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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
In the Court of Common Pleas for the First Circuit

James C. Williams, Jr., Circuit Court Judge

Case No. 07-CP-18-337

D. R. Horton, Inc.,..Plaintiff,
v.
Wescott Land Company, LLC and Thomas R. Hawkins....................Defendant,

---

Thomas R. Hawkins and Wescott Land Company, LLC,....................Appellants,
v.
D.R. Horton, Inc.,..Respondent.

SECOND
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

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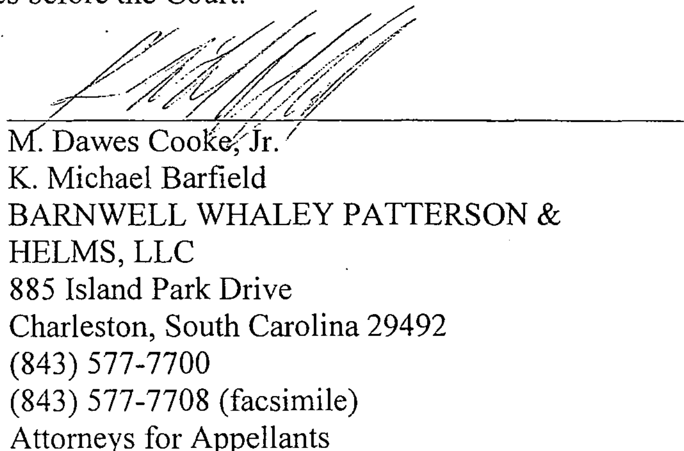
September 7, 2010

Pursuant to Rule 209 of the South Carolina Appellate Court Rules, Appellants, Wescott Land Company, LLC and Thomas R. Hawkins, hereby include the following item as part of the Record on Appeal in this matter. Unless otherwise expressly stated, each item designated is to include all attachments or exhibits to the original of the referenced item. Appellants expressly reserve the right to seek supplementation to the record pursuant to Rules 209 and 212, SCACR. In addition to the matters designated by Respondent, which designations are incorporated herein by reference, Appellants designate the following matters for inclusion in the Record on Appeal in addition to their previously-designated items:

1. Deposition transcript Michael Shetterly, pages 26 and 27, November 20, 2008.

Appellants certify, pursuant to S.C.A.C.R., Rule 209(c), that the designations set forth above are relevant to the appeal in this matter, and that they have not designated any matter which is irrelevant to the issues before the Court.



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Dated: September 7, 2010
Charleston, South Carolina

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PROOF OF SERVICE

I, Peggy Belbusti, an employee with the law firm of Barnwell Whaley Patterson & Helms, LLC, attorneys for Appellants, do hereby certify that on this date I caused a copy of Appellants' **SECOND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** to be served upon the party by depositing a copy of same in the United States Mail, postage pre-paid, addressed to the following:

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-AND-

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FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in entering summary judgment as to Appellants' slander of title claim?
2. Did the Circuit Court err in entering summary judgment as to Appellants' South Carolina Unfair Trade Practices claim?
3. Did the Circuit Court err in entering summary judgment as to Appellants' abuse of process claim?
4. Did the Circuit Court err in entering summary judgment as to Appellants' malicious prosecution claim?
5. Did the Circuit Court err in entering summary judgment as to Appellants' breach of contract accompanied by fraudulent act claim?
6. Did the Circuit Court err in entering summary judgment as to Appellants' tortious interference with prospective contractual relations claim?

STATEMENT OF CASE

On December 4, 2006, D.R. Horton, Inc. (hereinafter "Horton" or Respondent) filed a *lis pendens* on properties owned by Wescott Land Company, Inc. (hereinafter "Wescott" or, together with Thomas R. Hawkins, Appellants) claiming entitlement to purchase certain lots in the Wescott development. (2006-CP-18-1981). D.R. Horton, Inc. failed to file suit within twenty (20) days, therefore allowing this initial *lis pendens* to expire. Horton then filed another *lis pendens* on February 13, 2007 (2007-CP-18-257), followed by filing a Complaint February 26, 2007. (2007-CP-18-337). Wescott

answered and filed Counterclaims against Horton alleging causes of action for slander of title, breach of contract, unfair trade practices, and fraud.

On April 27, 2009, Horton filed an Amended Complaint. Wescott answered, asserting additional counterclaims for abuse of process, malicious prosecution, breach of contract accompanied by fraudulent act, and tortious interference with prospective economic advantage, and dropped its cause of action for fraud. Thomas Hawkins (hereinafter "Hawkins"), Wescott's owner, was added as a Counter-Claimant, asserting the same claims against Horton. In essence, the Counterclaims were based on Wescott's and Hawkins' contention that Horton did not merely breach its contract to purchase the lots, it breached the contract using pretexts to draw out the closing so that it could pre-sell the project before having to put up any purchase money. Further, once Horton failed to force Wescott to further extend and stagger the takedown dates, it filed improper *lis pendens* to prevent Wescott from negotiating a sale to a competitor.

By Order dated September 4, 2009, the court granted Horton's Motion for Summary Judgment as to all of Wescott's and Hawkins' Counterclaims sounding in tort. In addition, the court granted Horton's Motion for Summary Judgment as to Hawkins' Counterclaim for breach of contract. Wescott filed a Motion for Reconsideration, which was denied. This appeal followed. Appellants contend in this appeal that they have tendered sufficient direct and circumstantial evidence to create a jury issue as to its tort claims.

STATEMENT OF FACTS

In November, 2004, the parties to this action entered into a contract pursuant to which Horton would, over a period of time, purchase some 193 lots located at The Farms,

Wescott Plantation. The properties were split into three phases. The first two and most of the third were to be developed for the construction of single-family residences. The final portion of Phase 3, known as Phase 3E, consisted of 110 lots, upon which Horton was to build multi-family dwellings. Wescott was to perform certain preliminary work, including grading, erosion control, and preparation of plans for water, sewer, storm drains, and utility layouts. The contract provided a "take down" schedule, pursuant to which closings on different portions of the property were to be held on the later of either a date certain or the date upon which Wescott obtained final plat approval and recorded the lots. (See Def.'s Memo. Opp. S.J., R. pp. 119-120; Complaint, Exhibit A, R. pp. 33-48).

The closings on the single-family lots, Phases 1 and 2 of the contract, were completed as scheduled. All of Phase 3, except for Phase 3E, was also conveyed to Horton, although the project was behind schedule at that point. As a result of these delays, the contract was amended, effective November 15, 2004, with respect to the work to be done, the conditions precedent to closing, and the closing schedule for the townhouse lots in Phase 3E. Specifically, Phase 3E was split into three sub-phases, with a closing schedule set forth as follows:

> Phase 3E-1 (37 lots) on or before the later of January 1, 2006 or upon final plat approval and recordation;[1]
>
> Phase 3E-2 (37 lots) on or before the later of April 1, 2006 or upon final plat approval and recordation; and

[1] Phase 3E was platted by D.R. Horton as a single tract. It is undisputed that final plat approval and recordation could not have been accomplished piecemeal. Rather, the entirety of Phase 3E would have to be Substantially Complete, as that term is defined in the Contract, before a plat could be submitted to the City for approval. (See Depo. Michael Flannery, R. p. 771 lines 8-14).

3E-3 (36 lots) on or before the later of July 1, 2006 or upon final plat approval and recordation.

Finally, the amendment required Wescott to provide Condition Precedent documentation and certifications at least twenty days prior to any scheduled closing. Because of additional delays, and for logistical purposes, none of Phase 3E was ready to close prior to the end of July 2006. However, substantial completion was reached as to all of 3E the first week of August. (See Defs.'s Memo. Opp. S.J., R. p. 120; Counter-claimant's Memo. Opp. S.J., R. pp. 560-561, Exhibit 2, R. pp. 581-582).

"Substantial Completion" is a defined term within the parties' Contract that essentially means that Horton has received proof and acknowledges that all conditions precedent have been met. (See Complaint, Exhibit A, R. pp. 33-48).

On August 2, 2006, counsel for Wescott (Steven Smith) wrote to Horton to inform them that all conditions precedent to the closing of Phase 3E had been completed and that the final plat had been approved and recorded by the City of North Charleston on July 19, 2006. Smith went on to say, "[A]s all of the original closing dates have passed, the closing is triggered by the satisfaction of these conditions. Failure to close on all lots by August 9, 2006, will be considered to constitute a default under the Contract of Sale and Amendment to the Contract, dated November 15, 2004." (See Counter-claimant's Memo. Opp. S.J. Exhibit 3, R. p. 584). The timetable set forth by Smith is reflective of Paragraph 2 of the Amendment to the parties' Contract, which gave Horton twenty (20) days to confirm that all conditions precedent had in fact been satisfied from the date that Horton received notice from Wescott that the conditions had been satisfied. (See Counter-claimant's Memo. Opp. S.J., Exhibit 2, R. pp. 581-582). This twenty (20) day

due diligence period was confirmed by Ken Bagwell (hereinafter "Bagwell"), regional counsel for Horton. Bagwell responded to Smith's August 2, 2006 letter with a letter dated August 11, 2006. Bagwell's letter states:

> The conditions precedent to closing stated in Section 15 of the Contract were not satisfied with regard to the townhouse lots until the afternoon of August 9, 2006. Wescott may not require Horton to close on the purchase of any lot until at least twenty (20) days after Wescott has provided Horton documentation and certification of satisfaction of all conditions precedent to the purchase of that lot. The last of that documentation and certification for the townhouse lots was received on the morning of August 10, 2006. Horton can not be in default under the Contract for failing to close on the purchase of any of the townhouse lots until August 31, 2006, at the earliest.

While acknowledging that Horton had properly received the certifications of completion of all conditions precedent, Horton demanded that the properties be closed in three takedowns, separated by several months, notwithstanding the fact that all closing dates had passed. Bagwell proposed a second amendment to the Contract that acknowledges that the townhouse lots are now substantially complete and that establishes the new takedown schedule. (See Defs.'s Memo. Opp. S.J, Exhibit 2, R. pp. 141-142).

Wescott did not wish to enter into another Contract, which would cause further delays in the closing of Phase 3E, and declined Bagwell's offer to enter into one.

Horton grew more insistent that the parties enter into a Second Amended Contract setting forth staggered takedown dates. This is reflected in e-mail communications between Mitchell Flannery (hereinafter "Flannery"), one of the principals of Horton's Charleston office, and Tim Fraylick (hereinafter "Fraylick"), one of the owners of Wescott Land, LLC. In a September 13, 2006 e-mail from Flannery to Fraylick, Flannery

stated that 36 units had been funded for the first takedown and that they were willing to close on only that takedown within two weeks. Attached to that e-mail was a proposed Second Amended Contract. Numbered paragraph 1 to the proposed Second Amendment states: "[t]he Contract has been partially performed by both parties. As of the date of this Second Amendment, Purchaser has purchased all single-family lots to be purchased pursuant to the Contract. The townhouse lots have now been developed by Seller and are ready for sale and purchase, subject to the terms of the Contract." (See Counter-claimant's Memo. Opp. S.J., Exhibit 6, R. pp. 589-591). Nowhere in this proposed Second Amendment is any indication that Horton was dissatisfied with the condition of Phase 3E or that it was taking the position that any conditions precedent had not been satisfied. (See Counter-claimant's Memo. Opp. S.J., Exhibit 2, R. pp. 581-582).

In another e-mail from Flannery to Fraylick, dated September 18, 2006, Flannery reiterates that Horton had funded the purchase of 36 units, which could be purchased in short order, and that the parties would need to enter into a Second Amendment to the Contract to dictate the timetable for the closing of subsequent takedowns. The same proposed Second Amendment was attached to the September 18, 2006 e-mail, again making no mention of Wescott's failure to satisfy any conditions precedent. What's more, this e-mail from Flannery contains an implied threat, stating, "[I]f you all don't agree to this the property could be tied up for a lot longer than this so I hope you will consider my proposal." In his deposition, Flannery testified regarding his references to funding for 36 lots, stating, "I don't know whether that was a, you know, whether I was trying to get them to work with me or whether there was really money. I really don't

know. I don't remember." (See Counter-claimant's Memo. Opp. S.J., Exhibit 7, R. pp. 593-595).

On October 16, 2006, Michael Shetterly (hereinafter "Shetterly"), outside counsel for Horton, wrote to Smith. In this letter, nearly 90 days after the date that Wescott submitted proof of the satisfaction of all of the conditions precedent, and nearly 75 days after the date that Horton's in-house counsel contended that such proof was submitted, Shetterly took the position that certain conditions precedent still had not been satisfied as of mid-October. Specifically, Shetterly stated that Paragraph 15, subparts (i) and (j) had not been accomplished at all. Shetterly explained, "[C]ontrary to subpart (i), there is no evidence of erosion control in place, and D.R. Horton has not seen any 'sign-off' from a governmental authority stating erosion control has been erected. In derogation of subpart (j), no street lights have been installed on the site. Until these items are complete, the conditions precedent have not been completed." (See Counter-claimant's Memo. Opp. S.J., Exhibit 8, R. pp. 597-598).

In addition to this being the first mention of Wescott's alleged failure to satisfy certain conditions precedent, this letter misstates the requirements set forth in Paragraph 15 of the parties' Contract. Contrary to Shetterly's assertion, Paragraph 15, subpart (i) simply states, "[T]he Lot(s) shall be cleared of any trash, construction materials, debris, brush, partially constructed buildings, materials and all rights of way have been graded, seeded and strawed as may be required by any applicable governmental authority." (See Complaint, Exhibit A, R. pp. 33-48). It makes no mention of erosion control or sign-offs from any particular governmental entity. Even if Shetterly's conditions were part of the contract, at the very least a factual issue exists as

to whether Wescott had taken all necessary and reasonable steps to control erosion, maintain clean jobsites, and stay within the good graces of all governmental entities overseeing the Project, including the Department of Health and Environmental Control (DHEC).

