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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY

Doyet A. Early, III, Circuit Court Judge

Appellate Case No: 2014-000135

Moore Taylor & Thomas, P.A. ....Plaintiff/Appellant

v.

Marsha Banks and Mary Guynn..Defendants

Of Whom Mary Guynn is the.. Respondent

INITIAL BRIEF OF APPELLANT

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May 21, 2014

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ISSUES ON APPEAL

A. Did the Circuit Court err when it held that a closing attorney does not have a duty to comply with Rule 1.15 and hold separate escrow funds that are in dispute?

B. Did the Circuit Court err by dismissing Appellant's negligence claim on the ground that Appellant failed to plead the elements of a negligence claim?

C. Did the Circuit Court err when it held that the contractual defense of the statute of frauds barred a negligence claim against a closing attorney?

D. Did the Circuit Court err in granting Respondent's Motion to Dismiss?

STATEMENT OF THE CASE

This lawsuit was filed on September 8, 2013 and asserts a cause of action against Respondent/Defendant Guynn for negligence. Respondent/Defendant responded to the complaint by way of a Motion to Dismiss on October 11, 2013. Memoranda in support of and in opposition to the Motion to Dismiss were filed by each respective party. A hearing was held on November 13, 2013 before Judge Early. On December 19, 2013, Judge Early issued an Order granting the Motion to Dismiss.[1] The Order was received by Appellant on December 23, 2013, and a Motion to Reconsider was filed on December 30, 2013. On January 9, 2014, Judge Early issued his Order denying the Motion to Reconsider and on January 21, 2014, this appeal followed.

FACTUAL BACKGROUND

From the allegations contained in the Complaint, the facts are as follows:

1. Defendant Banks represented Susan Cain in a dispute between Ms. Cain and

[1] The Circuit Court incorrectly held that the lawsuit was one for legal malpractice. The words "legal malpractice" do not appear anywhere in the complaint (see Order at p.3). Rather, this is an action against an attorney for breaching duties owed to a third party.

Warren Matha. Complaint at ¶ 4.

2. The dispute devolved into active litigation in the Federal District Court in Aiken, captioned Matha v. Cain, C/A 1:09-1366 where Matha asserted claims in excess of $800,000.00. Complaint at ¶ 5.
3. Upon filing of litigation, Defendant Banks contacted Appellant to retain Appellant for representation of Ms. Cain. Complaint at ¶ 6.
4. Upon being contacted, Appellant advised Defendant Banks that it was concerned that it would not get paid for its time. Complaint at ¶ 7.
5. Defendant Banks ensured that Appellant would get paid for its services and that she would ensure payment. Complaint at ¶ 8.
6. Based on Defendant Banks' representations and promises, Appellant undertook the representation of Ms. Cain. Complaint at ¶ 9.
7. Appellant represented Ms. Cain in the federal litigation and periodically billed Ms. Cain for their services. Complaint at ¶ 10.
8. Ms. Cain failed to pay the bills during the litigation. Appellant provided bills to Ms. Cain on a monthly basis. Complaint at ¶ 11.
9. Upon Ms. Cain's failure to pay the bill, Appellant contacted Defendant Banks. Once again, Defendant Banks promised payment to Appellant. Appellant relied upon that promise of payment in proceeding forward with representation. Complaint at ¶ 12.
10. Ultimately, a settlement was reached in the federal litigation. Complaint at ¶ 13.
11. As part of the settlement, property in dispute between Ms. Cain and Mr.

Matha was sold with the proceeds from the sale of property to be divided between Ms. Cain and Mr. Matha. Complaint at ¶ 14.

