

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Robert Shelley, a/k/a RDS Investments,)
LLC, a/k/a ROS Investments, LLC,)
Plaintiff,)

Civil Action No. 2012-CP-26-5546

vs.

Horry County State Bank and HCSB)
Financial Corporation,)
Defendants.)

ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

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SC Court of Appeals

HORRY COUNTY
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CLERK OF COURT

This matter comes before the Court on Defendants' Motion for Summary Judgment ("Motion"). A hearing was held on March 4, 2014, before The Honorable Larry B. Hyman, Jr. All parties were represented by counsel, who were provided a full and fair opportunity to be heard. For the reasons discussed herein, Defendants' Motion for Summary Judgment is GRANTED.

FINDINGS OF FACTS

Plaintiff Robert Shelley became a customer of Horry County State Bank ("Bank") "sometime in the mid-2000's." Soon after this time, Mr. Shelley asked an employee of the Bank whether "anybody [had] any stock for sale." The employee said she didn't know of anyone who was selling HCSB Financial Corp. ("Financial Corp.") stock, but would let Mr. Shelley know if this changed. Mr. Shelley testified he was fine with this arrangement.

In or around July 2005, Mr. Shelley was contacted by an employee of the Bank and advised that someone was selling 1,285 shares of Financial Corp. stock. Mr. Shelley agreed to purchase the stock for \$35.00 per share, and requested that the Bank arrange payment to the seller by debiting one of his accounts. As a result of this purchase, Mr. Shelley began receiving

the Financial Corp.'s annual report. There are no claims in the Amended Complaint related to this stock purchase.

Mr. Shelley's second purchase of Financial Corp. stock – the first transaction subject to the Amended Complaint - occurred in the same way as the first. In July 2009, Mr. Shelley was contacted by Bank employee Jane Cannon, who told him "there was some stock for sale ... and was [Shelley] interested in buying it." Mr. Shelley agreed to purchase 1,000 shares at \$24.00 per share and went to the Bank on July 17, 2009, to complete the transaction. While he was at the Bank, Mr. Shelley testified he asked Ms. Cannon if she knew who was selling the stock – Ms. Cannon said she did not.¹ Importantly, Mr. Shelley testified that at the time he asked Ms. Cannon, it did not matter to him who owned the stock. Mr. Shelley requested that Ms. Cannon complete the stock purchase for him by drafting the purchase price from his account at the Bank. Consequently, the following events took place on July 17, 2009: (1) Mr. Shelley's account was debited \$24,000.00 for the purchase of stock; (2) a cashier's check in the amount of \$24,000.00 was remitted from Mr. Shelley's account to the seller and Bank employee, Deborah Guyette; and (3) the cashier's check was deposited by Ms. Guyette into her account at Plantation Federal Bank.

Mr. Shelley alleges that sometime **after** the July 17, 2009 purchase – he cannot say exactly when – he was in the Bank meeting with Ms. Guyette on another matter. Mr. Shelley testified that he asked Ms. Guyette if she knew who sold him shares of Financial Corp. stock on July 17, 2009, and she said she did not know who the seller was.² Mr. Shelley claims that it was not until sometime in 2012 when he found out that Ms. Guyette was in fact the seller in the July

¹ There is no evidence before the Court that Ms. Cannon knew who the seller was when Mr. Shelley made the inquiry.

² Ms. Guyette testified that Mr. Shelley did not ask her who the seller was in the July 17, 2009 transaction. However, for purposes of this Motion, the Court will treat this allegation in the light most favorable to Mr. Shelley.

2009 sale. Mr. Shelley has not offered any evidence or testimony of other purported false or misleading statements in relation to this stock purchase.

