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SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Oak Pointe Homeowners' Association, Inc.
Plaintiff,

C/A No.: 2013-CP-32-02386

v.

ORDER GRANTING AND DENYING
SUMMARY JUDGMENT

Mackenzie E. Peffley

Defendant.

FILED
2014 OCT 3 P 2 18
DEBRA A. BRUCE
CLERK OF COURT

This matter came before the Court on October 7, 2014, upon Plaintiff's Motion for Summary Judgment pursuant to Rule 56, SCRCP. This Court has received and reviewed the parties' submissions relating to this motion. For the reasons that follow, this Court hereby **DENIES** Plaintiff's Motion for Summary Judgment on (1) its foreclosure claim; (2) Defendant's counterclaim for a Declaratory Judgment that Plaintiff does not have the power or authority to fine Defendant; (3) Defendant's action for an accounting, and (4) Defendant's claim for violation of the Servicemembers Civil Relief Act, 50 U.S.C. Appx. § 501 *et seq.* ("SCRA").

This Court **GRANTS** Plaintiff's Motion for Summary Judgment as to Defendant's counterclaims for (1) violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.*; (2) breach of contract; (3) breach of contract accompanied by fraudulent act; (4) negligent misrepresentation (5) slander of title, and (6) libel.

GRANTS OF SUMMARY JUDGMENT

Unfair Trade Practices Act

The South Carolina Unfair Trade Practices Act ("SCUTPA") prohibits "[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(a). To prevail on a SCUPTA claim, Defendant must

show (1) that the opposing party engaged in an unlawful trade practice, (2) that the claimant suffered actual, ascertainable damages as a result of the opposing party's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the opposing party had an adverse impact on the public interest. *Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283, 291 (4th Cir. 1998). To establish an adverse impact on the public interest, Defendant must demonstrate that the complained of conduct has the potential for repetition. *Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 473 S.E.2d 47, 50 (1996). A potential for repetition may be demonstrated by showing that "similar unfair activities occurred in the past . . . or by showing [the current] procedures create a potential for repetition." *Beattie v. Nations Credit Finc. Svcs. Corp.*, 59 Fed.Appx 585, 589 (2003).

Defendant's Counterclaim alleges that Plaintiff acted unfairly and deceptively in levying and collecting non-compliance assessments against Defendant's property. However, the contract between the parties specifically authorizes the Plaintiff to take these actions. The restrictive covenants were recorded with the Lexington County Register of Deeds on December 12, 2002, nearly five years prior to Defendant accepting title to the property. By accepting title to the property Defendant agreed to follow the rules of the community and agreed to pay non-compliance assessments if she failed to do so. Accordingly, Defendant has failed to establish any facts that would constitute unfair or deceptive acts by Plaintiff.

Accordingly, Defendant has failed to establish evidence sufficient to withstand Plaintiff's Motion for Summary Judgment with respect to its claim that Plaintiff violated the SCUPTA. Therefore, the Court hereby **GRANTS** Plaintiff's Motion for Summary Judgment with respect to this counterclaim.

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Breach of Contract

To bring an action for breach of contract the claimant has the burden "to prove the contract, its breach, and the damages caused by the breach" *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The necessary elements of a contract are offer, acceptance and valuable consideration" *Roberts v. Gaskins*, 327 S.C. 478, 484, 486 S.E.2d 771, 773 (Ct. App. 1997). "[B]efore a party can recover for the breach of a contract, he must allege and prove by competent, relevant testimony each one of the material elements of the contract sued on." *Rabon v. State Finance Corp.*, 203 S.C. 183, 26 S.E.2d 501, 502 (1943).

Defendant claims that the Plaintiff breached a contract with the Defendant by promising to remove a fine and failing to honor the promise. However, Defendant fails to allege each material element of the contract. While Defendant alleges that Plaintiff promised to waive a non-compliance assessment, Defendant fails to establish which non-compliance assessment was to be waived. Without this certainty the Defendant cannot establish that the parties had the requisite meeting of the minds to establish a contract. Defendant further fails to allege or establish any consideration that she gave to Plaintiff in exchange for its promise to waive the non-compliance assessment.

Further, there is no separate cause of action for breach of the implied covenant of good faith and fair dealing because it is subsumed in a claim for breach of contract. In *Ro Tec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 472, 597 S.E. 2d 881, 884 (Ct. App. 2004) the court concluded that, "the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract."

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Accordingly, Defendant has failed to set forth evidence sufficient to show a genuine issue of material fact exists as to its counterclaim for breach of contract. Therefore, this Court **GRANTS** summary judgment in favor of Plaintiff on this counterclaim.

Breach of Contract Accompanied by Fraudulent Act

To prevail on a claim for breach of contract accompanied by a fraudulent act, a claimant must prove: (1) a breach of contract; (2) fraudulent intent relating to the contract's breach (not merely its making); and (3) a fraudulent act accompanying the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 336 S.E. 2d 502 (Ct. App. 1985). A fraudulent act is broadly defined as "any act characterized by dishonesty in fact or unfair dealing." *Ro Tec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. at 472, 597 S.E. 2d at 883 (Ct. App. 2004).

This cause of action fails as the Defendant has not set forth evidence sufficient to show a genuine issue of material fact exists as to her breach of contract claim. Moreover, Defendant failed to plead or establish any fraudulent intent, dishonesty or unfair dealing by Plaintiff such that she would be entitled to damages for breach of contract with fraudulent intent. Accordingly, Defendant has failed to set forth evidence sufficient to show a genuine issue of material fact exists as to her claim for breach of contract accompanied by fraudulent act. Therefore, this court **GRANTS** summary judgment in favor of Plaintiff on this counterclaim.