12. The closing attorney for the sale was Respondent Mary Guynn. Complaint at ¶ 15.
13. Prior to the closing, Respondent was aware that significant monies were owed to Appellant and that Appellant was to be paid out of the closing. Complaint at ¶ 16.
14. Prior to closing, Ms. Cain stopped communicating directly with Appellant. Defendant Banks took it upon herself to talk on behalf of Ms. Cain. Complaint at ¶ 17.
15. The day before closing, Appellant contacted Defendant Banks and was advised by Ms. Banks that Ms. Cain disputed some portion of the legal bill. Complaint at ¶ 18.
16. The day before closing was the first time that Appellant became aware that there was dispute with its bills. Complaint at ¶ 19.
17. Though Ms. Cain never spoke with Appellant regarding the bill for legal services, Respondent confirmed that there was a dispute regarding the bill and Appellant's claims. Complaint at ¶ 20.
18. Further, Respondent, in breach of her responsibilities as a closing agent, refused to recognize the disputed amount at closing and withhold the money from distribution. Complaint at ¶ 21.

In addition to the above facts from the Complaint, Appellant's expert opined in his Affidavit incorporated into the Complaint that Respondent Guynn failed to follow her

duties as the closing agent for the real estate transaction. As a result of the above actions, Appellant properly brought a cause of action for negligence against Respondent Guynn.

STANDARD OF REVIEW

"In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "The 12(b)(6) motion may not be sustained if the facts alleged and inferences therefrom would entitle the plaintiff to any relief on any theory." Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "'The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.'" Marion, 645 S.E.2d at 247-248 (quoting Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)).

Furthermore, as a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRCP, motion to dismiss. Instead, a novel issue is best decided in light of the testimony to be adduced at trial. Tyler v. Macks Stores of South Carolina, Inc., 275 S.C. 456, 272 S.E.2d 633 (1980). However, where the dispute is not as to the underlying facts but as to interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss for failure to state a claim. Brown v. Theos, 338 S.C. 305, 526 S.E.2d 232 (Ct.App.1999) and Evans v. State, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001).

ARGUMENT: THE CIRCUIT COURT ERRED IN FINDING THAT RESPONDENT CLOSING ATTORNEY DID NOT HAVE A DUTY TO THE APPELLANT WHEN THE APPELLANT CLAIMED AN INTEREST IN DISPUTED FUNDS

In its Order, the Circuit Court dismissed Appellant's cause of action for negligence, holding that Respondent did not have a duty to the Appellant. The Circuit Court held that no such duty exists for a closing attorney to hold disputed funds from distribution. Order at p. 4. The Circuit Court is incorrect as South Carolina law requires an attorney to withhold disputed funds in her possession. This duty is found, among other places, in the South Carolina Rules of Professional Conduct, Rule 407, SCACR.

"An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998) (citing Rogers v. S.C. Dep't of Parole & Cmty. Corr., 320 S.C. 253, 464 S.E.2d 330 (1995).[2]

Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another. Murray v. Bank of America, N.A. 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct.App.2003) (citing Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977)). The South Carolina Supreme Court has recognized the relevance and admissibility of the South Carolina Rules of Professional Conduct, Rule 407, SCACR, in assessing the legal duty of an attorney in a malpractice

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[2] In order to prevail in a negligence cause of action, the Plaintiff must establish: (1) the Defendant owed a duty of care to the Plaintiff; (2) the Defendant breached the duty by a negligent act or omission; (3) the Defendant's breach was the actual and proximate cause of the Plaintiff's injury; and (4) the Plaintiff suffered an injury or damages. Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999); *see also* Thomasko v. Poole, 349 S.C. 7, 561 S.E.2d 597 (2002).

action. Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 472 S.E.2d 612, 613 (1996). In order to relate to the standard of care in a particular case, the Rule of Professional Conduct must be intended to protect a person in the Plaintiff's position or be addressed to the particular harm. *Id.* at 437, 472 S.E.2d at 613 (quoting Allen v. Lefkoff, Duncan, Grimes Dermer, 265 Ga. 374, 453 S.E.2d 719, 721-22 (1995)).