The third purchase of Financial Corp. stock – and the second transaction subject to the Amended Complaint – occurred in October 2009. As with the first two transactions, Mr. Shelley was contacted by Ms. Cannon or Ms. Guyette³ about stock available for purchase. Mr. Shelley testified he doesn't recall whether he asked who the seller was, and he did not know who sold him the stock at the time of his deposition on August 27, 2013. As with the first two purchases, Mr. Shelley requested that the seller be paid by drafting his account at the Bank. As a result, Mr. Shelley purchased 2,192 shares at \$18.00 per share. Mr. Shelley testified that he is not aware of any false or misleading statements in relation to the October 2009 stock purchase.

The only evidence before the Court is that at the time of his stock purchases in 2005 and 2009, Mr. Shelley neither asked for nor received any disclosures from the Financial Corp., the Bank, or the actual sellers of the stock he purchased. Mr. Shelley also testified that he did not conduct any inquiry into the reasonableness of any price he paid for stock, nor did he review the annual reports he had been receiving since the end of 2005.

Importantly, the only evidence before the Court is that neither the Financial Corp. nor the Bank: (1) sold Mr. Shelley any stock; (2) instructed or requested anyone to sell stock to Mr. Shelley; (3) instructed or advised Mr. Shelley how much Financial Corp. stock was worth or how much he should pay for it; (4) instructed or advised the sellers of stock how much the stock was worth or how much to charge Mr. Shelley; and/or (5) received any commission, fee or other payment or benefit as a result of any purchase of stock by Mr. Shelley.

³ The only evidence before the Court is that neither Ms. Guyette nor Ms. Cannon are officers or directors of the Defendants.

Plaintiff filed his Summons and Complaint on July 19, 2012, naming only the Financial Corp. and Bank as Defendants. Plaintiff later filed an Amended Complaint, in which he asserted the following causes of action against both Defendants: (1) breach of fiduciary duty; (2) violation of the S.C. Uniform Securities Act of 2005 ("Securities Act"); (3) negligence; and (4) civil conspiracy. Defendants denied liability and timely moved for summary judgment as to all claims in the Amended Complaint.

CONCLUSIONS OF LAW

I. Plaintiff's Causes of Action

A. Breach of Fiduciary Duty

In his Amended Complaint, Plaintiff asserts a claim for breach of fiduciary duty based on the Defendants' failure to advise him of the Bank's financial condition or the name of the seller of shares he purchased in July 2009 prior to his purchase.

"The determination of whether a fiduciary relationship exists is an equitable issue to be determined by the court." Cowburn v. Leventis, 366 S.C. 20, 37, 619 S.E.2d 437, 447 (Ct. App. 2005) (citing Hendricks v. Clemson Univ., 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003)). "South Carolina holds the normal relationship between a bank and its customer is . . . not fiduciary in nature." Regions Bank v. Schmauch, 354 S.C. 648, 670-71, 582 S.E.2d 432, 444 (Ct. App. 2003). In contrast, "[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 interests of the one reposing confidence." Schmauch, 354 S.C. at 670, 582 S.E.2d at 444 (internal citations omitted). Furthermore, "a fiduciary relationship cannot be established by the unilateral action of one party. . . The other party must have actually

accepted or induced the confidence placed in him.” Id. at 670-71, 582 S.E.2d at 444 (internal citations omitted).

In the case at bar, no fiduciary relationship existed between the Plaintiff and Defendants. In fact, the very nature of Shelley’s allegations leads to the opposite conclusion. First, Shelley never asked for any information regarding the Bank’s financial condition and Defendants did not provide him any such information in connection with his purchases of stock from private shareholders. Second, although Shelley asked about the ownership of the shares he purchased, Ms. Cannon advised him that she did not know who owned them; however, Shelley chose to proceed with his purchase despite the lack of this information. Because Defendants did not undertake to advise him on either of these issues, he could not have relied on Defendants in making his purchases. See Schmauch, 354 S.C. at 670-71, 582 at 444 (Ct. App. 2003) (holding that no fiduciary relationship existed as a matter of law where a bank’s customer never asked questions about the transaction at issue and the bank did not undertake to advise her in connection with the transaction). Shelley cannot show that he placed any “special confidence” in Defendants for his stock purchases or that the Defendants "accepted or induced confidence" from Shelley, and thus no fiduciary relationship was created as a matter of law.