In direct contravention to Shetterly's assertion that street lights were required to have been installed, Paragraph 15(j) requires merely "[C]ontracts by Seller for the installation of street lights and street signs as required by any appropriate governmental authority and such contracts shall in no way place any financial burden upon Purchaser." (See Complaint, Exhibit A, R. pp. 33-48). In reality, Wescott did not have any authority to install street lights on what were to become publicly dedicated streets. That authority lay solely with South Carolina Gas and Electric (SCE&G), and all necessary contracts and approvals have been obtained such that SCE&G could install street lights very soon thereafter. Shetterly's letter goes on to say, however, that Horton proposes that the parties execute a Second Amendment to the contract excusing Wescott's alleged failure to satisfy these conditions and setting forth a new takedown schedule.

Over the course of the ensuing weeks, counsel for Horton and Wescott began to negotiate the terms of a new deal between the parties. Horton even appeared to acquiesce to the idea of closing all of 3E at once. However, Wescott was adamant that it would not enter into a Second Amendment to the parties' Contract except at the closing table, out of fear that Horton would use a new Amendment to insert further delays into the process. In the meantime, Wescott received written offers from KB Homes, a national builder comparable to Horton, to purchase Phase 3E at $30,000 per lot - $5,000 more per lot than

the price under the Horton Contract, then increasing the proposal to $33,000 per lot. (See Counter-claimant's Memo. Opp. S.J., Exhibit 15, R. pp. 600-604).

A meeting was held on December 21, 2006 at Wescott's counsel's office, wherein the parties attempted to hammer out the details of a last-ditch effort to make their deal work. At this meeting Horton reiterated its concerns about erosion control on the site, abandoned its earlier complaint about street lights, and for the first time raised the issue that it was concerned about the compaction of the building pads at Phase 3E. (See Counter-claimant's Memo. Opp. S.J., Exhibit 16, R. pp. 606). On December 21, 2006, Wescott conveyed the property to Hawkins.

The closing of all of Phase 3E was scheduled to take place at the office of Larry Dodds (hereinafter "Dodds"), another of Horton's lawyers, on February 2, 2007. Leading up to that closing, lawyers for both parties attempted to hammer out the final details of the Second Amendment to the parties' Contract, which was to be ratified at the closing table. As of late January 2007, the only remaining obstacle to the closing was Horton's insistence that Wescott re-do compaction tests on the building pads to certify that they were compacted to 2,000 PSF. Wescott contended that they had long since submitted proof of compaction and that the pads were in substantially the same condition as they were then.

Believing that an agreement had been reached, representatives of Wescott came to the offices of Dodds on February 2, 2007 at the appointed time to attend the closing. Dodds himself had prepared all necessary closing documents and was awaiting funds from Horton to hit his trust account. However, Horton sent no representatives to the closing. According to Horton's counsel, Shetterly, Wescott's counsel, Smith, called him

from Dodds' office on February 2, 2007 to inquire as to why no one was there from Horton. Shetterly explained to Smith that he had not received final confirmation that Wescott was willing to redo the compaction tests and that that was a deal breaker for Horton. That was the last of the parties' attempts to close on the deal, and immediately thereafter Horton filed its first *lis pendens* against the property, preventing Wescott from selling it to any third parties. (See Lis Pendens of D.R. Horton, filed Feb. 13, 2007, R. pp. 22-23).

Horton gave numerous and varied reasons for not closing on the sale. First, it insisted that under the contract it was entitled to purchase takedown 3E-1 and purchase the subsequent two takedowns at later dates. Months later and well after their period of due diligence had expired, Horton claimed that neither satisfactory erosion controls nor street lights were in place but still focused on the argument that the property should be closed in a series of takedowns. Thereafter, Horton finally relented and agreed to close on the entire property at once but, approximately one month before the scheduled closing, raised questions regarding the compaction of the lots—making that their new primary focus and their ultimate reason for not coming to the closing scheduled at their own attorney's office.

Wescott has always contended that Horton's myriad reasons for delaying closing on Phase 3E were pretextural and that the only real reason for its delay was that it had determined that its financial interests were best served by not closing. Phase 3E consisted of 110 townhome lots. Horton was pre-selling townhomes to consumers as the development began to take shape. Based on the Pre-Sale Contracts that Horton has produced through discovery, only 19 of 110 lots had pre-sold. To purchase more than

Phase 3E-1 at one time would shift the carrying costs of the property from Wescott to Horton.

The gravamen of Wescott's tort claims in this case is that Horton used various pretexts to string the transaction out until it could determine if it could pre-sell enough units to justify abiding by the Contract. Once it decided to breach the Contract, Horton added insult to injury by filing *lis pendens*, preventing Wescott from selling the property to anyone else. Thus, Horton went beyond merely breaching its contract. It used pretext to breach it and it tied up the property so that Wescott could not negotiate a sale to competing purchasers.

On February 26, 2007, Horton filed its Complaint, alleging that Wescott had breached the contract between the parties, and that Horton remained ready, willing and able to perform in a staggered manner. Horton requested damages for delay, and specific performance. Between the time of the commencement of the negotiations regarding the closing schedule and the time of the filing of the Complaint – a period comprising some six months – Horton filed a number of *lis pendens* on the property as well. These were filed at the RMC Office of Berkeley County, but were never served. After the filing of the Complaint, Defendant Wescott filed Counterclaims, which were subsequently amended.

STANDARD OF REVIEW

"On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to appellant, the non-moving party below." Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 395, 596 S.E.2d 42, 45 (2004) (citing Williams v.

Chesterfield Lumber Co., 267 S.C. 607, 230 S.E2d 447 (1976)); Koon v. Fares, 379 S.C. 150, 154, 666 S.E.2d 230, 233 (2008); Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007); Platt v. CSX Transp., Inc., 379 S.C. 249, 255, 665 S.E.2d 631, 634 (Ct. App. 2008). The appellate court will apply the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Connor Holdings, LLC v. Cousins, 373 S.C. 81, 84, 644 S.E.2d 58, 60 (2007); Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006); Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007); see also Higgins v. Med. Univ. of S.C., 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (a trial judge considering a motion for summary judgment must consider all documents and evidence within the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits). "If triable issues exist, those issues must go to the jury." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005); Mulherin-Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Hancock v. Mid-South Management, Co., Inc., 361 S.C. 326, 673 S.E.2d 801 (2009).

Summary judgment is a drastic remedy and should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App.

2004). Summary judgment is inappropriate where further inquiry into the facts of the case is necessary to clarify the application of law. Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 542, 608 S.E.2d 440, 447 (Ct. App. 2004).

ARGUMENTS

I. The Circuit Court erred in granting summary judgment as to Appellants' slander of title claim

a. Error of law as to whether filing of *lis pendens* is an absolute privilege

The Circuit Court erred in granting Respondent summary judgment as to Appellants' slander of title claim finding that Appellants had failed to establish any facts which satisfy the elements of this cause of action. It is undisputed that Respondent filed two *lis pendens*. (See Or. Granting Pl.'s Mot. S.J., R. p. 6).

The court incorrectly stated that Appellants failed to meet their burden because they failed to set forth any facts which establish any of the elements of slander of title. The court found that the act of filing a *lis pendens* is absolutely privileged in South Carolina, and therefore a claim for slander of title fails as a matter of law. Id. at 6. The Court cites Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002), for this proposition. However, that is a far too broad a reading of the case, and is an unjustified interpretation of the decision. Rather, Pond Place stands for the proposition that, assuming that the *lis pendens* is properly filed in accordance with all statutory requirements, by one who has a colorable claim to the property to which it attaches, and who completes the statutory process by the timely filing of an associated

complaint, its filing is privileged. It does not speak to the filing of a *lis pendens* that is not in compliance with the statutory scheme, is not promptly followed by the filing of a complaint, or which otherwise is unconnected to a legitimate lawsuit regarding an interest in the property. Pond Place did not extend a blanket privilege that would encompass an improper *lis pendens*. "Since the filing of a *lis pendens* is an extraordinary privilege granted by statute, strict compliance with the statutory provisions is required." Id. at 17, 567 S.E.2d at 889 (emphasis added). Respondent filed two *lis pendens*, the first of which was never served upon Appellant; nor was it perfected by being followed by a Complaint.

At least one court has realized that Pond Place does not, on its face, automatically confer privileged status upon the filing of any *lis pendens*, in any case, no matter whether the filing is otherwise in accordance with the law or not. In BidZirk, LLC v. Smith, 2007 U.S. Dist. LEXIS 78481 (D.S.C. Oct. 22, 2007), the United States District Court for the District of South Carolina was faced with a motion to dismiss a claim for sanctions predicated upon the allegedly improper filing of a *lis pendens*. The moving party argued, as Respondent did here, that the filing itself was privileged under the Pond Place ruling.

The District Court found that the underlying claims in the case did not affect any interest in real property, and that, notwithstanding any possible privilege language gleaned from Pond Place, no privilege attached to a *lis pendens* in such a situation. The court focused primarily on the same criteria as those of the Pond Place court: that the filing of a *lis pendens* requires strict compliance with the statute, and may only be properly maintained in those situations set out in the statutory scheme. Where the party fails to comply, there can be no legal basis for the lien, and it cannot be privileged.

Unlike the filing in BidZirk, there is no question that the filings in the instant action do purport to affect an interest in real property. In addition, they do not comply with the statutory scheme in that Respondent herein filed a series of *lis pendens* on the realty without either serving them upon Appellant or, until the last, following them with the filing of a complaint. They were designed for no purpose other than to cloud Appellants' title to its property, and to interfere with Appellants' ability to freely alienate that property.

The Circuit Court noted the BidZirk case and stated that "Bidzirk and the instant matter are clearly distinguishable, in that this matter is involving a matter affecting real property and the matter in BidZirk was not," and then made the blanket statement that "Bidzirk is not applicable to the facts of this case." (See Or. Granting Pl.'s Mot. S.J., R. p. 7). While there are distinguishing facts in the BidZirk case from the instant action, there are also distinguishing features of the Pond Place decision, as pointed out above. The fact that the facts in BidZirk are not identical to the instant action does not make it inapplicable.

There can be no doubt but that the true meaning of the decision in Pond Place, as properly recognized by the United States District Court, is not to protect as privileged any oppressive or malicious pleading, but merely to recognize that a properly filed *lis pendens*, accomplished in accordance with the statutory requirements of a connection to real property and timely filing of a complaint, is not actionable even if the party ultimately fails on the merits of his case. The instant matter is precisely the type of situation contemplated by the BidZirk court as falling outside the scope of the holding in Pond Place, and the Circuit Court erred in its interpretation of the law in granting

Respondent summary judgment as to this cause of action. Summary judgment is inappropriate where further inquiry into the facts of the case is necessary to clarify the application of law. Gadson, 364 S.C. at 320, 613 S.E.2d at 535.

b. Error of law as to whether Appellants had standing to file claim

The Circuit Court erred in granting Respondent summary judgment as to Appellants' slander of title claim in finding that because Appellants no longer had an ownership interest in the property in question when a valid *lis pendens* was filed, it did not have standing to assert a claim of slander of title.

As noted in the Court's Order, the elements of slander of title are: (1) the publication of (2) a false statement (3) derogatory to the individual's title, (4) with malice, (5) which causes special damages and (6) as a result, diminished value in the eyes of a third party. (See Or. Granting Pl.'s Mot. S.J., R. p. 7 (citing Huff v. Jennings, 319 S.C. 142, 459 S.E.2d 886, 889 (Ct. App. 1995)). Whether a *lis pendens* has been properly filed or not is not a determinant of whether Appellants are damaged. The filing of the *lis pendens* itself causes special damages by placing a cloud on the title, which prevents the owner from freely disposing of the property before the litigation is resolved. Shelley Construction, Co. v. Sea Garden Homes, Inc., 287 S.C. 24, 336 S.E.2d 488, 491-492 (Ct. App. 1985). The initial *lis pendens* Respondent filed was allowed to expire. However, by the time it expired, damage had already been done. Namely, KB Homes had made offers to purchase the property that Appellants could not ratify because of the cloud Respondent had placed on the title to the property. (See Counter-Claimant's Suppl. Memo. Opp. Pl.'s Mot. S.J., R. p. 570).

II. The Circuit Court erred in granting summary judgment as to Appellants' South Carolina Unfair Trade Practices Act claim

The Circuit Court erred in granting Respondent summary judgment as to Appellants' South Carolina Unfair Trade Practices Act (SCUTPA) claim. The Court held that "Wescott has failed to establish its *prima facie* case because its claim rests solely on the assertion that D.R. Horton failed to fulfill its contractual obligations." (See Or. Granting Pl.'s Mot. S.J., R. p. 10). The Court stated that South Carolina courts have held that a mere breach of contract does not constitute a violation of the Unfair Trade Practices Act. Id. Appellants recognize and do not dispute that a claim of breach of contract, standing alone, cannot state a claim under the Unfair Trade Practices Act. The unfair trade practice in this case is not, however, limited to the breach of contract entered into with Respondent. Respondent has engaged in a pattern and procedure of engaging in the same acts complained of herein.

Respondent is a national builder of residential developments. In furtherance of its overall plans, Respondent routinely enters into contracts similar to the one between it and Appellants throughout the country. Respondent has used myriad reasons for delaying the closing without adequate presales, including changing the reasons for not closing. Respondent used various pretexts to string the transaction out until it could determine if it could pre-sell enough units to justify abiding by the Contract. Once it decided to breach the Contract, Respondent added insult to injury by filing *lis pendens*, preventing

Appellants from selling the property to anyone else. Respondent's behavior is capable of repetition.

Carried out across the country, this procedure would clearly be a violation of the Unfair Trace Practices Act. The evidence is sufficient to form the basis for a claim of a violation of the SCUTPA, and the Circuit Court erred in granting summary judgment. The Court erred both by holding that Appellants rest their claim solely on failure to fulfill contractual obligations, and that failure to provide details regarding resolution of similar misconduct are grounds for granting Respondent summary judgment. Material issues of fact remain as to whether or not Respondent has violated the SCUPTA.