Here, the South Carolina Rules of Professional Conduct are clear; Respondent owed a duty to the Plaintiff pursuant to Rule 1.15. Moore v. Weinberg, 373 S.C. 209, 225, 644 S.E.2d 740, 748 (Ct. App. 2007) (finding that Rule 1.15 can inform the duty of a lawyer acting as an escrow agent) aff'd, 383 S.C. 583, 681 S.E.2d 875 (2009). Rule 1.15, entitled Safekeeping Property, subsections (d) and (e) provide in pertinent part:

> **(d)** Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
>
> **(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests**, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

The Rule instructs an attorney to hold funds in which two or more parties claim an interest rather than to disburse those funds. The comments to Rule 1.15 re-enforce the obligation to hold funds and further prohibits a lawyer from arbitrating any dispute over the funds. Comment 4 to the Rule provides:

> [4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such

> third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. **A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute**.

The Circuit Court held that the closing attorney does not have a duty to withhold disputed funds unless there is a written, "recognized" lien that "properly secure[s] the property at issue." See Order at p. 4. The Circuit Court's conclusion is incorrect and contradicts Rule 1.15, which does not allow a closing attorney to determine whether a lien is valid. Rather, the rule forbids a closing attorney from making the "validation" that the Circuit Court finds is the "law": "A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party...." Furthermore, Appellant's expert, Michael Virzi, an attorney licensed to practice law in this state opined that this duty existed and that it was breached. **ROA** ____. Mr. Virzi's opinion was referenced and incorporated into the Complaint. Respectfully, the Circuit Court erred in finding no duty was owed.

ARGUMENT: APPELLANT PLED FACTS SUFFICIENT TO STATE A CLAIM FOR NEGLIGENCE AGAINST RESPONDENT

Under Rule 12(b)(6), a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). In deciding whether the trial court properly granted the motion

to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. Brazell v. Windsor, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). Furthermore, a copy of a document which is an exhibit to a pleading is a part of the pleading for all purposes if a copy is attached to such a pleading. Rule 10(c), SCRCP; Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009); Ranucci v. Crain, 397 S.C. 168, 178, 723 S.E.2d 242, 247 (Ct. App. 2012) (recognizing that affidavits filed pursuant to S.C. Code Ann. § 15-36-100 are "part of the complaint" and that the affidavit "is a pleading for the purpose of the circuit court's evaluation of motions and the merits of the plaintiff's case").

Appellant pled:

"[Defendant] in breach of her responsibilities as a closing agent, refused to recognize the disputed amount at closing and withhold money from distribution." Complaint at ¶ 21; and,

Attached and incorporated into the Complaint is an expert opinion as to the duties of closing attorneys which set forth the applicable standard of care. See **ROA** ___ exhibit A to the Complaint.

Appellant properly pled an action against Respondent.

The facts, as pled, and the inferences available from those facts clearly demonstrate: (1) Respondent Guynn was the closing agent for a transaction; (2) there was a dispute as to the funds being dispersed to Ms. Cain; (3) Appellant claimed an interest in the funds to be dispersed; (4) Ms. Cain claimed an interest in the same funds as Appellant; (5) Respondent Guynn was aware of the dispute; and (6) Respondent Guynn selected to disperse the funds to Ms. Cain rather than hold them in escrow as

she was obligated to do. Respondent became the unilateral arbiter of the dispute between her client and a third party in direct contravention to her obligations.

Even though the Complaint states a claim for negligence against Respondent, the Circuit Court dismissed the Complaint on the ground that Appellant failed to plead all the elements of a legal malpractice claim. Specifically, the Circuit Court held that Appellant failed to plead the existence of an attorney-client relationship. Not all cases involving negligence claims against professionals, including lawyers, are malpractice claims. *See, e.g.,* Dawkins v. Union Hospital District, Op. No. 27380 (S.C. Sup. Ct., April 9, 2014). Further, the South Carolina Supreme Court has recognized that lawyers owe a duty to third persons outside of the attorney-client relationship under circumstances where the lawyer acts as an escrow agent for funds in which two or more parties assert an interest. *See* Moore v. Weinberg, 383 S.C. 583, 681 S.E.2d 875 (2009).