Because Plaintiff has failed to establish the existence of a fiduciary duty owed by the Defendants, his claim for breach of fiduciary duty fails as a matter of law.

B. Violation of South Carolina's Uniform Securities Act of 2005

Next, Shelley asserts a cause of action pursuant to S.C. Code Ann. § 35-1-509(b)(1). Amended Complaint ¶ 30. This provision sets forth the private causes of action available for violation of South Carolina's Uniform Securities Act of 2005 ("Securities Act"). Specifically, this Section provides that a seller of a security is liable to the purchaser in only three instances:

- (1) if the seller violates Section 35-1-301 regarding securities registration;
- (2) if the seller violates Section 35-1-501 regarding fraud generally; or
- (3) if the seller, "by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission."

See S.C. Code Ann. § 35-1-509(b)(1).

First, it must be noted that Section 35-1-509(b)(1) provides liability only for sellers of securities. See S.C. Code Ann. § 35-1-509(b)(1). The only evidence before the Court – including the testimony of Mr. Shelley – is that Defendants were not the sellers of any stock to Mr. Shelley. Therefore, Defendants are not liable under the Securities Act.

Even if there was some evidence that the Defendants were "sellers," Shelley's claims under the Securities Act still fail. Shelley asserts that Defendants violated Sections 35-1-501 and 35-1-504 of the Securities Act. Amended Complaint ¶¶ 28-29. These two provisions are addressed in turn.

i. Violation of Section 35-1-501: General Fraud

Section 35-1-501 provides as follows:

It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

(1) to employ a device, scheme, or artifice to defraud;

(2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

S.C. Code Ann. § 35-1-501. Shelley's Amended Complaint alleges that this Section was violated by Bank employees offering the sale of stock but failing to advise him of the current financial condition of the Bank at the time. Amended Complaint ¶ 28.

First, the Bank's failure to provide Shelley with the current financial condition of the Bank at the time of his purchase could not operate as a fraud or deceit upon Shelley. Shelley admits there were no statements made regarding the Bank's financial condition at the time and, therefore, there could be no false representation to constitute fraud or deceit. In any event, Shelley admitted he had received the Financial Corp.'s annual reports for several years as he became a shareholder in 2005, and further testified that "the condition of the bank was not in bad shape at all" when he made his purchase in October 2009.

Although not pleaded as the basis for the violation of this Section, the only statement made in connection with his purchases alleged to be false was the statement made by Ms. Guyette after his July 2009 purchase: that she did not know from whom Shelley was purchasing stock, even though she owned the shares he purchased in July 2009.

First, this alleged statement was made after his purchase was complete and, therefore, it could not have been relied on by Shelley when making his purchase as a matter of law. Moreover, Shelley testified that at the time he made his purchase, it did not matter to him who owned the stock. Accordingly, the alleged misrepresentation could not have been material.

Finally, Shelley has come forward with no evidence to show how this alleged misrepresentation caused him any damage. Although he claims a decline in the stock price, there is no evidence that the identity of Shelley's seller was the cause for the alleged decline. Lastly, Shelley testified that he cannot say if or how knowing the identity of the seller may have changed his decision to purchase stock in July 2009.

Because Plaintiff has failed to establish the necessary elements of a cause of action under Section 35-1-501, his claim against Defendants fails as a matter of law.

ii. Violation of Section 35-1-504: Filing of Sales and Advertising Literature

First, there is no private cause of action for a violation of Section 35-1-504. As noted above, S.C. Code § 35-1-509(b)(1) sets forth the only three private causes of action available for violation of the Securities Act, none of which included a violation of Section 35-1-504.

