty between a licensed real estate agent and all parties in the transaction, but also that the Defendants' interpretation separately supports denial of summary judgment for all Plaintiffs causes of action.

To establish a claim for breach of fiduciary duty. A party must prove a) the existence of a fiduciary duty; b) breach of that fiduciary duty owed to the plaintiff by the defendant; and c) damages proximately resulting from the wrongful conduct of the defendant. RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166 (2012).

South Carolina law imposes a per se fiduciary duty between a licensed agent and all parties to a real estate transaction. S.C. Code § 40-57-350 Real Estate Brokerage Firm Duties to Client; Agency Relationship; Applicability of Common Law states in pertinent part:

SECTION 40-57-350. Real estate brokerage firm duties to client; agency relationship; applicability of common law.

(A) A real estate brokerage firm that provides services through an agency agreement for a client is bound by the duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting as set forth in this chapter. The following are the permissible brokerage relationships a real estate brokerage firm may establish:

(1) seller agency;

(2) buyer agency;

(3) disclosed dual agency;

(4) designated agency; or

(5) transaction brokerage.

Thus, the statute itself creates and defines fiduciary duties of loyalty and disclosure.

Section 40-57-350 further states:

G)(1) A licensee shall treat all parties honestly and may not knowingly give them false or misleading information about the condition of the property which is known to the licensee. A licensee is not obligated to discover latent defects or to advise parties on matters outside the scope of the licensee's real estate expertise. Notwithstanding another provision of law, no cause of action may be brought against a licensee who has truthfully disclosed to a buyer a known material defect. [Emphasis added by author herein].

(2) No cause of action may be brought against a real estate brokerage firm or licensee by a party for information contained in reports or opinions prepared by an engineer, land surveyor, geologist, wood destroying organism control expert, termite inspector, mortgage broker, home inspector, or other home inspection expert, or other similar reports.

(3) A licensee, the real estate brokerage firm, and the broker-in-charge are not liable to a party for providing the party with false or misleading information if that information was provided to the licensee by the client or customer and the licensee did not know the information was false or incomplete.

Plaintiffs herein emphasize that the statutory mandate to disclose owed by Mr. Reichel applies to all parties, and is not limited to the Sellers or the clients of the agent. The statute states this specifically. Indeed, Mr. Reichel admitted at deposition that he knew or should have known that the square footage was incorrect. His own actions by manipulating the public comments in the listing notes, and then deleting them, confirm this knowledge. He also admitted at deposition that had he informed the Bernardons' agents of this information, the transaction would not likely have closed, and certainly not at the subject purchase price. The Bernardons confirmed this in their own depositions—they would not have purchased at the subject price had the information been disclosed, and likely would not have purchased at all. Reichel's failure to disclose his knowledge to all parties regarding the inaccuracy of the square footage represented in the listing is a per se breach of his fiduciary duty.

The limited exceptions to this duty stated in the statute arise in instances not applicable to this case—a) where the licensee has truthfully disclosed the material defect or b) where the licensee did not know the information to be false. Mr. Reichel admitted that he knew the information was materially defective—he was told by the mortgage broker and/or appraiser that the property would not appraise due to a discrepancy in the stated square footage, and yet he chose to not disclose this information to the Bernardon's agents. That is not disputed. Regarding whether knew that the information he inputted into MLS was actually false is a genuine issue of material fact for which the trier of fact could reasonably find against Mr. Reichel. While his statements at deposition and emails and letters reflect that he understood there was a problem but was not certain regarding what the actual square footage was, he also produced a copy of the appraisal the Damianos had purchased a month earlier which included a diagram and statement that the actual square footage was in fact less than 2650 square feet. The trier of fact in this case could reasonably infer that whether or not Mr. Reichel was specifically told about the actual square footage by the mortgage broker or appraiser or a third party, he could have and should have checked the appraisal in his file and which confirmed that the square footage had been measured by the Damianos prior appraiser and was incorrect. Mr. Reichel's actions, in temporarily inserted a sentence in the public comments that "Home heated square feet is approximately 2,400", which he deleted the day the second offer came in, confirms his belief and knowledge.

