

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2014CP0600182

MAR 17 2015

Joel C. Greene Jr. vs. Clarence Felder, et al

SC Court of Appeals

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRCP; Rule 41(a),
SCRCP (Vol. Nonsuit); Rule 43(k), SCRCP (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRCP; Bankruptcy:
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Order Granting Summary Judgment of Defendants Ron Powell, John England, England Enterprises, Inc. a/k/a England Enterprises is Closed, Inc.

Dated at Barnwell, South Carolina, this 3rd day of March, 2015 .

Court Reporter: Bethanie Creppon

S/11 Doyet A. Early, III

PRESIDING JUDGE – Doyet A. Early, III

This judgment was entered on the 9th day of March, 2015 , and a copy mailed first class this 10th day of March, 2015, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Mansfield

Constance B. Mansfield – Deputy Clerk of Court

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STATE OF SOUTH CAROLINA)
)
COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2014-CP-06-182

Joel C. Greene, Jr.,)
)
Plaintiff,)

vs.)

Clarence Felder a/k/a Clarence Edward)
Felder a/k/a Clarence E. Felder)
individually and d/b/a Custom Home)
Improvements,)
Clarence E. Felder, LLC,)
Ron Powell a/k/a Ronald Powell)
individually,)
England Enterprises, Inc. a/k/a)
England Enterprises is Closed,)
Inc.,)
SAFEBuilt Carolinas, Inc. f/k/a)
England Enterprises a/k/a)
England Enterprises, Inc.,)
City of Barnwell,)
Larry Nipper, individually and)
d/b/a Nipper's Electric Service,)
Sanders Supply Company, Inc.,)
Griffin Specialty Contracting, Inc.,)
Gregory J. Griffin,)
and John Doe representing any)
other unknown inspectors,)
contractors or subcontractors)
on this project,)
)
Defendants.)

[PROPOSED] ORDER

RHONDA D. McELMEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

2015 MAR -9 PM 1:12

FILED FOR RECORD

This matter comes before the Court on the Motion for Summary Judgment of Defendants Ron Powell, John England, and England Enterprises, Inc. a/k/a England Enterprises is Closed, Inc. (hereinafter "England Defendants"). The Court heard oral argument on the England Defendants' motion on February 4, 2015. Present at the hearing were Thomas O. Sanders of

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Sanders Law Firm, LLC, on behalf of the Plaintiff and Joshua D. Shaw of Turner Padgett Graham & Laney, P.A., on behalf of the England Defendants. After giving due consideration to the arguments and authorities presented at the hearing and in the motions and legal memoranda submitted by the parties, the Court hereby grants the England Defendants' motion for the reasons set forth below.

LEGAL STANDARD

“Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.” *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) (citing Rule 56(c), SCRPC). “However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” *Id.* (citing *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006)).

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from the construction of an office building for Plaintiff located in Barnwell County. Plaintiff alleges that the building contains numerous construction defects that will require repair and partial replacement. Plaintiff's lawsuit asserts causes of action against various contractors who performed work on the building and the England Defendants.

The facts relevant to the England Defendants' motion are undisputed. During the time period when the building was being constructed, England Enterprises, Inc. served as the Building Official for the City of Barnwell pursuant to a Professional Services Agreement that was presented to the Court in Exhibit B of Plaintiff's legal memorandum and at the hearing. The Professional Services Agreement states in the first paragraph, “Jurisdiction [City of Barnwell]



shall engage England and it shall have the exclusive right to act as the Jurisdictions Building Official operating the Building Codes office” Individual defendants Ron Powell and John England are alleged to have served as the Building Official as employees/representatives of England Enterprises, Inc. Plaintiff does not allege or argue that the England Defendants had any role in the construction of the building other than serving as the Building Official.

