

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Appellate Case No.: 2015-0001291
Circuit Case No.: 2014-CP-18-01284

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SC Court of Appeals

Toni Lynn Tillman,

Respondent,

v.

Timothy Troy Tillman and Crystal Tillman,

Defendants.

Of whom Timothy Troy Tillman is the Appellant.

BRIEF OF APPELLANT

William B. Jung, Esq.
1156 Bowman Road, Ste. 200
Mt. Pleasant, S.C. 29464
(843) 576-4200

Attorney for the Appellant

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STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN DISMISSING THE APPELLANT'S CLAIM FOR IMPOSITION OF A CONSTRUCTIVE TRUST OVER THE PROPERTY?
- II. DID THE TRIAL COURT ERR IN DISMISSING THE APPELLANT'S CLAIM FOR PROMISSORY ESTOPPEL?
- III. DID THE TRIAL COURT ERR IN DISMISSING THE APPELLANT'S CLAIM FOR FRAUD AND MISREPRESENTATION?
- IV. DID THE TRIAL COURT ERR IN DISMISSING THE COUNTS III, V AND VI OF THE APPELLANT'S COUNTERCLAIMS WITHOUT GRANTING LEAVE TO REPLEAD?

STATEMENT OF THE CASE

Procedural History

Respondent Toni Lynn Tillman ("Toni Tillman" or Respondent) filed a Complaint on July 3, 2014, alleging nine (9) causes of action against her brother, appellant Timothy Troy Tillman ("Troy Tillman" or Appellant) and his wife, co-defendant Crystal Tillman, related to the ownership of a residential Dorchester County property known as 526 West Butternut Road, Summerville, S.C. (the "Property"), where Appellant, co-defendant Crystal Tillman and their five children presently reside. (R. pp. 14-36).

The Complaint alleges and seeks a declaratory judgment that Respondent is the sole legal and equitable owner of the Property to exclusion of the Troy and Crystal Tillman and that the Appellant and his family should be ejected from their current possession or, alternatively, directed to pay rent to Respondent. (R. pp. 16-20, 22-23). The Complaint also seeks equitable remedies to quiet the defendants' claim to have an equitable interest in the Property and/or sell and partition the Property. (R. pp. 23-26).

On July 7, 2014, service of the Summons and Complaint was made upon Respondent. (R. pp. 6-7). On August 6, 2014, co-defendant Crystal Tillman filed a *pro se*, handwritten Answer on behalf of the "defendants," in which she requested an

extension of time to retain counsel. (R. pp. 37-46). However, because the August 6, 2014 Answer was not also signed by Appellant, Respondent filed a motion for a default judgment on the following day, August, 7, 2014, and further moved to strike the Answer of co-defendant Crystal Tillman pursuant to Rule 12(f), SCRCP. (R. pp. 47-52, 61-66).

On August 27, 2014, counsel for the Appellant appeared and filed a motion to set aside Appellant's default. (R. pp. 53-60). On August 29, 2014, a hearing on Respondent's motions to strike Crystal Tillman's Answer and for entry of default judgment was held before Judge Maite Murphy. (R. p. 67). At this time, Judge Murphy denied Respondent's motion to strike Crystal Tillman's Answer and continued Respondent's motion for entry of a default Judgment so Appellant's motion to set aside his default could be considered. (R. pp. 67=68).

On October 9, 2014, a hearing on Appellant's motion to set aside his default was heard by Judge Murphy, and that motion was granted from the bench¹. (R. p. 72). On October 17, 2014, Appellant filed an Answer with counterclaims against the Respondent. (R. pp. 73-91). The Appellant's counterclaims seek a declaratory judgment over the parties' respective rights and interests in the Property, as well as, equitable enforcement (via claims for promissory estoppel and constructive trust) of an alleged agreement between the parties whereby Respondent agreed to convey title to the Property to the Appellant and his wife. (R. pp. 82-84). Similar to the Respondent, Appellant seeks to quiet the alleged title to the Property asserted by Respondent. Appellant's Counterclaims also asserted that Respondent committed fraud in falsely promising to convey title to the Property to Appellant as a condition to inducing Appellant

¹ A formal Order on Appellant's Motion to set aside his default was subsequently signed on October 27, 2014. (R. pp. 69-72).

to satisfy a lien² he held against the Property, thereby allowing the title to close in only Respondent's name. (R. pp. 84-87).

