

A. RULE 12 (B)(6)

The South Carolina Supreme Court has held that a motion to dismiss at the inception of a case pursuant to Rule 12 (b) (6) is a drastic measure and that pleadings should be liberally construed so that substantial justice may be done between the parties. *Russell v. City of Columbia*, 406 S.E.2d 338 (S.C. 1991).

B. PRIVITY/NEGLIGENCE

Defendant contends that there is no privity between it and the Plaintiff, and that its relationship was with the developer of the project. It relies primarily on the decision in *Rydde v Morris*, 675 S.E. 2d 431 (S.C. 2009), where the Supreme Court found no privity in a case in which a prospective beneficiary under a Will that was not executed before the decedent's death brought suit because the decedent died intestate; and thus precluded the prospective beneficiaries from receiving their intended inheritance.

Plaintiff states that Atlantica is a horizontal property regime established pursuant to South Carolina Code Section 27-31-10 *et seq.*, *Horizontal Property Act*. A horizontal property regime is created when an owner of a property develops it into multiple units and common areas. The units are sold to separate individuals or entities that each then come to own a share of the common elements and indeed must contribute pro rata towards their administration, maintenance and repair. Section 27-31-60, *Property rights of apartment owner.*; Section 27-31-70. *Common elements shall not be divided.*; and Section 27-31- 80. *Use of common elements* through 27-31-80; and Section 27-31-190. *Expenses shall be shared*. The co-owners may, as Plaintiff did here, incorporate for the purpose of administering the property constituted into the horizontal property regime. Section 27-31-90. *Incorporation of co-owners*. As set forth in Section 27-31-20 (f) (7) and (k). *Definitions*, the general common elements include easements belonging to the property that is part of the regime. Plaintiff submits therefore that as the property owners association for this regime it now stands in the shoes of the developer as to claims against third parties for matters affecting the co-owners.

In *United Leasing Corporation v. Miller*, 263S.E.2d 313 (Ct.App. N.C. 1980), the North Carolina Court of Appeals denied a motion to dismiss in a case by a leasing company against the law firm for a debtor that missed a prior lien on the relevant collateral. The Court, quoting Prosser, Torts 4th Ed., states (26 S.E.2d at 317):

"(B)y entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person."

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I find that the involvement of the Defendant with regard to horizontal property regime is unclear at this time and thus conclude dismissal of Complaint pursuant to Rule 12 (b) (6) for lack of privity is not appropriate.

C. FIDUCIARY DUTY

Defendant also moves to dismiss the Plaintiff's claim for breach of fiduciary duty citing *RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P.* 399 S.C. 322, 732 S.E.2d 166 (2012). In that case, a former client sued its former law firm for both legal malpractice and breach of fiduciary duty concerning representation of the client in the purchase of real property. The Court found that the former client's breach of fiduciary duty claim against the law firm was duplicative of the claim for legal malpractice, and thus not viable, where the former client did not set forth any specific facts that demonstrated that its breach of fiduciary duty claim was distinguishable from legal. *RFT Management Co., L.L.C., supra*, 732 S.E.2d at 173.²

I conclude that a breach of fiduciary duty claim may sound in tort as well as contract and does not require privity, depending on the facts of the case. *Compare. Southern Housing Foundation. v. Smith*, 670 S.E.2d 680, 694 n. 18 (S.C. Ct.App.2008) (noting that the dismissal of a party's legal malpractice claim would extinguish the breach of fiduciary duty cause of action in one action, but whether the defendant breached a fiduciary duty in other capacities could be a jury question).

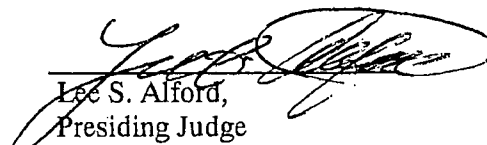
D. CONCLUSION

Because I conclude that the Complaint adequately sets forth causes of action legal malpractice and breach of fiduciary duty, dismissal under Rule 12(b)(6) would not be appropriate. Further discovery of the facts and the conduct of the parties in the case should establish whether there is privity and a possible breach of fiduciary duty. Plaintiff cannot rely on the allegations in the Complaint in a summary judgment motion; and, therefore, after discovery, Defendant could pursue that course of action.

For the reasons stated above, Defendant's Motion to Dismiss is denied.

IT IS SO ORDERED.

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2013


Lee S. Alford,
Presiding Judge
of the Fifteenth Judicial Circuit

York, South Carolina

November 15, 2013

² It is also significant that the plaintiff's breach of fiduciary claim in *RFT Management Co., L.L.C.L.P.* proceeded to a jury trial and a judgment entered by the Circuit Court Judge.