Plaintiff alleges that the England Defendants are liable to him for failure to adequately perform the duties and obligations of the Building Official. Plaintiff’s Amended Complaint asserts causes of action against the England Defendants for Negligence, Breach of Contract (Third Party Beneficiary), and violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”). The England Defendants filed their motion for summary judgment and supporting memorandum of law on January 12, 2015, arguing, *inter alia*, that the Building Official does not owe a legal duty to individual members of the public, that they did not contract with Plaintiff or enter into any contract for Plaintiff’s benefit, and that they did not engage in any “trade” or “commerce” with Plaintiff that would support a SCUTPA claim. The Court finds that there are no genuine issues of material fact relating to these legal arguments asserted by the England Defendants, and they are ripe for determination.

LEGAL ANALYSIS

I. Negligence / Legal Duty

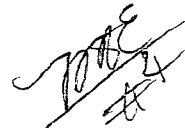
It is black letter law that in order to state a claim for negligence, the defendant must have breached a duty owing to the plaintiff. *Steinke v. S.C. Dep’t of Labor, Licensing, and Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (S.C. 1999) (holding that in a negligence action, the plaintiff must establish that the “(1) defendant owes a duty of care to the plaintiff, (2)

defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages.").

Thus, the lack of a legal duty owed to the Plaintiff would be a complete bar to Plaintiff's negligence claim against the England Defendants. *Id.* See also *Rayfield v. S.C. Dep't of Corrections*, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988) ("The absence of any one of these elements renders the cause of action insufficient."). "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Rayfield*, 297 S.C. at 100, 374 S.E.2d at 913.

Plaintiff argues that the England Defendants owed him a legal duty by virtue of acting as the Building Official for the City of Barnwell. The Court finds that pursuant to the contract with the City of Barnwell and governing law, the England Defendants were authorized and directed to enforce the applicable building code with respect to the construction of Plaintiff's building. However, the Court further finds that this activity does not create a legal duty to a resident who contracts with building professionals for the construction of a building on his property. The purpose of the building code is to protect the public at large, not to create a legal duty flowing from the Building Official to each and every resident who can establish that a building code violation or violations went undetected:

The purpose of this article is to establish the minimum requirements to safeguard the public health, safety and general welfare through structural strength, means of egress facilities, stability, sanitation, adequate light and ventilation, energy conservation, and safety to life and property from fire and other hazards attributed to the built environment and to provide safety to firefighters and emergency responders during emergency operations.



Barnwell City Code, Sec. 6-23 (emphasis added)¹. See also S.C. Code Ann. § 6-9-5 (“The public policy of South Carolina is to maintain reasonable standards of construction in buildings and other structures in the State consistent with the public health, safety, and welfare of its citizens.”)

The Supreme Court has interpreted a similar municipal ordinance relating to development standards in finding that a municipality did not owe a duty to a developer. See *Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 439 S.E.2d 266 (1993). In *Brady*, the municipality’s Development Standards Ordinance stated its purpose as follows: “The purpose of this chapter is to promote the public health, safety and general welfare;” *Id.* at 77, 439 S.E.2d at 268. Interpreting this provision, the Supreme Court held, “The essential purpose of the ordinance is to protect the public from the dangers of overdevelopment on the Island of Hilton Head.” *Id.* The Supreme Court went on to note that to recognize an individual duty to the developer “would make the Town substantially an insurer of all developments it undertook to inspect and control through its Development Standards Ordinance and would likely discourage all efforts at such control.” *Id.* (citing *Hannon v. Counihan*, 54 Ill. App. 3d 509 (Ill. App. Ct. 2d Dist. 1977)). Accordingly, the Supreme Court reversed and held that the trial court erred in not finding for the municipality as a matter of law based on the absence of a legal duty owed to plaintiff.

The Court finds that the reasoning and holding of *Brady* are applicable to the instant case. To impose a legal duty on the City of Barnwell Building Official to each and every resident engaged in a construction project within the municipality’s jurisdiction would make the Building Official “substantially an insurer” of all such construction projects. See *Brady*, 312 S.C. at 77, 439 S.E.2d at 268. This is most certainly not the purpose and intent of South Carolina law with respect to the mandatory adoption and enforcement of building codes to promote the “public

¹ Both parties attached a copy of this portion of the Barnwell City Code to their legal memoranda and relied on its application in their respective arguments.