On November 17, 2014, Respondent filed a Motion to Dismiss four of the counterclaims brought by Appellant for: (i) fraud and misrepresentation; (ii) imposition of a constructive trust; and (iii) promissory estoppel. (R. pp. 93-106). A hearing on Respondent's Motion to Dismiss was held on January 29, 2015 before Judge Diane S. Goodstein. (R. pp. 119-21). By Order dated April 27, 2015, Judge Goodstein granted Respondent's Motion to Dismiss Counts III, IV, V and VI of Appellant's Counterclaims and further expressly denied Appellant leave to file an amended pleading. (R. pp. 1-12). Specifically, the trial court found that it lacked subject matter jurisdiction to plaintiff's claim for fraud (Count III of the Appellant's Counterclaims) and that Appellant's allegations of fraud were not plead with sufficient particularity. *Id.* With respect to Counts V and VI of Appellant's Counterclaims for imposition of a constructive trust over the Property and for promissory estoppel, respectively, the trial court found that the pleadings did not plead a condition precedent to the viability of those claims and failed to plead fraud with sufficient particularity. (R. pp. 11-12). The trial court's April 27, 2015 Order further denied Appellant leave to file an amended pleading, which Appellant's counsel has previously requested. (R. pp. 12, 117).

On May 12, 2015, Appellant filed a Motion for Reconsideration of Judge Goodstein's April 27, 2015 Order. (R. pp. 159-62). By Order dated June 12, 2015,

² Before filing the instant action, Respondent filed a 2013 ejectment action in the Dorchester County Magistrate's Court seeking to remove the Appellants from the Property. R. pp. 15-16, 33). On June 17, 2013, all parties appeared before Magistrate P Brandt Shelbourne, at which time Respondent Toni Tillman was represented by her current attorney, Kenneth Peck, Esq. (R. pp. 31-32). By Decision dated June 28, 2013, Magistrate Shelbourne denied Respondent's Petition for Ejectment finding that the Appellant and his wife "have an equitable in the property" based upon their satisfaction of a mortgage or other lien that they had had on the Property which permitted Respondent to take title in her name at closing. (R. p. 32).

Judge Goodstein denied Appellant's Motion for Reconsideration but further stated that Appellant "may make a formal motion to amend their counterclaims³." (R. p. 13). On June 17, 2015, Appellant filed a timely Notice of Appeal of Judge Goodstein's April 27, 2015 and June 12, 2015 Orders. (R. p. 163).

Factual Background

In 2008, Appellant and his wife signed a contract to purchase the property known as 526 West Butternut Road, Summerville, S.C. (the "Property") from sellers, Charles and Mary Sloan, who were in the process of constructing a spec residence thereupon. (R. p. 58). However, the Sloan's failed to complete construction of said residence. *Id.* This prompted Appellant and his wife to complete the construction though expenditure of their personal funds, for which the Sloan's gave Appellant a mortgage in excess of \$100,000.00 against the Property as security for Appellant's investment in the Property which had yet to close. *Id.*

On January 21, 2011, a closing on the Property occurred by which Appellant satisfied his mortgage lien on the Property to allow Respondent's lending bank, Bank of America, to have the priority of a first mortgage on the Property. (R. pp. 58-59, 31-32). At this time, a deed was given in the Respondent's name. (R. p. 31). It is the allegation of the Appellant and his wife that an agreement between the parties that Respondent would subsequently give Appellant and his wife a deed to the Property for the purpose of allowing them to refinance and satisfy the Respondent's mortgage in favor of a new loan in the name of only the Appellant and his wife. (R. pp. 86 (par. 210); 59). As acknowledged by the plaintiff, Appellant and his family continued to reside at the Property following the January 11, 2011 closing. (R. p. 17).

³ On June 26, 2015, Respondent filed a motion to file an attached proposed amended Answer which remains uncalendared at the time of this submission. (R. pp. 165-88).