Even if a private cause of action for violation of this Section existed, Shelley's claim would fail. Section 35-1-504(a) provides as follows:

Except as otherwise provided in subsection (b), a rule adopted or order issued under this chapter may require the filing of a prospectus, pamphlet, circular, form letter, advertisement, sales literature, or other advertising record relating to a security or investment advice regarding securities, addressed or intended for distribution to prospective investors, including clients or prospective clients of a person registered or required to be registered as an investment adviser under this chapter.

S.C. Code Ann. § 35-1-504(a) (emphasis added).

Shelley's Amended Complaint alleges that the Bank violated this section by not providing Shelley with a prospectus or other documentation regarding the proposed sale of stock prior to the sale. Amended Complaint ¶ 29. However, Section 35-1-504 does not require the Bank to give him a copy, but instead provides that a rule or order issued under the Securities Act

may require that such information be **filed**. Shelley does not allege that any rule or order includes such requirement and makes no allegation regarding the filing of such information.

In any event, Section 35-1-504(b) exempts the subject security and transaction. Section 35-1-504(b) provides as follows:

This section does not apply to sales and advertising literature specified in subsection (a) which relates to a federal covered security, a federal covered investment adviser, or a security or transaction exempted by Section 35-1-201, 35-1-202, or 35-1-203 except as required pursuant to Section 35-1-201(7).

S.C. Code Ann. § 35-1-504(b). As noted in this provision, a security or transaction listed as exempt in Sections 35-1-201 or 35-1-202 is exempt from the potential filing of sales and advertising literature.

Section 35-1-201 exempts securities issued by and representing an interest in any banking or depository institution. S.C. Code Ann. § 35-1-201(3)(A)-(C). The stock at issue here represents an interest in a banking or depository institution and, therefore, is exempt under this provision.

Section 35-1-202 exempts any transaction that is “an isolated nonissuer transaction.” S.C. Code Ann. § 35-1-202(1). A “nonissuer transaction” is defined as a transaction “not directly or indirectly for the benefit of the issuer,” and “issuer” is defined as “a person that issues or proposes to issue a security . . . ” S.C. Code Ann. § 35-1-102(17) and (18). The Official Comments to Section 35-1-202 explain that this exemption is generally “intended to cover the occasional sale by a person.” S.C. Code Ann. § 35-1-202, Official Comments n.2. Here, the issuer would be HCSB Financial Corp. because the shares were issued in its name. However, the subject stock sales were **not** for the benefit of Financial Corp. because the only evidence before the Court is that neither the Financial Corp. nor the Bank received any sort of commission or other benefit from the sale. Further, Ms. Guyette testified that she has not sold any of her

Financial Corp. stock other than the one sale in July 2009, making this the type of occasional sale by an individual that this exemption was specifically designed to encompass.

Section 35-1-202 also exempts any transaction that consists of an offer to an existing shareholder of the issuer if a commission or other remuneration is not paid or given, directly or indirectly, for the solicitation. S.C. Code § 35-1-202(15). Here, Shelley was an existing shareholder by virtue of his earlier purchase in 2005. Further, Defendants received no commission or other remuneration in connection with the sale. Therefore, Section 35-1-202 also exempts the subject sales from the potential filing of sales and advertising literature under Section 35-1-504.

Because there is no genuine issue of material fact as to Defendants' liability for violation of Section 35-1-504, Defendants are entitled to summary judgment on this claim.

C. Negligence

Next, Shelley asserts a claim for negligence. Amended Complaint ¶ 32. Again, the claim is based on the Bank's alleged failure to provide Shelley with any information regarding the Bank's financial condition or the identity of the seller of the shares he purchased.