III. The Circuit Court erred in granting summary judgment as to Appellants' abuse of process claim

The Circuit Court erred in granting Respondent summary judgment as to Appellants' abuse of process claim. The Court held that "D.R. Horton is entitled to summary judgment as to Wescott's and Hawkins' Counter-Claim for abuse of process because D.R. Horton filed a *lis pendens* as allowed by South Carolina Code." (See Or. Granting Pl.'s Mot. S.J., R. p. 10). The Court noted that Appellants "failed to set forth or point to specific facts showing that there is a genuine issue of material fact as to any ulterior motive." Id. at 10. However, filing a *lis pendens* to prevent the sale of property to a third party has been found to constitute ulterior motive. Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991).

Appellants, through their original counsel Steve Smith, notified Respondent that it was in default on the parties' Contract on August 2, 2006 and again on August 10, 2006. Respondent failed to cure its default and close on the purchase of Phase 3E, and Appellants rescinded the contract. Even though the parties continued to negotiate in an attempt to put their deal back together, Appellants refused to sign a new Contract with Respondent except at the closing table in order to be consistent in its position that the parties no longer had any contractual obligations to each other. Despite Appellants' valid rescission of the contract, Respondent filed a *lis pendens* against the property. As Respondent concedes in its Memorandum in Support of Summary Judgment, a *lis pendens* is valid only if suit is filed within twenty (20) days of the filing of the *lis pendens*. The initial *lis pendens* Respondent filed was allowed to expire on its own. However, by the time it expired, damage had already been done. Namely, KB Homes had made offers to purchase the property that Appellants could not ratify because of the cloud Respondent had placed on the title to the property. (See Counter-Claimant's Suppl. Memo. Opp. Pl.'s Mot. S.J., R. p. 570).

Respondent cannot claim that it carried the process out to its authorized conclusion because it allowed the *lis pendens* to die on the vine. Furthermore, Respondent's lack of specific knowledge of KB Homes' offer does not excuse their conduct. They knew that Appellants had every right to walk away from the parties' Contract at that point, but Respondent was not satisfied with that reality. Instead, it misused a *lis pendens* to tie up the property while it continued to browbeat Wescott into accepting Respondent's new terms. Indeed, this is the very course of action that was threatened by Mitchell Flannery, one of the principals of D.R. Horton's Charleston office,

in his e-mail to Tim Fraylick, one of the owners of Wescott Land, LLC, of September 18, 2006, saying "[I]f you all don't agree to this the property could be tied up for a lot longer than this so I hope you will consider my proposal." Id. at 14. This is precisely the same conduct that was addressed in Broadmoor, 306 S.C. 482, 413 S.E.2d 9. In that case, our Supreme Court held that filing a *lis pendens* even when followed by a Summons and Complaint, could constitute abuse of process when done without justification and for the purpose of preventing third parties from purchasing the subject property.

Furthermore, the Circuit Court found that under South Carolina law, the filing of the *lis pendens* is an absolute privilege, and Respondent's filing of the *lis pendens* constituted a proper act. (See Or. Granting Pl.'s Mot. S.J., R. p. 11). As discussed above, the filing of a *lis pendens* is not an absolute privilege when it is not in strict compliance with the statutory provisions, as was the case here.

Genuine issues of material fact exist as to whether Appellants have established sufficient evidence to satisfy a claim of abuse of process. If the Circuit Court had properly considered the issues above, it would not have entered summary judgment against Appellants. Therefore, this Court should reverse and vacate the entry of summary judgment against Appellants based upon the issues raised by Appellants in the court below.

IV. The Circuit Court erred in granting summary judgment as to Appellants' malicious prosecution claim

The Circuit Court erred in granting Respondent summary judgment as to Appellants' malicious prosecution claim. The Circuit Court held that Appellants' claim for malicious prosecution is not ripe, and that in order to be successful under this cause of action against Respondent, Respondent must have instituted a judicial proceeding against Appellants, and the judicial proceeding must have been terminated in Appellants' favor. (See Or. Granting Pl.'s Mot. S.J., R. pp. 11-12).

With regard to Respondent's argument that Appellants' claim for malicious prosecution is not ripe, Appellants submit that Respondent, and the Court, were not referring to the civil proceeding that underpins Appellants' malicious prosecution claim—namely, the filing of the original *lis pendens*, which expired under its own terms. In fact, the very case that the Court cites as grounds for its summary judgment as to Appellants' cause of action for slander of title, Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881, states: "[T]he jurisdictions are in agreement that the proper action against a maliciously filed lis pendens is under abuse of process or malicious prosecution." Id. at 31, 567 S.E.2d at 897. As such, the fact that Appellants had yet to prevail against Respondent in the present action has absolutely no bearing on the rightness of its claim for malicious prosecution based on the first *lis pendens*.

V. The Circuit Court erred in granting summary judgment as to Appellants' breach of contract accompanied by fraudulent acts claim

The Circuit Court erred in granting Respondent summary judgment as to Appellants' breach of contract accompanied by fraudulent acts claim. The Circuit Court

held that Respondent is entitled to summary judgment as to Appellants' claim because a mere unfilled promise does not give rise to such a claim. (See Or. Granting Pl.'s Mot. S.J., R. p. 13).

Appellants have put forth facts sufficient to support recovery for this cause of action, ranging from Respondent's shifting reasons for refusing to close on Phase 3E of the property; its reversing positions as to whether conditions precedent had been satisfied, its strained and self-serving construction of the parties' contracts; and Mitchell Flannery's written threat to tie up the property if Respondent did not get its way. (See Counter-Claimant's Suppl. Memo. Opp. Mot. S.J., R. pp. 576-577).

The Circuit Court stated that a misrepresentation made in reckless disregard for the truth will support an action for breach of contract accompanied by a fraudulent act, but that reliance on the misrepresentation must also be proved. (See Or. Granting Pl.'s Mot. S.J., R. p. 14) (citing Corley v. Coastal States Life Ins. Co., 244 S.C. 1, 135 S.E.2d 316 (1964); Vann v. Nationwide Ins. Co., 257 S.C. 217, 185 S.E.2d 363 (1971)). The Circuit Court held that Appellants provided no evidence that they relied on the alleged misrepresentations. Whether Appellants provided sufficient evidence that they relied on the misrepresentations is a genuine issue of fact to be determined by the trier of facts.

The Court focused its decision on the language of a letter of Respondent's regional counsel, Ken Bagwell, to Appellants' counsel describing the terms of the contract regarding conditions precedent. In the letter, the Respondent acknowledged that all conditions precedent to the sale had been satisfied by the Appellants. However, sometime later, the Respondent asserted that its own in-house attorney's letter was incorrect and that certain conditions precedent had in fact not been satisfied. (See

Counter-Claimant's Suppl. Memo. Opp. Mot. S.J., R. pp. 562-564). Respondent proceeded to then change its position on several occasions as to which conditions precedent had not been satisfied. The Court held that Appellants' reliance on Mr. Bagwell's letter as evidence of reversing positions on the conditions precedent is unfounded. (See Or. Granting Pl.'s Mot. S.J., R. p. 15). However, clearly there are genuine issues of material fact as to whether Appellants' reliance on Mr. Bagwell's letter was unfounded.

The Court also held that Appellants failed to provide any supporting evidence (affidavits) which supports the second element of fraudulent intent relating to the breaching of the contract. Id. In its Order, the Court relies heavily on the fact that Appellants submitted no affidavits to counter those submitted by the Respondent. However, Appellants would respectfully argue that failing to submit affidavits is not fatal when there is factual evidence already in the record to support Appellants' Counter-Claims. Indeed, Appellants submitted to the Court a great deal of circumstantial evidence that would tend to show that Respondent, not Appellants, breached its contract to purchase the property that is the subject of this case.

Appellants assert that the filing of its successive *lis pendens* for the purpose of preventing third parties from acquiring the property and forcing Appellants to bend to Respondent's will is in itself a fraudulent act accompanying Respondent's breach of the parties' Second Amended Contract. (See Counter-Claimant's Suppl. Memo. Opp. Mot. S.J., R. pp. 576-577).

The Circuit Court found this argument misplaced, holding that "the filing of the *lis pendens* was part of the 'full range of activities and procedures attendant to litigation'

arising out of an agreement for the transfer of real property, and that the filing was to provide notification to third-parties of the contract dispute which is what is intended under South Carolina law." (See Or. Granting Pl.'s Mot. S.J., R. pp. 15-16). As discussed above, the *lis pendens* were designed for no purpose other than to cloud Appellants' title to its property, and to interfere with Appellants' ability to freely alienate that property. Genuine issues of material fact exist as to whether Respondent's intent was fraudulent.

VI. The Circuit Court erred in granting summary judgment as to Appellants' tortious interference with prospective contractual relations claim

The Circuit Court erred in granting Respondent summary judgment as to Appellants' tortious interference with prospective contractual relations claim. The Circuit Court held that Appellants' own decisions not to accept other offers from interested third parties, rather than the actions of Respondent, ended the formation of contracts for sale of the property. (See Or. Granting Pl.'s Mot. S.J., R. p. 16). The Court stated that Appellants "acknowledged that they themselves were the reason they failed to ratify numerous offers." Id. The Court has determined that because Appellants decided not to accept offers from third parties to purchase the subject property that Respondent is somehow immune from liability for this cause of action.

The evidence presented, however, establishes that Appellants declined to ratify numerous offers to purchase the subject property out of concern that Respondent's *lis pendens* would prevent those deals from going forward. If Respondent acted in bad faith

by filing a *lis pendens* to "tie up the property" as Mitchell Flannery threatened to do, it was with full knowledge that their actions would prevent Wescott, and subsequently Hawkins, from selling the subject property to third parties. Appellants would seek to prove that this was a tactic designed to bully Appellants into coming back to the negotiating table and selling Respondent the property under terms dictated by Respondent. Genuine issues of material fact exist as to Appellants' claims, and therefore this Court should reverse and vacate the Circuit Court's entry of summary judgment as to this cause of action.

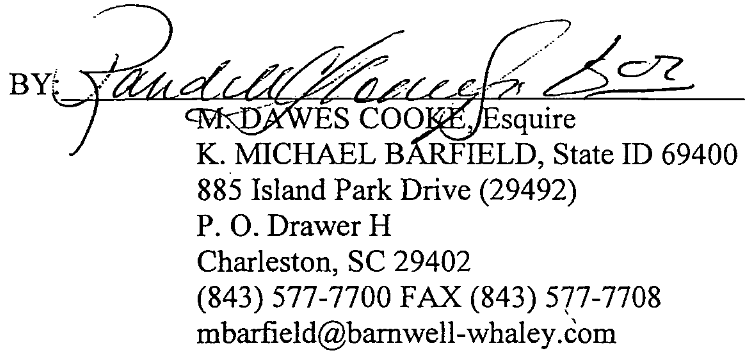
CONCLUSION

Summary judgment in favor of Respondent D.R. Horton was inappropriate as to each of Appellants' Counter-Claims sounding in tort. As demonstrated, questions of fact exist as to each cause of action alleged by Appellants. In fact, Appellants would assert that the evidence clearly demonstrates that Respondent engaged in a pattern of misconduct designed to force Appellants to close on the subject property under Respondent's own terms—namely, that the property would be sold only piecemeal despite the plain language of the Contract which allowed for a single closing on the entire tract.

As plainly demonstrated by the testimony of Respondent's own representatives, their motive for engaging in this conduct was to avoid buying any portion of the property until they had pre-sold enough lots to avoid incurring any carrying costs thereby leaving the burden of carrying the property on the shoulders of Appellants.

For the foregoing reasons, this Court should reverse and vacate the Circuit Court's entry of summary judgment.

BARNWELL WHALEY PATTERSON & HELMS, LLC



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October 27, 2010

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS
THE HONORABLE JAMES C. WILLIAMS, JR.
CIRCUIT COURT JUDGE

CASE NO.: 2007-CP-18-00337

D.R. Horton, Inc.

PLAINTIFF,

versus

Wescott Land Company, LLC and Thomas R. Hawkins,

DEFENDANTS,

Thomas R. Hawkins and Wescott Land Company, LLC,

APPELLANTS,

versus

D.R. Horton, Inc.

RESPONDENT.

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COUNTERSTATEMENT OF ISSUES ON APPEAL

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A. The Trial Court's grant of summary judgment to D.R. Horton on the slander of title counterclaim was proper where the filing of the *lis pendens* and the lawsuit are protected by the doctrine of absolute privilege.

B. The Appellants' counterclaim for slander of title also fails because they cannot show a false statement made with malice or diminished property value in the eyes of third parties.

C. Wescott no longer owns the Property and does not have standing to maintain a slander of title claim.

D. Hawkins cannot maintain a slander of title claim because no *lis pendens* or lawsuit has been filed against him by D.R. Horton.

II. The Trial Court properly granted summary judgment to D.R. Horton on the Appellants' counterclaim for violation of the Unfair Trade Practices Act because a mere breach of contract between two private contracting parties does not impact the public interest and therefore cannot constitute an unfair trade practice.

III. The Trial Court properly granted summary judgment to D.R. Horton on the Appellants' counterclaim for abuse of process.

A. The Appellants failed to establish the existence of an ulterior purpose and a willful act in the use of the process that was not proper in the conduct of the proceeding.

B. D.R. Horton has never instituted any process against Appellant Hawkins and therefore he cannot maintain an abuse of process claim.

IV. **The Trial Court properly granted summary judgment to D.R. Horton on the Appellants' counterclaim for malicious prosecution.**

   A. **The Appellants' malicious prosecution claim fails as a matter of law because they cannot show (1) the termination of a civil judicial proceeding in their favor; (2) malice by D.R. Horton in instituting the proceedings; and (3) lack of probable cause by D.R. Horton in instituting the proceedings.**

   B. **Hawkins's malicious prosecution claim fails as a matter of law because D.R. Horton never instituted any civil proceeding against him.**

V. **The Trial Court properly granted summary judgment to D.R. Horton on the Appellants' breach of contract accompanied by a fraudulent act counterclaim.**

   A. **The Appellants' breach of contract accompanied by a fraudulent act counterclaim fails a matter of law because the Appellants have offered no evidence of any separate fraudulent act committed by D.R. Horton.**

   B. **Hawkins does not have a contract with D.R. Horton and therefore cannot satisfy even the breach of contract element of this counterclaim.**

VI. **The Trial Court properly granted summary judgment to D.R. Horton on the Appellants' counterclaim for tortious interference with prospective contractual relations because:**

   (1) **D.R. Horton was unaware of any other offers on the Property and therefore did not intentionally interfere with such offers;**

   (2) **Third parties continued to make substantial offers on the Property despite D.R. Horton's filing of the *lis pendens* and lawsuit; and**

   (3) **D.R. Horton was properly exercising its own legal rights in seeking to have the Contract of Sale enforced.**

COUNTERSTATEMENT OF THE CASE

This case arises out of a breach of contract dispute between D.R. Horton, Inc., as purchaser, and Wescott Land Company, LLC, as seller of certain property located in Dorchester County, South Carolina. When Wescott refused to perform as required under the sales contract, D.R. Horton filed a suit against Wescott on February 26, 2007 in the Dorchester County Court of Common Pleas seeking specific performance. [R.pp. 24-50; Summons and Complaint.]