Mr. Reichel clearly owed the Damianos the duty to disclose to them the material information regarding his knowledge of the actual square footage. Whether he did disclose this information to the Damianos is an issue for the finder of fact to determine. At deposition Reichel claimed he did not recall informing the Damianos that there was an issue regarding the size of the home and the Damianos testified that they were not informed that the Mills deal fell through due to a square footage issue—they unbelievably claim they did not ask why the earlier offer terminated. Plaintiffs do not find testimony of the Defendant parties credible on this issue—however, accepting their testimony as truthful for the purpose of this motion, Reichel owed all parties a duty including his own clients, and had he informed them of the actual state of affairs, they would have either caused a correction to the listing on their own or otherwise disclosed this information to the Purchaser side. The knowledge of an agent is inputed to his principal. Reichel's failure to disclose to his clients is breach of duty, which in turn caused them to breach the contract and also gives rise to a claim for a claim for negligent misrepresentation, which has not been specifically plead but which is available through amendment at or before trial as it is based on the same set of facts.

II. Fraud in the Inducement Claims.

Defendants argue that the appraisals and documents that revealed the accurate square footage were not in the possession of Defendants at the time of closing. This averment is incorrect and contrary to the evidence discovered thus far. In fact, the Damianos had an appraisal in their possession that documented the lower square footage. At her deposition Mrs. Damiano claimed that she did not read that specific page of the appraisal that disclosed the reduced square footage. Mr. Reichel had the same appraisal in his possession which was reviewed at his depositon. He claimed he did not read the entire document and notice the sketch and disclosure that demonstrated the lower square footage. Further, he learned of the reduced square footage in his communications with Matt Topping and/or the appraiser and in turn, added, and then subsequently deleted, the sentence to the public comments section of the listing mentioning 2400 square feet.

Mr. Reichel had actual knowledge that the square footage was inaccurate. He knew or should have known of this fact based on the information he received. He elected to not inform the Purchaser side because he knew it would cause the transaction to fail, and in turn delay the Damianos purchase of their replacement home on Calibogue Cay, which they purchased almost immediately after 10 Oyster Catcher closed.

Defendants argue that the Plaintiffs were not entitled to reasonably rely on the inaccurate information provided by Defendants, citing Schnellmann v. Roettger. The disclaimers provided in the MLS listing in Schnellmann were materially different than the disclaimers stated in the Damiano listing and thus Schnellmann is distinguishable and not controlling herein.

In Schnellmann, the listing in question stated: "IF EXACT SQUARE FOOTAGE IS IMPORTANT TO YOU, MEASURE, MEASURE!" The Schnellmann listing also included standard MLS disclaimers similar to those found in the boilerplate language of the 10 Oyster Catcher listing, including the standard disclaimer the information is "deemed reliable but not guaranteed."

Alpha Contracting is distinguishable because while the decision appears to have focused on the Plaintiffs conduct, there was no evidence in the reported decision that the agent involved had actual knowledge of the misstated square footage. In this case sub judice, the trier of fact could reasonably find that Reichel had actual knowledge that the listing he prepared contained false information as to the square footage. Further, there is no indication that there was a breach of fiduciary duty claim alleged in Alpha--it appears to be a negligent misrepresentation case. Moreover, Alpha did not involve the time constraints and demands that have been alleged and manifest in the case sub judice which prevented the Bernardons from measuring the property before closing.

The Damiano's listing, which the Bernardons relied on in making their initial and subsequent offer, did not include any reference that the square footage was or may have been inaccurate. The Damiano listing only contained at the bottom of the listing two MLS boiler plate disclaimers, being "Information is believed accurate but not warranteed," and "Information Deemed Reliable But Not Guaranteed." (See Defendants Exhibit E which includes the listing and disclaimers).

These disclaimers which Defendants argue excuse their conduct are not and were not intended to protect a fraudulent or negligent Seller or Agent. Rather, as evidenced by the MLS service mark and or © immediately adjacent to each disclaimer, these disclaimers are intended to protect the MLS from liability associated with inaccuracies in their listings. Moreover, the disclaimers are designed to address information that is inserted erroneously without actual knowledge that it is false. The instant case is distinguished because Mr. Reichel, and thus his principals, had actual knowledge and implied knowledge that the square footage was incorrect, yet proceeded with the listing and sale without disclosing this information.