"Negligence is the breach of a duty of care owed to the plaintiff by the defendant." Schmauch, 354 S.C. at 668, 582 S.E.2d at 443 (internal citations omitted). For Shelley to be successful on his negligence claim, he must show that Defendants owed him some duty to advise him of the Bank's financial condition or the seller of the shares he purchased. "Ordinarily, the common law imposes no duty on a person to act. Where an act is voluntarily undertaken, however, the actor assumes the duty to use due care." Cowburn, 366 S.C. at 39, 619 S.E.2d at 448 (affirming grant of summary judgment where there was no evidence that defendant undertook duty to investigate investment he had recommended to plaintiff). As discussed above,

Ms. Cannon did not voluntarily undertake to advise Shelley of the Bank's financial condition or the owner of the shares Shelley was purchasing in July 2009. Had she done so, she would have assumed the duty to use due care regarding the information that was provided. See Schmauch, 354 S.C. at 669-70, 582 S.E.2d at 443-44 (distinguishing a case finding that a duty of care was owed where erroneous information was given from the situation where no duty of care is owed because no guidance was provided). However, because this obligation was not assumed, and because the record is devoid of any other evidence of a breach of duty owed by Defendants to Plaintiff, Shelley's claim for negligence fails as matter of law.

D. Civil Conspiracy

Lastly, Shelley asserts that Defendants' officers and employees conspired to injure him. Amended Complaint ¶ 37. "It is well-settled in South Carolina that the tort of civil conspiracy contains three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) causing plaintiff special damage." Pridgen v. Ward, 391 S.C. 238, 243, 705 S.E.2d 58, 61-62 (Ct. App. 2010) (quoting Cowburn, 366 S.C. at 49, 619 S.E.2d at 453). "A civil conspiracy cannot be found to exist when the acts alleged are those of employees or directors, in their official capacity, conspiring with the corporation." Id. (quoting McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 565, 626 S.E.2d 884, 887 (2006)). "As a result, 'no conspiracy can exist if the conduct challenged is a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment.'" Id. "However, although a corporation cannot conspire with itself, 'the agents of a corporation are legally capable, as individuals, of conspiracy among themselves or with third parties.'" Id. (quoting Lee v. Chesterfield General Hosp., Inc., 289 S.C. 6, 14, 344 S.E.2d 379, 383 (Ct. App. 1986)).

To the extent Shelley alleges that Bank officers and employees were conspiring with the Bank, such allegations fail because a company cannot conspire with itself as a matter of law. Id. Alternatively, to the extent Shelley alleges that the officers and employees were conspiring with one another, such a claim is not appropriately lodged against Defendants Bank and Financial Corp., but rather against the individuals themselves as a matter of law. Accordingly, Defendants are entitled to summary judgment on Shelley's civil conspiracy claim.

II. Statute of Limitations – July 2009 Purchase

As set forth in more detail above, all of Plaintiff's causes of action against the Defendants must be dismissed for failure to sufficiently establish the necessary elements of each claim. However, as an additional basis for summary judgment, the applicable statutes of limitation bar Plaintiff's claims related to the July 17, 2009, stock purchase.

All claims set forth in the Amended Complaint are subject to a three-year statute of limitations. See Moore v. Benson, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010) (breach of fiduciary duty); S.C. Code Ann. § 35-1-509(j) (South Carolina Uniform Securities Act); Gibson v. Bank of America, N.A., 383 S.C. 399, 680 S.E.2d 778 (Ct. App. 2009) (negligence); Murphy v. Jefferson Pilot Communications Co., 657 F.Supp.2d 683 (D.S.C. 2008) (Civil Conspiracy).

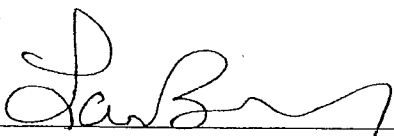
Plaintiff's first purchase in 2009 was completed on July 17, 2009. See p.2, supra. The Summons and Complaint in this case was filed on July 19, 2012. To the extent Plaintiff's claims are based on allegations that Defendants failed to provide information or made false or misleading statements at the time of the transaction, they are barred by the statute of limitations. Plaintiff's allegation that Ms. Guyette falsely stated she did not know who sold him the stock on July 17, 2009, does not save any of his claims. Not only did this occur after the sale was completed, Mr. Shelley testified that (1) at the time of the purchase, he did not care who the

seller was and (2) even if Ms. Guyette would have told him she was the seller, Mr. Shelley does not know how or if this would have changed his decision to purchase the stock.