Wescott filed its answer and counterclaims of slander of title, breach of contract, unfair trade practices, and fraud on March 13, 2007. [R.pp. 51-55; Answer.] Wescott filed a similar amended answer and counterclaims on April 6, 2007. [R.pp. 56-60; Amended Answer.]

D.R. Horton responded on April 6, 2007, denying the material allegations of the counterclaims. [R.pp. 61-65; Answer to Counterclaims.]

D.R. Horton thereafter filed an amended complaint on April 27, 2009 seeking alternative remedies of either (1) damages as a result of the breach of contract; (2) specific performance; or (3) termination of the contract with a return of the earnest money on deposit. [R.pp. 144-178; Amended Complaint.]

Wescott responded to the Amended Complaint by asserting counterclaims of (1) breach of contract, (2) unfair trade practices, (3) abuse of process, (4) malicious prosecution, (5) breach of contract accompanied by a fraudulent act, (6) tortious interference with prospective economic advantage, and (7) slander of title. Wescott dropped its counterclaim for fraud. In the counterclaims to the amended complaint,

Wescott also unilaterally added Thomas R. Hawkins as a counter-claimant even though D.R. Horton had never asserted any claims against Hawkins. [R.pp. 179-192; Answer and Counterclaims to Amended Complaint.]

D.R. Horton filed its reply on May 26, 2009, once again generally denying the material allegations of the counterclaims. [R.pp. 607-618; Reply.]

D.R. Horton filed a motion for summary judgment on all counterclaims asserted by Wescott and Hawkins which The Honorable James C. Williams, Jr. heard on May 14, 2009. [R.pp. 66-92; 193-558; 696-768; Motion for Summary Judgment filed December 6, 2007 and May 12, 2009; Hearing Transcript.]

On September 4, 2009, the Trial Court granted D.R. Horton's motion for summary judgment on Wescott and Hawkins's counterclaims for:

1. Slander of title;
2. Violation of the Unfair Trade Practices Act;
3. Abuse of process;
4. Malicious prosecution;
5. Breach of contract accompanied by a fraudulent act; and
6. Tortious interference with prospective contractual relations.

[R.pp. 1-18; Order.]

The Trial Court also granted summary judgment to D.R. Horton on Hawkins's counterclaim for breach of contract. [R.p. 8; Id. at 7.] The only counterclaim the Trial Court let stand was Wescott's breach of contract cause of action. [R.pp. 18; Id. at 17.]

Wescott moved to reconsider the Trial Court's Order granting summary judgment, which the Trial Court denied on October 9, 2009. [R.pp. 619-622; 19; Motion; Order.] Hawkins did not make a motion for reconsideration.

Wescott and Hawkins then filed a Notice of Appeal of the Trial Court's Orders on November 12, 2009.

In their brief, the Appellants have appealed the Trial Court's grant of summary judgment to D.R. Horton on the counterclaims of:

1. Slander of title;
2. Violation of the Unfair Trade Practices Act;
3. Abuse of process;
4. Malicious prosecution;
5. Breach of contract accompanied by a fraudulent act; and
6. Tortious interference with prospective contractual relations.

Hawkins has not appealed the Trial Court's grant of summary judgment to D.R. Horton on his breach of contract counterclaim.

COUNTERSTATEMENT OF FACTS

In the early 1980's, Tommy Hawkins purchased approximately 400 acres of land in Dorchester County from Georgia-Pacific for $1,500.00 per acre. [R.pp. 347, 350; Hawkins Dep. pp. 26, 40 (Ex. E to Motion for Summary Judgment).] Hawkins sold approximately 26 acres of the land to another developer and then entered into a series of contracts with D.R. Horton for the sale of approximately 326 acres of the remaining 374 acres. [R.pp. 348-350; Id. at 32-39.] The sale of the parcels to D.R. Horton began in 1999 and concluded in 2004. [R.pp. 349-350; Id. at 34-37.] In 2004, approximately 48 acres remained. At that time, Hawkins created Wescott Land Company, LLC to develop and sell the final 48 acres to D.R. Horton. [R.p. 350; Id. at 37-40.]

On or about November 15, 2004, D.R. Horton entered into a contract for the sale of the last 48 acres of land with Wescott. The land consisted of 83 single family lots on 31 acres and 110 townhome lots on 17 acres in The Farm at Wescott subdivision located in Dorchester County. [R.pp. 228-242; Contract of Sale (Ex. A).]

The Contract of Sale specifically set forth the terms, conditions, and obligations of the contracting parties. The purchase and sale of the property was to take place pursuant to a "Takedown Schedule" that set forth the number of lots to be purchased within a particular time frame. Id. The 83 single family lots are not an issue in this case because D.R. Horton closed on them prior to the disputes between the parties arising. This dispute in this appeal concerns the contractual obligations of the parties related only to the 110 townhome lots on approximately 17 acres of land of the original 400 acres owned by Hawkins (hereinafter referred to as "the Property"). [R.pp. 247-248; Fraylick Dep. pp.

20-21 (Ex. C).]

Under the contract, D.R. Horton was to purchase developed townhome lots over a period of 2 ½ years, at a certain minimum number per quarter. D.R. Horton was to purchase the lots in phases – each phase being its own separate transaction. Under the contract, D.R. Horton was to begin closing on a portion of the townhome lots beginning of the third quarter of 2006. [R.p. 241; Exhibit B to Contract of Sale.] D.R. Horton had the option to purchase lots earlier than the third quarter of 2006 if it desired. [R.p. 229; Contract of Sale, § 3(a).]

Prior to D.R. Horton's requirement to purchase, Wescott had obligations to prepare the lots for construction. The contract defines Wescott's obligations as "Conditions Precedent to Closing." These conditions precedent were required to be completed to the reasonable satisfaction of D.R. Horton. Specifically, the conditions precedent language states that "Seller shall send written notice to Purchaser that the Lots to be conveyed have satisfied said requirements," and that "'Substantial Completion' shall be achieved upon the date Purchaser receives Seller's notice pursuant to this paragraph accompanied by **evidence satisfactory to Purchaser**, in Purchaser's reasonable discretion that said requirements have been met." [R.pp. 235-236; Id. at § 15 (emphasis added).]

On or about July 27, 2005, D.R. Horton and Wescott executed an amendment to the Contract of Sale further specifying the duties and responsibilities of two parties as to development of the Property, the time period for Wescott to deliver the lots, and the time frame for D.R. Horton to purchase the lots. [R.pp. 244-245; Amendment (Ex. B).]

The Amendment did not abate any of Wescott's contractual obligations to perform

the required conditions precedent under the Contract of Sale, but rather established additional conditions precedent. The Amendment also established notice requirements which would allow D.R. Horton "sufficient time to verify all such documentation" to prove conditions precedent have been met. The Amendment did not alter D.R. Horton's right to refuse to close on any property until all conditions precedent were satisfied. [R.pp. 244-245; 259-262; Amendment; Fraylick Dep. pp. 52-55.]

The extended "Takedown Schedule" as set forth in Paragraph 1 of the Amendment to the Contract of Sale states as follows:

> 1. Pursuant to paragraph 3a and 3b in CONTRACT OF SALE effective November 15, 2004 and notes in Exhibit "B" attached thereto, Purchaser and Seller agree to amend the Exhibit B "Takedown Schedule" to provide that Purchaser shall purchase and seller shall sell the properties as follows:
>
> a. Phase 3A (45 lots) on or before the later of July 1, 2005 or upon final plat approval and recordation. 45 lots @ $32,000/lot = $1,440,000.00
>
> b. Phase 3D (38 lots) on or before the later of October 1, 2005 or upon final plat approval and recordation. 38 lots @ $32,000/lot = $1,216,000.00
>
> c. Phase 3E-1 (37 lots) on or before the later of January 1, 2006 or upon final plat approval and recordation 37 lots @ $25,500/lot = $943,500.00
>
> d. Phase 3E-2 (37 lots) on or before the later of April 1, 2006 or upon final plat approval and recordation 23 lots @ $25,500/lot = $586,500.00 and 14 lots @ $24,500/lot = $343,000.00
>
> e. Phase 3E-3 (36 lots) on or before the later of July 1, 2006 or upon final plat approval and recordation. 36 lots @ $24,500/lot = $882,000.00.

[R.p. 244; Amendment.]

D.R. Horton fully performed under subparts (a) and (b) and paid Wescott $2,660,000.00. Therefore, this dispute only concerns the obligations of the parties under subparts (c), (d), and (e).

Wescott admitted that it did nothing to attempt to satisfy the conditions precedent under these subparts within the timeframe provided:

> Q : Did Wescott attempt to complete phase 3E-1 before moving to 3E-2 and then the same for 3E-3?
>
> A : In total, no.
>
> Q : Is there any part of the construction described in Exhibit 4 where Wescott broke out the three subsections of phase 3E?
>
> A : No.

[R.p. 249; Fraylick Dep. p. 27.]

> Q : As of March 23, 2006 had the conditions precedent listed in Exhibit 2 of the contract been fully completed for the 3E phases?
>
> A : No.

[R.pp. 250-251; Id. at 30-31.]

> Q : Were all the conditions precedent done as to any lot in . . . phase 3E at the time of the March 23, 2006 letter?
>
> A : No.

[R.p. 252; Id. at 34.]

> Q: As of [April 26] were the conditions precedent met as to any lot in phase 3E-1, 3E-2 or 3E-3?
>
> A : As of April 26, no.

[R.p. 258; Id. at 49.]

Q : As of June 14, 2006 had Wescott completed the conditions precedent to close on any of the lots in phase 3E?

. . .

A : It says right there we were still waiting on a couple of those items.

[R.p. 263; Id. at 63.]

Q: Do you know when Wescott began constructing or began construction on phase 3E?

A : Sometime in the fall of 2005.

[R.p. 279; Id. at 84.]

Q : At that time did Wescott believe it was going to get all the conditions precedent on phase 3E completed prior to January of '06?

A : No.

Q : . . . did it believe it was going to get all of the conditions precedent that it was obligated to perform on phase 3E completed by April 1st, 2006?

A : No.

[R.pp. 280-281; Id. at 85-86.]

The Property was not bonded with the city of North Charleston until May 11, 2006. [R.pp. 282; 309; Id. at 89; Ex. 23 to Fraylick Dep. (City Resolution).] The final plat recordation for phase 3E did not occur until June 22, 2006. [R.p. 255; Fraylick Dep. p. 40.]. Wescott never paid for the bond as promised. [R.p. 254; Id. at 36.]. Wescott did not profess to satisfy all the conditions precedents until July 19, 2006. [R.pp. 297-308; Fraylick Dep., Exs. 13-17.]

As a result of Wescott's failure to satisfy all the conditions precedent by July 19, 2006, Wescott was in material breach of the Contract of Sale. The Contract clearly

provides that "[i]f [Wescott] has not achieved Substantial Completion by six (6) months past the estimated date in the Takedown Schedule with regard to any Lot(s) to be purchased, [D.R. Horton] shall have the right, in [D.R. Horton's] sole and exclusive discretion to either (i) terminate this Contract or (ii) extend the date for achievement of Substantial Completion." [R.p. 235; Contract of Sale, § 15.] By its own admission, Wescott did not attempt to declare Substantial Completion until July 19, 2006, more than six months after the estimated date of January 1, 2006 in the Takedown Schedule for Phase 3E-1. [R.pp. 352, 354; 461-463; Hawkins Dep., pp. 89-90, 113-114; Smith Dep. pp. 32-34 (Ex. K).]

Despite Wescott's material breach, it began to demand that D.R. Horton close on all three phases at once in contravention of the Contract of Sale. [R.p. 318; Fraylick Dep., Ex. 25 (Smith Letter dated August 2, 2006).]

However, even then Wescott was aware it had not satisfied all the conditions precedent. For example, Wescott was still attempting to have the City of North Charleston approve the roads as of July 21, 2006, which Wescott admits it had to do in order to complete the conditions precedent. [R.pp. 264-267; Fraylick Dep. pp. 66-69.] There is no evidence the City of North Charleston ever approved the roads. [R.p. 267; Id. at 69.]

Wescott did not obtain approvals for the water, which was also required under the conditions precedent, until August 2, 2006. [R.pp. 267-271; Id. at 69-73.] Wescott admits it had not satisfied the conditions precedent by early August 2006.

Furthermore, Wescott has still not completed all the conditions precedent.

Wescott admits that as part of the conditions precedent, Wescott had to provide necessary improvements to the property for erosion control and to prevent storm water from depositing sediment and other debris onto the property's roadways. [R.p. 272; Id. at 76.]

> Q : And the attachment appears to be a Stormwater Management and Sediment Reduction Site Inspection Report. Do you see that?
>
> A: Yes.
>
> Q : Is this report one of the reports that Wescott needed to get in order to comply with its conditions precedent?
>
> A : Yes.

[R.p. 274; Id. at 78.]

Wescott agrees that it never obtained an approved Stormwater Management and Sediment Reduction Site Inspection Report. [R.pp. 273-279; Id. at 77-79, 81-82, 83-84.]

Wescott could never get DHEC or OCRM's approval on the Stormwater Management and Sediment Reduction Site Inspection Report because Wescott never erected proper erosion controls at the site. Consequently, every time it would rain, the streets in phase 3E would become laden with sediment. [R.pp. 320-344; Affidavit of Mitchell M. Flannery with photographs (Ex. D).]