Defendants emphasize that Schnellmann and Alpha Contracting; together with the contract at hand and the listing, shift the burden of discovery of material defects in information to the Plaintiff victims. Schnellmann is distinguishable as noted above. Moreover, neither Schnellmann nor Alpha Contracting involve instances where the Selling party had actual knowledge of incorrect information and also failed to disclose that information in any meaningful way. The standard boilerplate disclaimers found in the MLS form Offer and Contract and Sale and listing agreement are not intended to relieve the parties obligations to be truthful and to disclose accurate information. These standard disclaimers are not intended to forgive fraud, nor do they. A contrary interpretation encourages fraud and non disclosure and conflicts with well settled concepts of conscionability.

Further, the trier of fact could find reasonable defenses as to why the Bernardons were unable to re-measure the property prior to closing. First, they had no reason to believe that the Sellers or Mr. Reichel were providing information known to be inaccurate. The false information provided matched the tax assessment records. Additionally, the Bernardons obtained a standard property condition inspection which does not typically involving measuring exact square footage. When a property is being purchased without a loan, it is not regular practice to hire an appraisal before closing. And most significantly, the Sellers listing and acceptance required that the closing be “as is” and within a tight time frame to accommodate their intended next purchase. In fact, the Bernardons agreed to move the closing up, being sooner, to accommodate the Sellers. There was insufficient time to obtain a full form appraisal while honoring the Sellers’ desired timeline.

III. Unjust Enrichment Claims.

Defendants argue that the Plaintiffs unjust enrichment claim fails against Defendants Reichel and Sea Pines because Mr. Reichel had no relationship or communications with the Plaintiffs. This interpretation ignores the express duty of a broker to disclose all material information to all parties as mandated by statute Section. The fact remains that Mr. Reichel and Sea Pines earned a substantial commission solely because Mr. Reichel did not disclose the information he knew as admitted by Mr, Reichel in his deposition.

Defendants claim for unjust enrichment against the Damianos as an alternative theory to breach of contract should survive summary judgment because Plaintiffs argue as an alternative theory that the contract should or could be invalidated under the equitable doctrine of mutual mistake mistake. See Alderman v. Bivin, 233 S.C. 545 (1958) and Restatement Second of Contracts § 152. The historical remedy upon a finding of mutual mistake is rescission or reformation. See Smothers v. United States Fidelity and Guaranty Co. 322 SC 207, 470 S.E.2d 858 (Ct. App 2011). In the instant case, this remedy would include either voiding the contract or an adjustment of the price term.

At deposition the Bernardons confirmed that had they been properly informed of the correct square footage, they would not have proceeded. They entered into the contract based on mistaken information. Accepting the Damianos at their word, that they did not know the square footage they stated was incorrect, then the subject contract was entered into by mutual mistake regarding a material fact. The Plaintiffs alternative theory of unjust enrichment should survive summary judgment against the Damianos.

IV, Breach of Contract Claims.

As discussed hereinabove, Defendants' material misrepresentation regarding the property's size formed the basis for the Bernardons' decision to purchase. The boilerplate broker disclaimer language found in the contract does not apply to circumstances where the Sellers or their agent had actual knowledge that the MLS listing, and the tax assessor data, was false. Whether or not the Sellers had actual knowledge of the inaccuracy of the information stated in their listing is a subject for determination by the trier of fact. Based on the admission that the Damianos had an appraisal in hand which demonstrated that the square footage they included in their listing was false, and their knowledge that the prior Mills contract terminated for some reason related to the appraisal, that they unbelievably claim they did not inquire into, Plaintiffs demonstrate genuine issues of material fact from which reasonable inferences can be drawn, and their claims for breach of contract should survive summary judgment.

V. Conclusion.

For the reasons set forth and argued herein, Plaintiffs respectfully request that the Honorable Court grant its motion to alter amend and reconsider, and deny summary judgment for all Plaintiffs' claims in their Amended Complaint, and for such other relief as the Honorable Court deems just and proper.

January 14, 2025

Respectfully Submitted,

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