ARGUMENT:THE CIRCUIT COURT ERRED WHEN IT HELD THAT THE STATUTE OF FRAUDS APPLIES IN A NEGLIGENCE ACTION

The Circuit Court incorrectly held that the statute of frauds applies to bar a negligence action (Order p. 3) even though the defense of the statute of frauds only applies to contract actions:

> The statute is not applicable to tort actions, such as actions for negligent misrepresentation, negligence, conversion, or trespass. However, a plaintiff should not be permitted to do indirectly what is directly forbidden by the statute of frauds; thus, the statute of frauds bars those tort claims that require an oral contract as an essential element to maintaining the claim.

37 C.J.S. Frauds, Statute of § 154. Interestingly, the Circuit Court in Moore v. Weinberg made the same mistake by applying the contractual defense of novation to a negligence claim. The Court of Appeals in Moore overturned the Circuit Court and held:

> While Moore may have a cause of action in contract against Wheeler, his causes of action for conversion, negligence, and civil conspiracy against Weinberg sound in tort. **Tort causes of action are not transformed into actions in contract simply because they arise out of circumstances involving a contract. As a matter of law, the trial court erred in granting summary judgment on the ground of novation.**

Moore v. Weinberg, 373 S.C. 209, 219, 644 S.E.2d 740, 745 (Ct. App. 2007) *aff'd*, 383 S.C. 583, 681 S.E.2d 875 (2009) (emphasis added). The same above paragraph from Moore v. Weinberg can be written about the Circuit Court's decision:

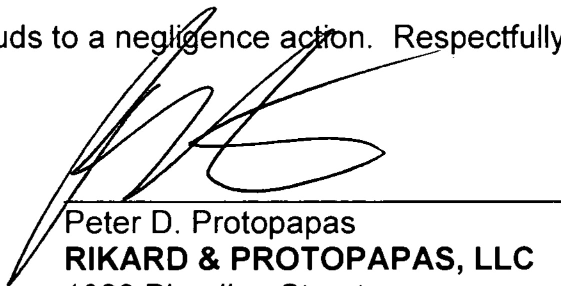
> While Moore Taylor and Thomas may have a cause of action in contract against Cain, its cause of action for negligence against Guynn sounds in tort. Tort causes of action are not transformed into actions in contract simply because they arise out of circumstances involving a contract. As a matter of law, the trial court erred in granting dismissal on the ground of statute of frauds.

Moore v. Weinberg, 373 S.C. 209, 219, 644 S.E.2d 740, 745 (Ct. App. 2007) aff'd, 383 S.C. 583, 681 S.E.2d 875 (2009). Furthermore, the statute of frauds is not applicable to the agreement to pay Appellant from the money held in Respondent's trust account. Even if the statute of frauds is relevant to a claim of an interest in proceeds of a real estate transaction *as proceeds of the transaction*, it is not relevant to Appellant's claim of an interest in money held in Ms. Guynn's trust account because Appellant had a claim against those funds regardless of where they came from. Regardless of whether Ms. Guynn was receiving funds on behalf of Ms. Cain from a real estate transaction, a civil settlement, or any other source, they were the result of the settlement of the litigation in which Appellant represented Ms. Cain, and Ms. Guynn acknowledged Appellant's claim to them. Ms. Guynn had notice of the claim just as Mr. Weinberg had notice of Mr. Moore's claim. The Court of Appeals did not find that Mr. Moore had a negligence cause of action because his claim was in writing. The court found that Mr. Moore had a cause of action because Mr. Weinberg was on notice of his claim.

Likewise, Ms. Guynn had knowledge of Appellant's claim to funds in her trust account and was obligated under Rule 1.15 to hold them until any dispute over them was resolved. The Court misapprehended the law when it held that a contract defense bars a tort claim.

CONCLUSION

The Circuit Court erred when it dismissed the instant action. Respondent had a duty to Appellant. Furthermore, Appellant pled the duty and its breach. Finally, there is no contractual defense of the statute of frauds to a negligence action. Respectfully, the Circuit Court Order should be reversed.



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