In addition to Wescott's failure to satisfy the conditions precedent as set forth above, Wescott never provided verification that compaction tests were performed to satisfy the 2000 PSF compaction requirement of the Contract of Sale. [R.p. 235; Contract of Sale, § 15(f).] In fact, no compaction tests were performed at all. [R.pp. 363-364; Affidavit of William Brown Wright, ¶ 6 (Ex. F).]

While Wescott produced foundation evaluations on May 1, 2006, these evaluations

do not reflect any compaction tests performed by Wescott's engineer. Regardless, the very engineer employed and endorsed by Wescott states that any compaction test performed in May 2006 would not be valid on July 19, 2006 or any later date. [R.pp. 363-364; 352-353; Id.; Hawkins Dep. pp. 92-93.]

The performance of the Contract of Sale came to an impasse over Wescott's refusal to provide D.R. Horton verification of the compaction reports and Wescott's continuing material breach.

As allowed by the terms of the Contract of Sale and in response to Wescott's breach, D.R. Horton offered to extend the date for closing by proposing an amendment that did not relieve Wescott from satisfying the conditions precedent set forth in the Contract of Sale. The proposed amendment dated August 18, 2006 extended the dates for Wescott to perform and changed the Takedown Schedule. [R.pp. 422-425; Proposed Amendment (Ex. G).]

Over the next five months, the parties negotiated additional terms of the Contract of Sale for inclusion in the proposed amendment. These negotiations included several drafts that were rejected and revised by D.R. Horton and Wescott through January 2007. [R.pp. 427-456; Proposed Amendments (Exs. H and I).]

In every instance, D.R. Horton would include the requirement that Wescott satisfy the conditions precedent, specifically the compaction requirement among other requirements. In every instance, Wescott would delete the compaction requirement from the proposed amendment.

During this period of negotiation, D.R. Horton agreed in response to Wescott's

demand to increase the purchase price per town home from $24,500.00 and $25,500.00 to a flat $30,000.00 per lot. In addition, D.R. Horton agreed to purchase all 110 lots in one transaction instead of three closings separated by 6 months as set forth in the Amendment. The impact of the increase in price per lot reflects an increase of $648,000.00 in the total purchase price. [R.pp. 453-456; Proposed Amendment (Ex. I).]

However, despite the increase in price per lot and the agreement to close on all 110 lots, Wescott refused to agree to the final proposed amendments because of the inclusion of the compaction requirement. [R.pp. 470-472; 458; Smith Dep. pp. 119-121; Smith e-mail dated January 30, 2007 (Ex. J).]

D.R. Horton informed Wescott in an e-mail dated January 31, 2007 that D.R. Horton would not agree to remove the compaction requirement and it needed a response from Wescott. [R.p. 476; Shetterly e-mail (Ex. L).] Wescott never responded and refused to sign the proposed amendment containing the compaction requirement. Without a response on the compaction requirement and no signed amendment, D.R. Horton did not believe that any closing on the 110 townhome lots would take place. [R.p. 357; Hawkins Dep. pp. 174-175.]

Wescott showed up to close on the lots on February 2, 2007. When no one from D.R. Horton appeared at the closing, Wescott's attorney called D.R. Horton's attorney and confirmed that D.R. Horton did not believe a closing would occur because of the outstanding compaction issue. [R.pp. 473-474; Smith Dep. pp. 143, 147.] Wescott's attorney confirmed that he had been very aware of D.R. Horton's issue with the compaction requirement:

Q: [D.R. Horton's attorney] relayed to you that it's always been [D.R. Horton's] intent to require new compaction testing to show that these pads meet the conditions precedent to the contract?

A: No doubt about it. We had talked about that for 30 days.

[R.p. 474; Id. at 147.]

During the period of negotiations between August 2006 and February 2007, Wescott had opportunities to sell the property to other interested parties. During that period, Wescott took the position that D.R. Horton's failure to close allowed Wescott to terminate the Contract of Sale and enter a contract with another interested party. Wescott started to attempt to sell the in August 2006 when it asserted it "was obvious D.R. Horton was not going to close on the property." [R.p. 286; Fraylick Dep. p. 96.]

In fact, Wescott received 2 offers to purchase the Property in November 2006:

1. On November 6, 2006, KB Homes sent a signed proposal agreeing to pay $30,000.00 per lot with closings on a quarterly basis [R.pp. 483-487; Ex. O.]
2. On November 29, 2006, KB Homes sent a signed proposal increasing the price per lot to $33,000.00 with 3 closings over 6 months. [R.pp. 488-493; Ex. O.]

However, Wescott rejected KB Homes's offers. [R.pp. 359-360; Hawkins Dep. pp. 208-209.]

As a result of the impasse between D.R. Horton and Wescott, D.R. Horton, to preserve its interest in the Property, filed a *lis pendens* pursuant to S.C. CODE ANN. § 15-11-10 on December 4, 2006 naming Wescott as the defendant. [R.pp. 537-538; December 2006 *lis pendens* (Ex. P).] Due to continued negotiations, D.R. Horton ended up not filing a complaint within the 20 days contemplated in the statute.

After declining to sell the property to KB Homes, Wescott contracted to sell the

property to Tommy Hawkins, Wescott's controlling member, for adequate consideration, and on December 21, 2006, Wescott conveyed the property to Tommy Hawkins free of any liens. [R.pp. 542-548; Deed (Ex. Q).] Wescott did not disclose to D.R. Horton that it had conveyed the property to Hawkins. D.R. Horton continued to negotiate with Wescott for the sale of the Property until February 2, 2007.

After the further failed negotiations, D.R. Horton filed a subsequent *lis pendens* on February 13, 2007 again naming Wescott as the defendant. [R.pp. 539-540; February 2007 *lis pendens* (Ex. P).] D.R. Horton thereafter filed its breach of contract action against Wescott on February 26, 2007. [R.pp. 26-32; Complaint.]

After the lawsuit was filed, Hawkins continued to receive substantial offers on the Property. On or about March 9, 2007, KB Homes actually made another offer to purchase the property from Hawkins for an amount greater than its two previous offers to Wescott. [R.pp. 494-525; Ex. O.] The total amount offered by KB Homes exceeded the contract price with D.R. Horton by more than $900,000.00. Id.

One month later, on or about April 27, 2007, Jessco Homes offered to purchase the property from Hawkins for $35,000.00 per lot, an amount more than $1.2 million higher than for what D.R. Horton agreed to purchase the lots from Wescott. [R.pp. 526-535; Ex. O.] Even though third parties were willing to purchase the Property, Hawkins declined to accept these offers.

ARGUMENT

This case is, at its core, a breach of contract case with both sides claiming that the other breached the Contract of Sale for the Property at issue.

When D.R. Horton filed its complaint against Wescott to enforce the Contract of Sale, Wescott and Hawkins responded with numerous counterclaims, including breach of contract; slander of title; violation of the Unfair Trade Practices Act; abuse of process; malicious prosecution; breach of contract accompanied by a fraudulent act; and tortious interference with prospective contractual relations.

The counterclaims sounding in tort unnecessarily complicated the case, obscured the real breach of contract issues, and sought damages outside the exclusive remedies available to Wescott in the Contract of Sale:

> In the event that Seller shall fulfill all of Seller's obligations pursuant to this contract and should Purchaser breach any material terms of this Contract, Seller shall be entitled, as Seller's **sole and exclusive remedy**, to: (i) waive the contractual obligations of Purchaser in writing; (ii) extend the time for performance by such period of time as may be mutually agreed upon in writing by the Parties hereto; or (iii) terminate this Contract as to all unpurchased property and retain or receive the Earnest Money then on deposit as liquidated damages for such default and not as a penalty, in which event the Parties shall be released herefrom and have no further rights, obligations, or responsibilities hereunder. Seller may not enforce specific performance and waives any other remedies which might be available to it upon default by Purchaser except for Seller's right to terminate this Contract and receive and retain the Earnest Money then on deposit as liquidated damages for such default and not as a penalty.

[R.pp. 230-231; Contract of Sale, § 7(a) (emphasis added).]

The counterclaims were only filed in retaliation for D.R. Horton's refusal to close on the property under Wescott's terms and for filing a *lis pendens* and lawsuit against Wescott. [R.pp. 189-191; Answer and Counterclaims to Amended Complaint, ¶¶ 72-87.]

During discovery, Wescott admitted that there was nothing D.R. Horton had done other than allegedly breaching the contract and filing the lawsuit:

> Q: Is there anything other than not purchasing 110 town home lots that Wescott is complaining that D.R. Horton did not do in this lawsuit?
>
> . . .
>
> A: No.

[R.p. 248; Fraylick Dep. p. 21.]

> Q: [O]ther than the lis pendens and the lawsuit what did D.R. Horton do in order to interfere with a potential transaction between [another buyer] and Wescott . . . ?
>
> A: I don't know.

[R.pp. 287-288; Id. at 102-103.]

Wescott filed the counterclaims because it felt like it had not been treated fairly by D.R. Horton when D.R. Horton had, according to Wescott, not closed in a timely fashion:

> Q: And what other than not closing on time did they do? Cite for me what they did, if anything?
>
> A: Okay. I guess it all relates back to not closing on time. . . .
>
> Q: Any other . . . ways you feel they treated you unfairly?
>
> A: I can't think of any right now.

[R.p. 293; Id. at 114.]

> Q: Are there any ways that Wescott . . . feels that D.R. Horton acted deceptively in these transactions?
>
> A: Absolutely.
>
> Q: In what way?
>
> A: Said they were going to close and they didn't close.

. . .

Q : So again, back to timeliness or not closing at all?

A : Performing at all, yes.

Q : Anything other than that?

A : That I can think of right now, no.

Q : Now I'm back to talking about in what ways D.R. Horton made false statements or lied to Wescott Land Company, LLC. Okay? My understanding is it's all related to timeliness of closing or not closing. Fair?

A : The majority of it, yes. Fair.

Q : Now you qualified it again. Is there anything that you recall other than that that you want to testify to today?

A: That I can think of right now, no.

[R.p. 294; Id. at p. 115.]

Finding no basis for Wescott's and Hawkins's counterclaims, the Trial Court granted summary judgment to D.R. Horton on all the tort claims and Hawkins's breach of contract claim, properly restoring the case to a breach of contract dispute between D.R. Horton and Wescott.

Wescott and Hawkins have now appealed the Trial Court's grant of summary judgment on the tort counterclaims. Hawkins has not appealed the Trial Court's grant of summary judgment to D.R. Horton on his breach of contract claim.

Standard of Review

An appellate court reviews the grant of a motion for summary judgment under the same standard applied by the trial court. George v. Fabri, 345 S.C. 440, 451 n.5, 548 S.E.2d 868, 873 n.5 (2001).

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988).

Although the burden is on the party seeking summary judgment, the non-moving party must make a showing sufficient to establish the existence of an element on which it will bear the ultimate burden of proof at trial; otherwise, the failure of proof concerning an essential element of the case necessarily renders all other facts immaterial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A party cannot rest on the mere allegations in the complaint. Nor can a party escape summary judgment on the mere hope that something will develop later at trial, or by remaining silent and later claiming additional facts supporting the cause of action. Hammond v. Scott, 268 S.C. 137, 143, 232 S.E.2d 336, 339 (1977). Therefore, where the plaintiff relies solely upon his pleadings, files no counter affidavits, or makes no factual showing in opposition to the motion for summary judgment, the trial court is required to grant summary judgment, if under the facts

presented by the defendant, he is entitled to judgment as a matter of law. Rule 56(e), SCRCP; Garrett v. Reese, 262 S.C. 327, 329, 204 S.E.2d 432, 433 (1974).

I. The Trial Court properly granted summary judgment to D.R. Horton on the Appellants' slander of title counterclaim.

A. The Trial Court's grant of summary judgment to D.R. Horton on the slander of title counterclaim was proper where the filing of the *lis pendens* and the lawsuit are protected by the doctrine of absolute privilege.

The Trial Court properly granted summary judgment to D.R. Horton on the Appellants' counterclaim of slander of title where the Appellants relied only upon the two *lis pendens* filed by D.R. Horton to support their claim and the filing of a *lis pendens* is absolutely privileged under South Carolina.

A plaintiff is required to prove the following elements to establish a slander of title claim: (1) the publication of (2) a false statement (3) derogatory to the individual's title, (4) with malice, (5) which causes special damages, and (6) as a result, diminished value in the eyes of a third party. Huff v. Jennings, 319 S.C. 142, 146, 459 S.E.2d 886, 889 (Ct. App. 1995).

The Appellants have never attempted, at summary judgment or in their Brief, to put forth any facts establishing the elements of a slander of title claim. Instead, the Appellants rely only upon D.R. Horton's filing of two *lis pendens* both of which relate to the property giving rise to D.R. Horton's lawsuit against Wescott.

The filing of a *lis pendens*, however, cannot establish a slander of title claim in South Carolina. The filing of a *lis pendens* is absolutely privileged. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 32, 567 S.E.2d 881, 897 (Ct. App. 2002).

South Carolina law allows the filing of a *lis pendens* prior to the filing of any complaint in any action affecting the title to real property:

> In any action affecting the title to real property the plaintiff (a) not more than twenty days before filing the complaint or at any time afterwards . . . may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action and the description of the property in that county affected thereby.

S.C. CODE ANN. § 15-11-10.

In Pond Place, this Court discusses in-depth the basis for according the absolute privilege to the filing of a *lis pendens* under this statute. The purpose of a *lis pendens* is to provide notice to and inform a potential purchaser that a particular piece of real property is subject to a dispute. A properly filed *lis pendens* binds subsequent purchasers to all proceedings evolving from the litigation. Pond Place, 351 S.C. at 16, 567 S.E.2d at 889. The *lis pendens* is designed to protect unidentified third parties by alerting prospective purchasers of pending litigation that may affect their title to real property and that the purchaser will take subject to any judgment. Id. at 17, 567 S.E.2d at 889; S.C. CODE ANN. § 15-11-20. The filing of a *lis pendens* does not prohibit the transfer of title but merely provides notice to third parties.