There is no dispute that after June 28, 2013, Appellant stopped paying Respondent's monthly expenses for servicing the mortgage on the Property. (R. p. 17). However, Appellant maintains that the monthly payments ceased only after Respondent refused to deed the Property to Appellant and his wife when they were ready to refinance the existing loan on the property in the name of the Respondent. (R. p. 59). The Respondent maintains that she only agreed to lease the Property to the Appellant and his wife and that Appellant - by his failure to pay over \$85,000.00 in rent - are squatting on the Property without permission. (R. pp. 17-18). At this point, Respondent filed eviction proceedings against Appellant in landlord tenant court. (R. p. 33). After the Magistrate Shelbourne ruled on June 28, 2013 that Appellant had an equitable interest in the property which precluded an eviction proceeding (R. p. 32), Respondent filed this action one year later on July 3, 2014. (R. p. 14).

STANDARD OF REVIEW

"When reviewing a dismissal of a claim for failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Logan v. Cherokee Landscaping and Grading Co.*, 389 S.C. 611, 698 S.E.2d 879, 882 (Ct. App. 2010), *citing Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 112, 659 S.E.2d 158, 161 (2008). "The question for the court is whether in the light most favorable to the plaintiff, the allegations set forth on the face of the complaint state any valid claim for relief." *Id*, *citing Sloan Constr.*, at 112-113, 659 S.E.2d at 161. "The Court will not sustain the motion if the 'facts alleged and inferences reasonably deductible therefrom would entitle the plaintiff to any relief on any theory of the case.'" *Id*, *citing Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S COUNTERCLAIM FOR IMPOSITION OF A CONSTRUCTIVE TRUST OVER THE PROPERTY

Appellant's Counterclaims originally plead two claims for imposition of a constructive trust – one for over the subject Property (Count V of Appellant's Answer) and a separate claim over property located in Charleston County at 1324 New Castle, Charleston, S.C., which had been the subject to a estate proceeding. (R. pp. 87-89). However, Appellant voluntarily withdrew the Counterclaim Count IV claim for imposition of a constructive trust over the Charleston County property at 1324 New Castle, Charleston, S.C., following the January 29, 2015 hearing on Respondent's Motion to Dismiss. (R. p. 148, fn. 1). As such, the only claim for constructive trust which is the subject to this appeal concerns the Property at 526 West Butternut Road, Summerville, S.C., alleged under Count V of the Appellant's Answer. (R. pp. 88-89).

As recently stated by this Court, "An action to declare a constructive trust is in equity... and will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding legal title". *Carolina Park Associates, LLC v. Marino*, 400 S.C. 1, 6-7; see also, *Hale v. Finn*, 388 S.C. 79, 694 S.E.2d 51, 56 (Ct. App. 2010). As further stated by this Court, "A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust." *McNair v. Rainsford*, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (Ct. App. 1998).

All of the necessary elements to support a claim for constructive trust are met in the allegations plead in Count V of Appellant's Answer. Par. 224 of the Appellant's Answer states as follows: "Plaintiff made false and fraudulent representations to defendant that plaintiff would convey title to the property known as 526 West Butternut

Road, Summerville, S.C. to defendant once defendant was prepared to obtain a new mortgage loan and refinance the existing loan in the plaintiff's name on said property." (R. p. 88). Appellant's claim for imposition of a constructive trust over the Property further pleads that Respondent owed a fiduciary duty to and was in a confidential relationship with Appellant following Appellant's agreement satisfy his mortgage lien⁴ on the Property so to allow Respondent to take title to the Property under the Appellant's sales contract made and then existing between himself and his wife and the selling parties, Charles and Mary Sloan. (R. p. 89). Finally, Appellant plead that Respondent "acquired title to [the Property] by means of fraud, in bad faith, abuse of confidence placed in plaintiff by defendant and Crystal Tillman and violations of fiduciary duties, all perpetrated by the plaintiff at the expense of and against the defendants." *Id.*

The allegations in County V of Appellant's Answer provide more than sufficient notice to Respondent that Appellant claimed that it was inequitable that title to the Property remain in Respondent's name as opposed to Appellant and his wife. *E.g.*, *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987) ("A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title."). The Court should have accepted the well-plead allegations of Appellant's Answer as true and grant Appellant the benefit of every reasonable inference from those allegations. *Stiles v. Onorato*, 318 S.C. 297, 300 (1995).