Negligent Misrepresentation

Defendant's Tenth Counterclaim avers that Plaintiff was negligent by falsely representing to the Defendant that it would rescind, remove or undo a fine levied against the Defendant. To establish a cause of action for negligence, a plaintiff must prove the following three elements: (1) a duty owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and

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(3) damages proximately resulting from the breach.” *Shaw v. City of Charleston*, 351 S.C. 32, 567 S.E. 2d 530 (2002).

This negligence claim is essentially the same argument set forth in Defendant’s claim for breach of contract and is defeated for the same reasons articulated above.

Accordingly, Defendant has failed to set forth evidence sufficient to show a genuine issue of material fact exists as to its claim for negligent misrepresentation. Therefore, this court **GRANTS** summary judgment in favor of Plaintiff on this counterclaim.

Slander of Title

In order to maintain an action for slander of title a party “must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff’s title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties” *Solley v. Navy Fed.Credit Union, Inc.*, 397 S.C. 192, 204, 723 S.E. 2d 597, 603 (Ct. App. 2012).

Defendant’s alleges her title was slandered when the Plaintiff recorded a notice of lien containing false statements. While Defendant does not specifically allege which statements were false, the court assumes that her argument is that Plaintiff’s lien contained amounts due for non-compliance assessments. However, as set forth more fully herein, Plaintiff was entitled to levy and collect all sums contained in its notice of lien.

Additionally, Defendant has failed to establish any specific facts to show such statement(s) were made with malice. “In slander of title actions, the malice requirement may be satisfied by showing the publication was made in reckless or wanton disregard to the rights of another, or without legal justification.” *Huff v. Jennings* 319 S.C. 142, 150, 459 S.E. 2d 886, 891 (Ct. App. 1995).

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Therefore, this Court hereby **GRANTS** Plaintiff's Motion for Summary Judgment with respect to this counterclaim.

Libel

Libel is actionable per se if it involves "written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or render him odious, contemptible, or ridiculous . . . in other words, if the trial judge can presume, because of the nature of the statement, that the plaintiff's reputation was hurt as a consequence of its publication, the libel is ~~actionable per se."~~ *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 510-511, 506 S.E.2d 497, 502 (1998).

Paragraph 56 of the Defendant's Answer avers that Plaintiff has published libelous statements to the effect that Defendant is currently delinquent in its payments "with regard to the loan subject of this action and is in default thereof." As stated earlier, this action is the foreclosure of an unpaid assessment lien. There is no loan at issue in this matter. Even Defendant's Affidavit contains no reference to a loan between Plaintiff and Defendant.

The Court finds that Defendant has not established evidence sufficient to withstand Plaintiff's Motion for Summary Judgment with respect to its claim for libel.

Therefore, this Court hereby **GRANTS** Plaintiff's Motion for Summary Judgment on this counterclaim.

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DENIALS OF SUMMARY JUDGMENT

Foreclosure Action

Plaintiff placed a lien on Defendant's property to secure payment of the non-compliance assessments it levied against Defendant. Plaintiff asks this Court to grant summary judgment as to its foreclosure action.

The non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Having heard the arguments of counsel and considered the parties' pleadings, depositions, affidavits, and memoranda of law, this Court determines there are disputed issues of fact concerning Plaintiff's foreclosure action, and Plaintiff's Motion for Summary is hereby **DENIED**.

Declaratory Judgment

Defendant claims it is entitled to a Declaratory Judgment that Plaintiff lacks authority to levy non-compliance assessments against Defendant because it is not a government and no government has delegated the power to issue fines to Plaintiff.

The non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Having heard the arguments of counsel and considered the parties' pleadings, depositions, affidavits, and memoranda of law, this Court determines there are disputed issues of fact concerning Defendant's counterclaim for a Declaratory Judgment that Plaintiff can or cannot

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levy a fine for non-compliance with assessments. Plaintiff's Motion for Summary Judgment as to this counterclaim is hereby **DENIED**.

Accounting

Defendant claims it is entitled to an accounting. Plaintiff asks this Court to grant summary judgment in its favor with respect to the claim for an accounting.

The non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

~~Having heard the arguments of counsel and considered the parties' pleadings,~~
depositions, affidavits, and memoranda of law, this Court determines there are disputed issues of fact concerning Defendant's claim for an accounting, and Plaintiff's Motion for Summary Judgment as to this counterclaim is hereby **DENIED**.

Servicemembers Civil Relief Act

Defendant asserts she is entitled to relief under the Servicemembers Civil Relief Act, 50 App. U.S.C. § 527 ("SCRA"). Plaintiff asks this Court to grant summary judgment in its favor with respect to this claim.

The non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Having heard the arguments of counsel and considered the parties' pleadings, depositions, affidavits, and memoranda of law, this Court determines there are disputed issues of fact concerning the applicability of and Defendant's entitlement to relief under the SCRA, and Plaintiff's Motion for Summary Judgment as to this counterclaim is hereby **DENIED**.

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CONCLUSION

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For the reasons stated above, this Court **GRANTS** partial Summary Judgment in favor of Plaintiff as to the following of Defendant's counterclaims: (1) violation of the SCUTPA; (2) breach of contract; (3) breach of contract accompanied by fraudulent act; (4) negligent misrepresentation; (5) slander of title, and (6) libel. The Court **DENIES** Summary Judgment as to the following: (1) foreclosure of Plaintiff's lien; (2) a Declaratory Judgment that Plaintiff does not have the power or authority to fine Defendant; (3) an accounting, and (4) violation of the SCRA.

AND IT IS SO ORDERED.



The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge

October 23, 2014

BETH A. GARRIGUE
CLERK OF COURT
LEWISBURG, TN

2014 OCT 23 P 2:18

FILED