An action "affecting the title to real property" clearly allows the filing of a *lis pendens* by an interested party in order to protect its ownership interest and such actions include actions for specific performance, which D.R. Horton has sought in this case. Pond Place, 351 S.C. at 17-18, 567 S.E.2d at 889-90.

This Court then observed that under South Carolina law, pleadings, even if defamatory, are absolutely privileged and no action can lie for their publication. Id. at

23, 567 S.E.2d at 892-93. The filing of a *lis pendens*, authorized by statute, falls within the category of judicial pleadings and thereby enjoys the same absolute privilege and cannot form the basis of an action for slander of title. Id. at 29-32, 567 S.E.2d at 896-97.

The first *lis pendens* filed by D.R. Horton on December 4, 2006 was filed in accordance with § 15-11-10 which allows the filing of a *lis pendens* prior to the filing of an action and provided notice "that an action will be commenced within the next twenty (20) days in this Court upon the Complaint of [D.R. Horton] against [Wescott] to enforce its contract to purchase the following described real property situated in Dorchester County, South Carolina." [R.p. 537; December 2006 *lis pendens*.]

Ultimately, because of continued negotiations between the parties, a complaint was not filed. The only effect this had was to render the *lis pendens* invalid and no longer enforceable against third parties. See South Carolina Nat'l Bank v. Cook, 291 S.C. 530, 532-33, 354 S.E.2d 562, 563 (1987); Horry County v. Ray, 382 S.C. 76, 82, 674 S.E.2d 519, 523 (Ct. App. 2009).

After negotiations once again failed, D.R. Horton filed its second *lis pendens* on February 13, 2007 and the subsequent action on February 26, 2007. [R.pp. 539; 26; February 2007 *lis pendens*; Complaint.]

Both of these *lis pendens* were filed in accordance with the statute and are entitled to the absolute privilege afforded judicial pleadings. The fact that the first *lis pendens* expired does not strip it of the absolute privilege. The statute expressly authorizes the filing of a *lis pendens* prior to the filing of an action, and D.R. Horton complied with the statute by doing so. If an action is not filed, the *lis pendens* simply expires and cannot

be binding on any subsequent purchasers.

There are likely many instances where a party files a *lis pendens* and then no longer needs to file the action. The dispute between the parties may settle, the parties may agree to further negotiate, or the one filing the *lis pendens* may decide to no longer pursue rights in the property. After the first *lis pendens* was filed, D.R. Horton believed a solution may have been able to be reached through further negotiations, and an action was not needed at that time. In February 2007, it became clear that litigation would be needed to resolve the parties' dispute and D.R. Horton filed the second *lis pendens* and commenced suit.

B. <u>The Appellants' counterclaim for slander of title also fails because they cannot show a false statement made with malice or diminished property value in the eyes of third parties.</u>

Even if somehow the first *lis pendens* is not afforded the protection of the absolute privilege, the Appellants nevertheless have not shown any evidence supporting any of the six elements of a slander of title claim. <u>Huff v. Jennings</u>, 319 S.C. 142, 146, 459 S.E.2d 886, 889 (Ct. App. 1995) ("(1) [T]he publication of (2) a false statement (3) derogatory to the individual's title, (4) with malice, (5) which causes special damages, and (6) as a result, diminished value in the eyes of a third party".). The failure of proof on just one element will defeat a claim.

The Appellants have not shown that there was a false statement made with malice when the first *lis pendens* was filed. When filed, D.R. Horton had the intent to file an action within twenty days which is what the *lis pendens* said. The parties were in fact having a dispute about the Contract of Sale of the Property. That was all true when filed. That a complaint was not filed within twenty days does not render the statements contained

in the *lis pendens* false when filed. The Appellants have never shown that the *lis pendens* constituted a false statement.

Moreover, to establish a claim for slander of title, the Appellants must also show that the filing of the *lis pendens* diminished the value of the property in the eyes of a third party. After the lawsuit was filed, on or about March 9, 2007, KB Homes actually made another offer to purchase the property from Hawkins for an amount greater than its two previous offers to Wescott. [R.pp. 494-525; Ex. O.] The total amount offered by KB Homes exceeded the contract price with D.R. Horton by more than $900,000.00. Id.

One month later, on or about April 27, 2007, Jessco Homes offered to purchase the property from Hawkins for $35,000.00 per lot, an amount more than $1.2 million higher than for what D.R. Horton agreed to purchase the lots from Wescott. [R.pp. 526-535; Ex. O.]

The *lis pendens* and filed lawsuit did not diminish the value of the property to third parties who continued to try to make substantial offers to purchase the property. The *lis pendens* and filed lawsuit did not stop third parties from making offers. Hawkins nevertheless rejected the offers from the third parties. [R.p. 356; Hawkins Dep. pp. 161-162.]

These high offers made by third parties despite the filed *lis pendens* and lawsuit alone defeat the slander of title claim.

C. Wescott no longer owns the Property and does not have standing to maintain a slander of title claim.

In addition, it is undisputed that Wescott no longer has an ownership interest in the Property in question because it transferred the Property to Hawkins. Therefore, it does not

have standing to bring a slander of title claim since it no longer owns the property. See Pond Place, 351 S.C. at 18, 567 S.E.2d at 890 ("Generally, an action under slander of title may only be maintained by one who possesses an estate or interest in the affected property.").

D. Hawkins cannot maintain a slander of title claim because no *lis pendens* or lawsuit has been filed against him by D.R. Horton.

D.R. Horton has also never filed a *lis pendens* or lawsuit against Hawkins, and therefore, he has no grounds for a slander of title action.

This Court should affirm the Trial Court's grant of summary judgment to D.R. Horton on the slander of title counterclaims because (1) the filing of a *lis pendens* is absolutely privileged under South Carolina law; (2) the Appellants have never presented any evidence establishing any elements of a slander of title claim; (3) Wescott lacks standing to assert a slander of title claim; and (4) D.R. Horton never filed any *lis pendens* against Hawkins.

II. The Trial Court properly granted summary judgment to D.R. Horton on the Appellants' counterclaim for violation of the Unfair Trade Practices Act because a mere breach of contract between two private contracting parties does not impact the public interest and therefore cannot constitute an unfair trade practice.

D.R. Horton is entitled to summary judgment on the Appellants' counterclaim for unfair trade practices where this case only involves a private contract dispute between the purchaser and seller of a specific piece of property.

The South Carolina Unfair Trade Practices Act ("UTPA") prohibits any "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. CODE ANN. § 39-5-20. In order to bring a cause of action under the

UTPA, the plaintiff must demonstrate: "(1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest." Havird Oil Co. v. Marathon Oil Co., 149 F.3d 283, 291 (4th Cir. 1998); S.C. CODE ANN. § 39-5-140.

Under South Carolina law, a mere breach of contract does not constitute a violation of the unfair trade practices act. Key Co. v. Fameco Distribs., Inc., 292 S.C. 524, 526, 357 S.E.2d 476, 478 (Ct. App. 1987). A breach of contract cause of action does not involve practices that either directly or indirectly affect the rights of anyone but the contracting parties. Id. at 526, 357 S.E.2d at 478. An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is "beyond the act's embrace." Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 479, 351 S.E.2d 347, 350 (Ct. App. 1986). Where the allegation is that one of the parties breached a contract, even intentionally, the plaintiff cannot establish an adverse impact on the public interest. If so, then every intentional breach of contract within a commercial setting would constitute an unfair trade practice. That is beyond the scope of the act's purpose. Key Co., 292 S.C. at 526-27, 357 S.E.2d at 478.

In an attempt to argue that D.R. Horton's alleged conduct reaches beyond the private commercial transaction between two sophisticated parties, the Appellants state, without pointing to any evidence in their Brief, that D.R. Horton may be engaging in the same type of breach of contracts across the country. The Appellants claimed in summary judgment briefings that they had a witness who would testify he was treated the same way

by D.R. Horton and that D.R. Horton had been involved in similar litigation, but the Appellants offered no evidence of that case and provided no affidavit of any witnesses expected to testify.

To defeat D.R. Horton's motion for summary judgment on the unfair trade practices counterclaim, the Appellants cannot rely on mere conclusory allegations or hopes that something will later develop at trial. Hammond v. Scott, 268 S.C. 137, 143, 232 S.E.2d 336, 339 (1977); Shupe v. Settle, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994). The party opposing summary judgment must point to specific facts showing that there is an issue of material fact and disclose the facts it intends to rely on by affidavit or other proof. Shirley's Iron Works, Inc. v. City of Union, 387 S.C. 389, 398, 693 S.E.2d 1, 5 (Ct. App. 2009); Shupe, 315 S.C. at 516, 445 S.E.2d at 655.

The Appellants failed to establish a *prima facie* case on their claim for unfair trade practices because the claim rests solely on the assertion that D.R. Horton failed to fulfill its contractual obligations and there is no evidence otherwise.

Furthermore, Appellant Hawkins did not have a contract with D.R. Horton and to the extent his allegations rest on D.R. Horton's alleged promise to close and then failure to do so, his claim must fail as well.

The Trial Court was correct to grant summary judgment to D.R. Horton on the Appellants' counterclaim alleging unfair trade practices.

III. **The Trial Court properly granted summary judgment to D.R. Horton on the Appellants' counterclaim for abuse of process.**

A. **<u>The Appellants failed to establish the existence of an ulterior purpose and a willful act in the use of the process that was not proper in the conduct of the proceeding</u>.**

The abuse of process claim asserted by the Appellants rests on D.R. Horton's filing of *lis pendens* on the property. [R.p. 189; Answer and Counterclaims to Amended Complaint, ¶¶ 65-67.]

The abuse of process tort provides a remedy for "one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." <u>Food Lion, Inc. v. United Food & Commercial Workers Int'l Union</u>, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002). To prevail on an abuse of process cause of action, the Appellants must be able to prove two essential elements: "an ulterior purpose and a willful act in the use of process not proper in the conduct of the proceeding." <u>Hainer v. American Med. Int'l, Inc.</u>, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997); <u>Huggins v. Winn-Dixie Greenville</u>, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967).

In this case, D.R. Horton filed two *lis pendens* on the property and a subsequent lawsuit for specific performance to protect its interest in the property when Wescott refused to perform as required under the Contract of Sale. The Appellants have failed to prove either of the two essential elements of an ulterior purpose and a willful act not proper in the proceeding. Accordingly, the Trial Court correctly granted D.R. Horton summary judgment because the Appellants' counterclaim for abuse of process fails as a matter of law.

With respect to the first element, that of ulterior purpose, the Appellants can only

establish an ulterior purpose if they can establish that the process was used to gain an objective not legitimate in the use of process. Food Lion, Inc., 351 S.C. at 71, 567 S.E.2d at 253. "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself." Hainer, 328 S.C. at 136, 492 S.E.2d at 107. Moreover, "liability exists not because a party merely seeks to gain a collateral advantage by using some legal process, but because the ***collateral objective was its sole or paramount reason for acting***." Food Lion, 351 S.C. at 75, 567 S.E.2d at 256 (emphasis added).

In the case at hand, D.R. Horton has not sought any collateral advantage by using the legal process. The purpose for bringing the action was to attempt to enforce the terms of the Contract of Sale and its Amendment to purchase the 110 lots. Use of process for such a purpose is a valid and proper use of process. Even if D.R Horton had known about other offers on the property, there is no evidence that D.R. Horton used the process to gain anything other than its rights under the Contract of Sale. See Davis v. Epting, 317 S.C. 315, 319-20, 454 S.E.2d 325, 328 (Ct. App. 1994) ("Even if Davis knew of Epting's plans to develop the party [and that legal action might dissuade Epting from developing it] . . . [the Court] finds no evidence that Davis used the process to gain anything other than his right to access Virginia Lane. This does not constitute an ulterior purpose.").

The Appellants have provided no specific evidence, other than generalized assertions, of a collateral or ulterior purpose on D.R. Horton's part in filing the *lis pendens* or bringing the lawsuit. See Food Lion, 351 S.C. at 73, 567 S.E.2d at 255 ("'[I]f the suit is brought not to recover on the cause of action stated in the complaint, but to accomplish a

purpose for which the process was not designed, there is an abuse of process'" (quoting 1 AM. JUR.2D *Abuse of Process* § 11 at 420 (1994)).

Even if the Appellants were able to meet the ulterior purpose prong, which they cannot, the cause of action for abuse of process must still fail as a matter of law because the Appellants have not proved that D.R. Horton "engaged in 'a willful act in the use of the process not proper under regular conduct of the proceedings.'" LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 71, 370 S.E.2d 711, 713 (1998) (quoting Johnson v. Painter, 279 S.C. 390, 391, 307 S.E.2d 860, 860 (1983)). "There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, ***even though with bad intentions***." Hainer, 328 S.C. at 136, 492 S.E.2d at 107 (emphasis added); see also Sierra v. Skelton, 307 S.C. 217, 222, 414 S.E.2d 169, 172 (Ct. App. 1992) ("[T]here must be an overt act and bad purpose alone is insufficient").

The "willful act" requires "'[s]ome definite act . . . not authorized by the process or aimed at an object not legitimate in the use of the process.'" Food Lion, 351 S.C. at 71, 567 S.E.2d at 253-54 (quoting Hainer, 328 S.C. at 136, 492 S.E.2d at 107) ("[T]he [willful act] element comprises three components: 1) a "willful" or overt act, 2) "in the use of process, 3) that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective.")

Both *lis pendens* filed by D.R. Horton were authorized by statute. The filing of the lawsuit was authorized, especially as D.R. Horton needed to protect its rights under the Contract of Sale by seeking specific performance. The filing of the *lis pendens* and the lawsuit were protected by the absolute privilege. Pond Place Partners, Inc. v. Poole, 351

S.C. 1, 32, 567 S.E.2d 881, 897 (Ct. App. 2002). D.R. Horton's filing of the *lis pendens* and lawsuit alone are insufficient to serve as the basis for an abuse of process claim.

B. D.R. Horton has never instituted any process against Appellant Hawkins and therefore he cannot maintain an abuse of process claim.