⁴ As referenced in the June 28, 2013 Decision of Magistrate P. Brandt Shelbourne on a previous application for ejectment filed by Respondent against Appellant (attached and incorporated as Exhibit "1" to plaintiff's Complaint, par. 12), Appellant voluntarily released and marked as satisfied a lien in excess of \$100,000.00 that Appellant's had against the sellers, Charles and Mary Sloan, in alleged reliance on Respondent's promise to convey title to the Property to defendants in advance of a mortgage refinance application. (R. p. 31).

The trial court's stated reasoning in its April 29, 2015 Order that Appellant did not alleged a condition precedent, *i.e.*, informing the Respondent that he was ready to refinance the existing loan in Respondent's name on the Property, has nothing to do with the crux of required allegations in support of a constructive trust, specifically that Respondent acquired title to the Property by dishonest, false means, in bad faith, and it would be inequitable to allow title to remain in Respondent's name. *Lollis v. Lollis, supra*. It was error for the trial court to conclude that alleging such a condition precedent was a necessary element to the Appellant's claim for imposition of a claim for constructive trust.

Furthermore, citing that Appellant did not plead fraud with sufficient particularity in order to plead a claim for constructive trust is misplaced. Appellant plead repeatedly throughout his Answer that Respondent falsely promised to convey title back to Appellant and his wife so they could apply to refinance the mortgage in Respondent's name, yet Respondent refused to honor that promise. (R. pp. 86-87). The Respondent's failure to convey title when Appellant maintains he was ready to refinance the existing mortgage on the Property precipitated the entire dispute that is the subject of this action. (R. p. 90, par. 232) ("Defendant has been damaged as a direct and proximate result of plaintiff's breach of her promise and agreement that she would convey title to the Property ... to the defendant once he informed plaintiff that he and wife were ready to obtain a new mortgage loan on said property."). It was error for the Trial Court to conclude that the Appellant had not properly plead a cause of action to impose a constructive trust over the Butternut Property, and it is respectfully submitted that the trial court's order on this issue should be reversed.

II. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S COUNTERCLAIM FOR PROMISSORY ESTOPPEL

A cause of action for promissory estoppel has the following elements: (1) a promise unambiguous in its terms; (2) reasonable reliance on the promise by the party to whom it was made; (3) reliance is expected and foreseeable by the party who made the promise; and (4) injury in reliance on the promise. *Powers Construction Co., Inc. v. Salem Carpets, Inc.*, 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984).

In his Answer, Appellant alleged that Respondent promised to convey title to the Property in advance of his seeking a mortgage refinance loan (R. pp. 89-90, par. 230); that he relied upon this promise as a condition to permitting title to be in plaintiff's name at closing (R. p. 90, par. 231); that his reliance upon said promise was justified (*Id* at par. 231) and that he was damaged by plaintiff's refusal to honor her promise **after** defendant "informed plaintiff that he and his wife were ready to obtain a new mortgage on said property." (*Id* at par. 232) (Emphasis Added). With respect to the element of a claim for promissory estoppel that the speaker intend the promise to be relied upon, Appellant plead and incorporated by reference his allegation that "plaintiff intended that defendant would rely upon the truth of plaintiff's representations concerning ... her willingness and agreement to convey title to the property known as 526 W. Butternut to the defendant." (R. pp. 87, 89). Accordingly, Appellant sufficiently plead the requisite facts necessary to sustain a claim for promissory estoppel and was further entitled any reasonable inferences therefrom in support of his alleged a cause of action for promissory estoppel. *Stiles v. Onorato*, 318 S.C. 297, 300 (1995).

Simply put, the trial court's reasoning that Appellant "has failed to allege a necessary condition precedent to his promissory estoppel claim (i.e., the Defendant being prepared to refinance the existing mortgage" (R. p. 11)) is clearly factually inaccurate. As

set forth above, Appellant alleged that he "was damaged as a direct and proximate result of plaintiff's breach of her promise and agreement that she would convey title to the Property ... to the defendant once he informed plaintiff that he and wife were ready to obtain a new mortgage loan on said property." (R. p. 90, par. 232.

It cannot be denied that Appellant's damage claims in his promissory estoppel, as well as, in all other of his causes of action, only arose because virtue of the Respondent's failure to convey title Appellant after Appellant informed the Respondent he wanted to refinance the existing mortgage. The trial court was obligated under long standing black letter law to accept the well-plead allegations of Appellant's Answer as true and grant Appellant the benefit of every reasonable inference from those allegations. *Stiles v. Onorato, supra*. It is respectfully submitted that the trial court's refusal to accept the well plead allegations in Appellant's claim for promissory estoppel and to afford the Appellant the benefit of all reasonable inferences therefrom from clear error, and the trial's court judgment on this issue should be reversed.