CONCLUSION

Based on the reasons set forth above, Plaintiff has failed to sufficiently prove the elements of his causes of action against the Defendants. Moreover, the applicable statutes of limitation bar Plaintiff's claims as they relate to the July 19, 2009, stock purchase. Accordingly, Defendants' Motion for Summary Judgment is hereby GRANTED and Plaintiffs' causes of action are hereby dismissed with prejudice.

AND IT IS SO ORDERED.



The Honorable Larry B. Hyman, Jr.
Presiding Judge, Fifteenth Judicial Circuit

Aden
March 8, 2014.

Conway, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS)
FIFTEENTH JUDICIAL CIRCUIT)

RECEIVED

Robert Shelley, a/k/a RDS Investments,)
LLC, a/k/a ROS Investments, LLC,)
)
Plaintiff,)

Civil Action No. 2012-CP-26-5546

DEC 01 2014

SC Court of Appeals

vs.)

ORDER DENYING PLAINTIFF'S
MOTION TO RECONSIDER

Horry County State Bank and HCSB)
Financial Corporation,)
)
Defendants.)

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MERRILEE HUBBINS-SHAW
CLERK OF COURT
HORRY COUNTY

This matter comes before the Court on Plaintiff's Motion to Reconsider the Court's April 14, 2014 Order Granting Summary Judgment. For the reasons discussed herein – and for the reasons more fully described in the Order, which is incorporated herein by reference – Plaintiff's Motion is DENIED.

Plaintiff filed his Summons and Complaint on July 19, 2012. Defendants filed a timely Answer and the parties conducted written and deposition discovery. Defendants filed a Motion for Summary Judgment on October 25, 2013, and the matter was heard by Judge Larry B. Hyman on March 4, 2014. By Order dated April 14, 2013, the Court granted Defendants' Motion for Summary Judgment and dismissed Plaintiff's Complaint with prejudice.

Plaintiff filed a timely Motion to Reconsider¹ on April 25, 2014. Neither party filed written briefs on the Motion. A hearing before Judge Hyman was held on October 1, 2014. All parties were represented by counsel and were afforded a full and fair opportunity to argue their respective positions. More specifically, counsel for both the Plaintiff and Defendants addressed

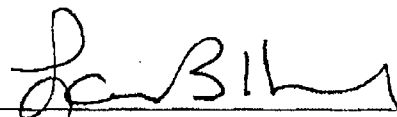
¹ A motion to alter or amend a judgment pursuant to Rule 59(e), S.C.R.Civ.P.

the same arguments against and in support of summary judgment that were presented at the March 4, 2014 hearing.

At the hearing of Plaintiff's Motion to Reconsider, Plaintiff's counsel presented the following documents: deposition transcripts for Robert Shelley, Deborah Guyette and Jane Cannon; Horry County State Bank's Code of Conduct. Counsel for the Defendants objected to the introduction or consideration of any documents that were not properly before the Court at the March 4, 2014 summary judgment hearing. The Court overruled the objection and agreed to consider all documents offered by the Plaintiff.

After carefully considering the arguments of counsel and the evidence properly before the Court, Plaintiff's Motion to Reconsider is hereby denied. Plaintiff and Defendants fully briefed all issues prior to the March 4, 2014 summary judgment hearing, at which extensive oral arguments were made. Because there has been no evidence presented that the April 14, 2014 Order is in error, and for the reasons set forth in more detail therein, Plaintiff's Motion to Reconsider must be denied.

AND IT IS SO ORDERED.



The Honorable Larry B. Hyman, Jr.
Presiding Judge, Fifteenth Judicial Circuit

October 15, 2014.

Conway, South Carolina