Furthermore, D.R. Horton did not file an action against Hawkins or file a *lis pendens* against Hawkins. No process was ever made on Hawkins, and he therefore cannot maintain an abuse of process claim. See Food Lion, Inc., 351 S.C. at 70, 567 S.E.2d at 253 (observing where no court process is involved, there can be no abuse of process).

The Trial Court properly found that the Appellants had not established either element of an abuse of process claim, and therefore, this Court should affirm the Trial Court's grant of summary judgment to D.R. Horton on the Appellants' counterclaim for abuse of process. See, e.g., Hainer, 328 S.C. at 136, 492 S.E.2d at 107 (affirming directed verdict motion in favor of defendant as to abuse of process claim); Food Lion, 351 S.C. at 68, 567 S.E.2d at 252 (affirming Rule 12(b)(6) motion to dismiss on abuse of process cause of action); Davis, 317 S.C. at 319-20, 454 S.E.2d at 328 (affirming directed verdict on abuse of process counterclaim asserted against plaintiff); LaMotte, 296 S.C. at 71, 370 S.E.2d at 713-14 (affirming grant of summary judgment to defendant on abuse of process claim).

IV. The Trial Court properly granted summary judgment to D.R. Horton on the Appellants' counterclaim for malicious prosecution.

A. The Appellants' malicious prosecution claim fails as a matter of law because they cannot show (1) the termination of a civil judicial proceeding in their favor; (2) malice by D.R. Horton in instituting the proceedings; and (3) lack of probable cause by D.R. Horton in instituting the proceedings.

The Appellants have not shown any evidence supporting all of the elements of a malicious prosecution claim and, therefore, the Trial Court did not err in granting summary judgment to D.R. Horton on the malicious prosecution counterclaim.

There are six elements which must be proven in a malicious prosecution action:

(1) Institution or continuation of original judicial proceedings, either civil or criminal;

(2) By, or at the instance of, the defendants;

(3) Termination of such proceedings in plaintiff's favor;

(4) Malice in instituting the proceedings;

(5) Lack of probable cause; and

(6) Resulting injury or damage.

Jordon v. Deese, 317 S.C. 260, 262, 452 S.E.2d 838, 839 (1995); see also Gaar v. North Myrtle Beach Realty Co., 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986).

Failure to prove any one of these elements defeats a malicious prosecution claim. Jordon, 317 S.C. at 262, 452 S.E.2d at 839. Furthermore, "the mere fact that a defendant was unsuccessful in the prior action has no bearing on the issue of probable cause." Gaar, 287 S.C. at 528, 339 S.E.2d at 889.

For Wescott or Hawkins to have a claim for malicious prosecution, D.R. Horton

must have instituted a judicial proceeding against them, and the judicial proceeding must have been terminated in Westcott's or Hawkins's favor. The current judicial proceeding has not been terminated in the Appellants' favor, and a claim for malicious prosecution based on the institution of the current lawsuit is not ripe.

The Appellants contend that because the filing of the first *lis pendens* expired, a claim for malicious prosecution is ripe based on the first *lis pendens*. The filing of a *lis pendens* does not satisfy the first element of a malicious prosecution claim, that a civil proceeding was instituted against the plaintiff. The filing of a *lis pendens*, while authorized by statute as part of the judicial process, is not a civil proceeding in itself. A *lis pendens* is simply notice to third parties that a particular piece of property is under dispute.

In addition, when the first *lis pendens* expired, that did not constitute a termination of a proceeding in the plaintiff's favor, another required element of a malicious prosecution claim. There was no proceeding and certainly no termination in the Appellants' favor as required for malicious prosecution. See Jordan, 317 S.C. at 262, 452 S.E.2d at 839 (holding that dismissal of criminal charges as a result of the accused's voluntary entry into a pre-trial intervention program is not, as a matter of law, a termination of the action in his favor). When the *lis pendens* expired, the only effect was that it was no longer enforceable against third parties. See South Carolina Nat'l Bank v. Cook, 291 S.C. 530, 532-33, 354 S.E.2d 562, 563 (1987); Horry County v. Ray, 382 S.C. 76, 82, 674 S.E.2d 519, 523 (Ct. App. 2009).

The Appellants have not shown any evidence that D.R. Horton acted with malice in instituting the proceedings. The Trial Court ruled "there [was] no evidence of any

malicious acts, but rather a genuine dispute regarding the Property." [R.p. 13; Order, p. 12.] The Appellants have not appealed or challenged that finding by the Trial Court.

The Trial Court's finding of a genuine dispute over the Property also defeats the element of "lack of probable cause" in maintaining the suit. The Trial Court found, and the Appellants did not challenge, that "Wescott admits that it did not satisfy all conditions precedent as of July 19, 2006, but continued to demand that D.R. Horton close on all three phases within twenty days of July 19, 2006." [R.p. 5; Order, p. 4.] Certainly D.R. Horton had probable cause to bring a suit seeking to enforce Wescott to comply with the conditions precedent when the Trial Court even found that Wescott had not satisfied such conditions.

B. <u>Hawkins's malicious prosecution claim fails as a matter of law because D.R. Horton never instituted any civil proceeding against him</u>.

Furthermore, D.R. Horton has not initiated any action against Hawkins. D.R. Horton's lawsuit was only filed against Wescott. Therefore, Hawkins cannot satisfy the most critical element of a cause of action for malicious prosecution – that a judicial proceeding was instituted against him by D.R. Horton.

For the above reasons, the Trial Court's grant of summary judgment to D.R. Horton on the malicious prosecution claim was proper.

V. The Trial Court properly granted summary judgment to D.R. Horton on the Appellants' breach of contract accompanied by a fraudulent act counterclaim.

A. The Appellants' breach of contract accompanied by a fraudulent act counterclaim fails a matter of law because the Appellants have offered no evidence of any separate fraudulent act committed by D.R. Horton.

D.R. Horton is entitled to summary judgment as to the Appellants' counterclaim of breach of contract accompanied by a fraudulent act because the Appellants have alleged nothing more than a mere breach of contract claim.

To establish breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: (1) breach of contract; (2) fraudulent intent relating to the breach; and (3) a fraudulent act accompanying the breach. Shelton v. Oscar Mayer Foods Corp., 319 S.C. 81, 90, 459 S.E.2d 851, 857 (Ct. App. 1995); Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 366, 375, 404 S.E.2d 912, 918 (Ct. App. 1991); Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-04 (Ct. App. 1985).

It is well-established under South Carolina law that a mere breach of contract, even if willful or with fraudulent purpose, is not sufficient to support a claim for breach of contract accompanied by a fraudulent act. See Floyd, 287 S.C. at 53, 336 S.E.2d at 503; see also Vann v. Nationwide Ins. Co., 257 S.C. 217, 220-21, 185 S.E.2d 363, 364 (1971) ("[A] mere violation of a contract will not support an allegation of fraud."); Holland v. Spartanburg Herald-Journal Co., 166 S.C. 454, 165 S.E. 203, 207 (1932); Rutledge v. St. Paul Fire and Marine Ins. Co., 286 S.C. 360, 365, 334 S.E.2d 131, 135 (Ct. App. 1985).

"The mere fact that a contract was broken does not carry with it the stigma of fraud, bad faith, malice, or wantonness." Holland, 165 S.E.2d at 208. To support an allegation

of fraud, an alleged misrepresentation "'must be one of an existing fact, not merely . . . promises or statements as to future events which later were unfulfilled.'" Shelton, 319 S.C. at 91, 459 S.E.2d at 857 (quoting Schie v. Gay & Taylor, Inc., 290 S.C. 31, 34, 347 S.E.2d 910, 912 (Ct. App. 1986)).

Moreover, proof of fraudulent intent alone will not support a claim for breach of contract accompanied by a fraudulent act because an actual fraudulent act accompanying the breach must also be established. Floyd, 287 S.C. at 54, 336 S.E.2d at 503-04. "The fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design." Harper v. Etheridge, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. Ap. 1986). The fraudulent act must be "separate and distinct" from the breach itself. Edens v. Goodyear Tire & Rubber Co., 858 F.2d 198, 203 (4th Cir. 1988). This court has observed that "no decision of this Court or the Supreme Court has held that either nonfeasance or a mere statement without more satisfies the requirement that the breach must be accompanied by a fraudulent *act*." Foxfire Village, 304 S.C. at 376, 404 S.E.2d at 918 (emphasis in original).

D.R. Horton contends that the Appellants cannot show any of the elements of the breach of contract accompanied by a fraudulent act counterclaim, including breach of contract, but at a minimum, the claim fails because they have put forth no evidence showing any separate fraudulent act from the alleged breach.

In their Brief, the Appellants argue that D.R. Horton's alleged shifting reasons for refusing to close, its alleged reversing positions on the satisfaction of the conditions precedent, and its self-serving construction of the parties' contracts supports this

counterclaim.

These acts at the most may support a claim for mere breach of contract but do not constitute separate fraudulent acts. The United States Court of Appeals for the Fourth Circuit had held that offering false excuses for cancelling a contract is not sufficiently separate and distinct from a breach to constitute the required fraudulent act. Edens, 858 F.2d at 203. Similarly, a party's alleged changing positions with respect to performance of the contract does not constitute a fraudulent act.

The Appellants also argue that an e-mail sent by Mitchell Flannery, the land acquisition manager for the Coastal Carolina Division of D.R. Horton, to Wescott supports their breach of contract accompanied by a fraudulent act claim. The full text of this e-mail is far from any alleged threat as the Appellants assert but rather an attempt to compromise with Wescott:

> Tim [Fraylick],
>
> As I mentioned last week we have 36 units funded and I need to either close on this in the next few weeks or I'll have to send the money back to corporate and that isn't always a good thing. As we discussed both groups do not see eye to eye as the contract stands and if we don't amicably try to move forward we are going to get into something we both don't want to deal with. To give a little I am proposing to shrink the takedown over 2 months rather than 3 and basically if we can close now you are really only 4 months out of this phase being completely taken down. If you all don't agree to this the property could be tied up for a lot longer than this so I hope you will consider my proposal. I have not run this by corporate but I have run our numbers and shrinking to two months may work. Please call me today to discuss what direction you all would like to take so we can prepare the closing. Thanks.
>
> Mitchell M. Flannery

[R.p. 430; Flannery E-mail dated September 18, 2006 (Ex. H).]

This e-mail shows that D.R. Horton was trying to work with Wescott, have the closing done sooner as Wescott desired, and avoid the protracted litigation the parties find themselves in today. There is no threat, no dishonesty, and no unfair dealing in this e-mail. It does not show fraudulent intent much less constitute evidence of a separate fraudulent act.

Moreover, the Appellants have presented no evidence that they relied upon or changed their position based on this e-mail. Wescott continued to refuse to perform as required under the terms of the Contract of Sale and its Amendment. While a misrepresentation made in reckless disregard for the truth will support an action for breach of contract accompanied by a fraudulent act, the Supreme Court has explicitly held that reliance on the misrepresentation must also be proved. Kelly v. Nationwide Mut. Ins. Co., 278 S.C. 488, 489, 298 S.E.2d 454, 455 (1982). Where there is no evidence that a party changed its position because of any alleged fraudulent act, such a claim fails. Vann, 257 S.C. at 221, 185 S.E.2d at 365.

Finally, the Appellants contend D.R. Horton's filing of the *lis pendens* was sufficient to constitute a fraudulent act. The Trial Court found that the filing of the *lis pendens* was proper and authorized by statute because it provided notification to third parties of the genuine contract dispute between D.R. Horton and Wescott, the very purpose of a *lis pendens*. D.R. Horton had an interest in the Property pursuant to the Contract of Sale and was justified in filing the *lis pendens* to preserve its interest in the Property. The filing of the *lis pendens* in this case does not support the Appellants' counterclaim of breach of contract accompanied by a fraudulent act.

B. Hawkins does not have a contract with D.R. Horton and therefore cannot satisfy even the breach of contract element of this counterclaim.

As to Appellant Hawkins, he did not have a contract with D.R. Horton. Hawkins has not appealed the grant of summary judgment to D.R. Horton on Hawkins' breach of contract counterclaim. Where Hawkins cannot show the existence of a contract and its breach, he cannot prevail on a claim for breach of contract accompanied by a fraudulent act and such claim fails as a matter of law.

The Trial Court correctly granted summary judgment to D.R. Horton on the Appellants' counterclaim of breach of contract accompanied by a fraudulent act.

VI. The Trial Court properly granted summary judgment to D.R. Horton on the Appellants' counterclaim for tortious interference with prospective contractual relations because:

(1) D.R. Horton was unaware of any other offers on the Property and therefore did not intentionally interfere with such offers;

(2) Third parties continued to make substantial offers on the Property despite D.R. Horton's filing of the *lis pendens* and lawsuit; and

(3) D.R. Horton was properly exercising its own legal rights in seeking to have the Contract of Sale enforced.

The Appellants also cannot maintain a claim for tortious interference with prospective contractual relations.

To recover on a cause of action for intentional interference with prospective contractual relations, the plaintiff must prove: "(1) the defendant intentionally interfered with the plaintiff's potential contractual relations; (2) for an improper purpose or by improper methods; (3) causing injury to the plaintiff." Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990); Santoro v. Schulthess, 384

S.C. 250, 261-62, 681 S.E.2d 897, 903 (Ct. App. 2009).

If a defendant acts for more than one purpose, "his improper purpose must predominate in order to create liability." Crandall Corp., 302 S.C. at 266, 395 S.E.2d at 180; Santoro, 384 S.C. at 262, 681 S.E.2d at 903.

The Appellants cannot prove either intentional interference or an improper purpose.

The Appellants presented no evidence that D.R. Horton was actually aware of any other offers at the time. D.R. Horton cannot intentionally interfere with potential contractual relations unless it is aware of them.