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health, safety, and welfare of its citizens.” S.C. Code Ann. § 6-9-5. Accordingly, the Court finds that acting as the Building Official did not create a legal duty on the part of the England Defendants to the Plaintiff and Plaintiff has not otherwise alleged any basis for the imposition of a legal duty on the part of the England Defendants. The absence of the element of legal duty renders Plaintiff’s negligence cause of action insufficient, and the England Defendants are entitled to summary judgment.

II. Breach of Contract

It is undisputed that there is no contract between Plaintiff and the England Defendants. Accordingly, Plaintiff’s breach of contract claim alleges Plaintiff’s status as a third-party beneficiary of the contract between the City of Barnwell and England Enterprises, Inc. (See Am. Compl. ¶ 40.) Under South Carolina law, “if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person.” *Windsor Green Owners Ass’n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004).

The Court finds that Plaintiff is not a third-party beneficiary of the contract between the City of Barnwell and England Enterprises, Inc. As outlined in the preceding Section, acting as the Building Official does not create any duty to individual members of the public. It follows that the contract with the City allowing the England Defendants to serve as the Building Official for the City of Barnwell could not have been “made for the benefit” of Plaintiff and with the intention “to create a direct, rather than an incidental or consequential, benefit to [Plaintiff]”. *Windsor Green Owners Ass’n*, 362 S.C. at 17, 605 S.E.2d at 752. Because Plaintiff does not have any contractual relationship with the England Defendants and is not a third-party

beneficiary of the England Defendants' contract with the City, Plaintiff's breach of contract cause of action fails as a matter of law.

III. SCUTPA Claim

Plaintiff's Amended Complaint asserts a cause of action for violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") against all defendants. SCUTPA declares that "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful, S.C. Code Ann. § 39-5-20, and provides a private cause of action for violations of Section 39-5-20. S.C. Code Ann. § 39-5-140.

As an initial matter, the Court notes that Plaintiff's cause of action for violation of SCUTPA does not identify any facts that allegedly constitute "unfair or deceptive acts" by the England Defendants. (*See* Am. Compl. ¶¶ 56-58). However, even if Plaintiff had alleged such facts, the Court finds that Plaintiff's SCUTPA cause of action necessarily fails against the England Defendants because they were not engaged in "trade" or "commerce" in their dealings with Plaintiff.

Under SCUTPA,

"Trade" and "commerce" shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

S.C. Code Ann. § 39-5-10. With respect to the England Defendants, Plaintiff's allegations relate solely to their role as the Building Official for City of Barnwell, and there is no allegation that they acted outside their capacity as the Building Official. Thus, the England Defendants did not

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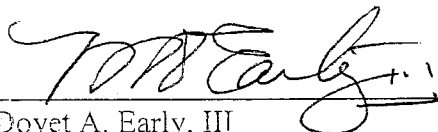
sell, or offer to sell, any service or thing to Plaintiff. The Court finds that serving as a municipality's Building Official does not constitute engaging in "trade" or "commerce" with residents of the municipality. Accordingly, based on the undisputed facts concerning the role of the England Defendants in this action, Plaintiff cannot establish the elements of his SCUTPA claim as a matter of law.

CONCLUSION

For the reasons stated above, viewing the evidence in a light most favorable to the Plaintiff, there is no genuine issue of material fact and the England Defendants are entitled to judgment as a matter of law. Therefore, the Court hereby grants summary judgment in favor of the Defendants Ron Powell, John England, and England Enterprises, Inc. a/k/a England Enterprises is Closed, Inc. as to each cause of action asserted by Plaintiff against them.

AND IT IS SO ORDERED.

This 3^{VRP} day of March, 2015



Doyet A. Early, III
Presiding Judge
Barnwell County Court of Common Pleas