In addition, the filing of the *lis pendens* and the lawsuit by D.R. Horton did not deter third parties from making substantial offers to purchase the Property. [R.pp. 483-535; Ex. O.] After the lawsuit was filed, KB Homes offered to purchase the Property for $900,000.00 more than D.R. Horton's contract price, and Jessco Homes offered an amount more than $1.2 million than what D.R. Horton had agreed to pay. Id. These third parties were willing to accept the risk of the outcome of D.R. Horton's lawsuit. Hawkins declined to accept these offers, believing that the *lis pendens* prevented him from selling the Property. A *lis pendens*, however, only serves as notice of a pending dispute to third party purchasers and does not prevent the transfer of title. If third parties were willing to purchase the Property despite the pending lawsuit and the Appellants nevertheless declined to accept such offers, then any failure to sell the Property was because of the Appellants' actions and not anything D.R. Horton did. There was no interference by D.R. Horton.

There is also no evidence in the record to suggest any purpose or motive by D.R.

Horton other than the pursuit of its own legal rights. "'Generally, there can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party.'" Eldeco, Inc. v. Charleston County Sch. Dist., 372 S.C. 470, 482, 642 S.E.2d 726, 732 (2007) (quoting So. Contracting, Inc. v. H.C. Brown Constr. Co., 317 S.C. 95, 102, 450 S.E.2d 602, 606 (Ct. App. 1994)).

Here, D.R. Horton had a bona fide right to pursue its interest in the Contract of Sale and seek specific performance of the contract. The Trial Court recognized that a genuine contract dispute exists between D.R. Horton and Wescott, a factual finding that the Appellants have not contested in this appeal. [R.p. 13; Order, p. 12.] In pursuit of its interest in the contract dispute, D.R. Horton was justified in exercising its legal rights and filing the *lis pendens* and the lawsuit. See Webb v. Elrod, 308 S.C. 445, 448, 418 S.E.2d 559, 561 (Ct. App. 1992) ("The exercise in good faith of a legal right by a party to a contract affords no basis for an action by the second party for intentional interference with a contract even though the consequence of the exercise of the legal right by the first party is to cause a third party not to perform another contract with the second party.").

The Trial Court therefore did not err in granting summary judgment to D.R. Horton on the Appellants' counterclaim for tortious interference with prospective contractual relations. Brown v. Stewart, 348 S.C. 33, 55-56, 557 S.E.2d 676, 688 (Ct. App. 2001) (affirming the circuit court's grant of a directed verdict motion on a claim for intentional interference with prospective contractual relations on the basis that the exercise of a legal right does not constitute an improper motive or improper purpose and stating that there was

no evidence to suggest any purpose or motive by the defendant other than the protection of his rights); So. Contracting Inc., 317 S.C. at 102, 450 S.E.2d at 606 (affirming summary judgment on a claim for intentional interference with prospective contractual relations on the ground that there was no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its contract rights with the codefendant).

CONCLUSION

At the crux of every counterclaim asserted by Appellants Wescott and Hawkins is D.R. Horton's alleged breach of contract and filing of the *lis pendens* and current lawsuit. The Appellants point to no other specific evidence. For the reasons argued in this Respondent's Brief, the tort counterclaims asserted by the Appellants fail as a matter of law and the Trial Court was correct to grant summary judgment to D.R. Horton on the counterclaims for:

(1) Slander of title;

(2) Violation of the Unfair Trade Practices Act;

(3) Abuse of process;

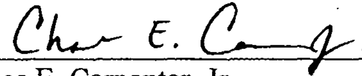
(4) Malicious prosecution;

(5) Breach of contract accompanied by a fraudulent act; and

(6) Tortious interference with prospective contractual relations.

Respondent D.R. Horton respectfully submits that the decision of the Trial Court should be affirmed.

Respectfully submitted,



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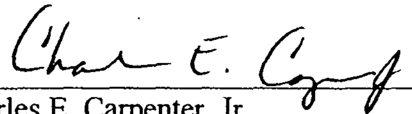
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned, an employee of Carpenter Appeals and Trial Support, LLC, attorneys for Respondent, D.R. Horton, Inc., do hereby certify that I have this date served the foregoing Final Brief of Respondent, dated October 21, 2010, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

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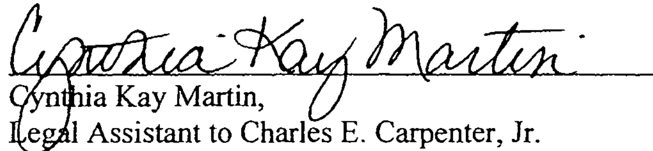

Cynthia Kay Martin,
Legal Assistant to Charles E. Carpenter, Jr.

Dated: October 21, 2010.

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In the Court of Common Pleas for the First Circuit

James C. Williams, Jr., Circuit Court Judge

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Wescott Land Company, LLC ....Defendants,

Thomas R. Hawkins and Wescott Land Company, LLC,......................Appellants,
v.
D.R. Horton, Inc.,..Respondent.

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October 27, 2010

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in entering summary judgment as to Appellants' slander of title claim?
2. Did the Circuit Court err in entering summary judgment as to Appellants' South Carolina Unfair Trade Practices claim?
3. Did the Circuit Court err in entering summary judgment as to Appellants' abuse of process claim?
4. Did the Circuit Court err in entering summary judgment as to Appellants' malicious prosecution claim?
5. Did the Circuit Court err in entering summary judgment as to Appellants' breach of contract accompanied by fraudulent act claim?
6. Did the Circuit Court err in entering summary judgment as to Appellants' tortious interference with prospective contractual relations claim?

SUPPLEMENTAL STATEMENT OF CASE

Appellants, Wescott Land Company, LLC ("Wescott") and Thomas R. Hawkins ("Hawkins"; collectively "Appellants"), file this Reply Brief to respond to certain factual assertions and point out errors and inconsistencies made by Respondent, D.R. Horton, Inc. ("Horton"), in its Brief filed in this Court. Arguments specific to each cause of action are addressed in Appellants' Initial Brief.

ARGUMENTS IN REPLY

I. Shifting, pretextual excuses for not closing caused damages

The gravamen of Appellants' tort claims in this case is that Respondent used various pretexts to string the closing on Phase 3E of the property out until it could determine if it could pre-sell enough units to justify abiding by the Contract. Once it decided to breach the Contract, Respondent filed a *lis pendens* so that Appellants could not sell the property to anyone else, even though it did not intend to perform under its Contract. Respondent intended to force Appellants into closing on terms different than the parties had agreed to. Respondent thus went beyond merely breaching its contract. It used pretext to breach it and it tied up the property so that Appellants could not negotiate a sale to competing purchasers.

Horton's pretextual reasons for not closing on Phase 3E of the property were constantly shifting. While acknowledging all conditions precedent had been met, Horton demanded that the properties be closed in three takedowns, notwithstanding that all original closing dates had passed, and proposed a Second Amendment to the Contract. (See Defs.'s Memo. Opp. S.J, Exhibit 2, R. pp. 141-142; Counter-claimant's Memo. Opp. S.J., Exhibit 6, R. pp. 589-591). Nowhere in this proposed Second Amendment is there any indication that Horton was dissatisfied with the condition of Phase 3E or that it was taking the position that any conditions precedent had not been satisfied. (See Counter-claimant's Memo. Opp. S.J., Exhibit 2, R. pp. 581-582). Wescott declined the proposal, not wishing to further delay closing on Phase 3E.

Subsequently, and nearly 90 days after the date that Wescott submitted proof of the satisfaction of all of the conditions precedent, and nearly 75 days after the date that Horton's in-house counsel contended that such proof was submitted, Horton's outside counsel, Michael Shetterly ("Shetterly"), took the position that certain conditions precedent had not been satisfied; specifically, that there was no evidence of erosion control in place, that no street lights had been installed on the site, and that until these items are complete, the conditions precedent have not been completed. (See Counter-claimant's Memo. Opp. S.J., Exhibit 8, R. pp. 597-598).

In addition to this being the first mention of Wescott's alleged failure to satisfy certain conditions precedent, Shetterly's letter misstates the requirements set forth in the parties' Contract. The Contract makes no mention of erosion control or sign-offs from any particular governmental entity. (See Complaint, Exhibit A, R. pp. 33-48).

In direct contravention to Shetterly's assertion that street lights were required to have been installed, the Contract merely requires that "[C]ontracts by Seller for the installation of street lights and street signs as required by any appropriate governmental authority and such contracts shall in no way place any financial burden upon Purchaser." (See Complaint, Exhibit A, R. pp. 33-48). Wescott did not have any authority to install street lights on what were to become publicly dedicated streets. That authority lay solely with South Carolina Gas and Electric (SCE&G), and all necessary contracts and approvals have been obtained such that SCE&G could install street lights very soon thereafter. Shetterly later conceded that the Contract did not require Wescott to install street lights:

> Q: Okay. And was it your understanding that street lights were a, the installation of street lights were a condition precedent to the contract?
>
> A: Well, early on, I, I think it's fair to say I was under the misunderstanding that that was the case. I, I, in looking carefully at the contact [sic] they only had to have a contract for the installation of street lights.

(See Depo. Michael Shetterly, R. p. 775, line 24-p. 776, line 6).

Despite Horton's changing assertions and excuses, counsel for Horton and Wescott began to negotiate the terms of a new deal between the parties. Horton even appeared to acquiesce to the idea of closing all of 3E at once. At a subsequent meeting at Wescott's counsel's office, the parties attempted to hammer out the details of a last-ditch effort to make their deal work. At this meeting, Horton reiterated its concerns about erosion control on the site, abandoned its earlier complaint about street lights, and for the first time raised the issue that it was concerned about the compaction of the building pads at Phase 3E. (See Counter-claimant's Memo. Opp. S.J., Exhibit 16, R. p. 606).

Respondent's shifting reasons for refusing to close on Phase 3E of the property, its reversing positions as to whether conditions precedent had been satisfied, its strained and self-serving construction of the parties' contracts, in addition to Mitchell Flannery's[1] written threat to tie up the property if Respondent did not get its way, are, at a minimum, some evidence of bad faith to support Appellants' recovery. This evidence supports elements of Appellants' slander of title, abuse of process, malicious prosecution, breach

[1] One of the principals of Horton's Charleston office. (See Initial Brief of Appellants, p. 23)

of contract accompanied by a fraudulent act, and tortious interference with prospective contractual relations causes of action.

II. Property not freely alienable

Respondent has continued to stand in the way of the sale of the property to third parties by maintaining their claims on the property, while at the same time, refusing to purchase the property under the terms of the parties' Contract, despite their demand for specific performance. It is disingenuous for Respondent to claim that the property could have been sold while they maintain that they have an equitable interest in it. Respondent states that filing of a *lis pendens* does not prohibit the transfer of title, and that offers to purchase the property were made after the lawsuit and *lis pendens* were filed. (See Respondent's Initial Brief p. 25, 41). Respondent fails to note that an offer and a sale are not equivalent. No purchaser would pay full market value for the property knowing that such a cloud on the title exists. As such, Appellants have suffered damages as the result of their inability to accept offers from third parties to purchase the property.

III. Appellants' standing to sue

Respondent claims that neither Appellant Wescott nor Appellant Hawkins have standing to sue. Respondent claims Wescott does not have standing to sue because Wescott no longer owns the property. (See Respondent's Initial Brief p.25-26). At the same time, Respondent also claims Hawkins does not have standing to sue because no *lis pendens* or lawsuit has been filed against Hawkins. (See Respondent's Initial Brief p.26, 32, 35, 40).

First, the fact that Wescott no longer owns the property does not mean it did not suffer damages. The filing of the initial *lis pendens* itself, when Wescott had ownership, caused special damages by placing a cloud on the title, which prevented the owner from freely disposing of the property before the litigation was resolved. During this period, Wescott had offers to purchase the property that it could not ratify because of the cloud Respondent had placed on the title to the property. (See Counter-Claimant's Suppl. Memo. Opp. Pl.'s Mot. S.J., R. p. 570).

Hawkins is the present owner of the subject property, and there is a cloud on the title to the subject property; therefore, Hawkins has standing to sue.

IV. Respondent's actions "capable of repetition"

In response to Appellants' South Carolina Unfair Trade Practices Act (SCUTPA) claim, Respondent claims that Appellants have not shown that Respondent's actions have "reach[ed] beyond the private commercial transaction between two sophisticated parties", and that "Appellants state, without pointing to any evidence in their Brief, that D.R. Horton may be engaging in the same type of breach of contracts across the country." (See Respondent's Initial Brief p.27).

It is not necessary for Appellants to show "an adverse impact on the public interest." (See Id.) It is sufficient to allege the conduct complained of is "capable of repetition." Sadighi v. Daghighfekr, 36 F.Supp.2d 279, 301 (D.S.C. 1999)(Allegations that defendants engaged in unfair methods of competition and unfair and unlawful deceptive acts or practices in the conduct of their business, which constituted a pattern or practice of unlawful conduct capable of repetition, stated an unfair trade practices cause

of action under South Carolina law even though plaintiffs did not specifically allege that defendants' conduct had an "adverse impact on the public interest.")

Appellants have clearly alleged that Respondent's conduct is "capable of repetition," (See Appellants' Initial Brief p.21; Answer and Counter-Claim ¶¶ 72-75, R. p. 190), and the very nature of Respondent's conduct is capable of repetition since Respondent is in the business of acquiring and developing real estate. Appellants have established sufficient evidence to form the basis of a SCUTPA claim.

CONCLUSION

For the reasons set forth above, and for the additional reasons articulated more fully in the Brief of Appellants previously filed, this Court should reverse and vacate the Circuit Court's entry of summary judgment.

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Charleston, South Carolina

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PROOF OF SERVICE

I, Peggy Belbusti, an employee with the law firm of Barnwell Whaley Patterson & Helms, LLC, attorneys for Appellants, do hereby certify that on this date I caused a copy of Appellants' Final Reply Brief to be served upon the party by depositing a copy of same in the United States Mail, postage pre-paid, addressed to the following:

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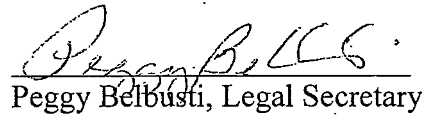
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b) S.C.A.C.R. The undersigned further certifies that this Final Brief is in compliance with the Supreme Court Order of August 13, 2007 regarding "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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