III. APPELLANT'S CLAIM FOR FRAUD AND MISREPRESENTATION IS PLEAD WITH SUFFICIENT PARTICULARITY AND IT WAS ERROR FOR THE TRIAL COURT TO HAVE DISMISSED THAT CLAIM

A cause of action for fraud and misrepresentation has the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) either the defendant's knowledge of its falsity or a reckless disregard for its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Kahn Construction Co. v. South Carolina National Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414 (1980). Each of these allegations are plead in the Appellant's Third Counterclaim for fraud. (R. pp. 86-87, pars. 210-217).

Specifically, the Appellant's Counterclaim for fraud alleges that (1) Respondent "represented to defendant that [Respondent] would convey title to the Property ... immediately after [Appellant] informed [Appellant] that defendant and Crystal Tillman were ready to refinance said property by obtaining a new loan against the property which would satisfy the existing mortgage in on the property which was in [Respondent's] name. (R. p. 86, par. 210). The next paragraph of Appellant's answer alleges that this specific representation in par. 210 was "false." (R. p. 86, par. 211). The next paragraph alleges that the representation made by Respondent concerning her promise to convey title to the Appellant was "material" to the Appellant's agreement to allow title to the Property to pass into the Respondent's name at closing under Appellant's contract with the sellers. (R. p. 86, par. 212). Paragraph 213 of Appellant's Answer alleges that Respondent's representation and promise she could re-convey title to the Property to Appellant and his wife were made by Respondent with "actual knowledge of [its] falsity or with reckless disregard for the truth or falsity of that representation." (R. p. 87).

Paragraphs 214 and 216 of Appellant's Answer allege that Respondent intended Appellant to rely on the truth of her representations, that Appellant actually relied upon the truth of that representation and suffered damages as a proximate result. *Id.* Finally, Paragraph 215 of the Appellant's Answer properly pleads that Appellant was ignorant of the falsity of Respondent's represent and promise she would deed title to the Property to him and his wife after closing. *Id.* As set forth above, all of the requisite elements of a properly plead claim for fraud and misrepresentation are found in pars. 210 to 217 of Count III of Appellant's Answer. (R. pp. 86-87).

The stated reasoning behind the trial court's determination that the Appellant did not plead a claim for fraud and misrepresentation with particularity as required under Rule 9(b), S.C.R.C.P. is that Appellant's Counterclaim for fraud failed to allege a "condition precedent" to the viability of a fraud claim, i.e., that the Appellant first informed Respondent he wanted to refinance the existing loan in Respondent's name on the Property. Appellant concedes that an express, verbatim allegation to this effect is not found in Count III and does not appear directly until alleged in support of Appellant's promissory estoppel claim in Count VI. (R. p. 90, par. 232). However, the lack of a specific pleading alleging that a condition precedent to a promissory or contractual obligation, while it may be necessary to support a breach of contract claim, is not a requirement to a claim for fraud and misrepresentation. The trial court's decision to require an express pleading to the effect that "Appellant asked to be put into title but Respondent refused" imposes an element of a breach of contract claim that is simply unnecessary to plead a claim for fraud and misrepresentation. (R. p. 141-42) (Trial Court's hearing discussion).

"Fraud occurs where one person or party intentionally deceives another by word or conduct for the purpose of inducing that other party to part with some property or surrender some legal right and the party accomplishes his purpose." Ralph King Anderson, Jr., South Carolina Request to Charge – Civil, 2002, § 18-1, p. 205. The fraud which Appellant has complained about was committed when, in reliance on Respondent's alleged promise to re-convey title to the Property following the January 21, 2011 closing, Appellant and his wife satisfied their existing mortgage on the Property in excess of \$100,000.00 so that the closing whereby Respondent would temporarily receive legal title could proceed on January 21, 2011.

The fraud complained of by Appellant occurred when Respondent made a false promise she would deed the Property to the Appellant and his wife at a date after closing. The fact that Respondent refuses to issue any deed to the Appellant and his wife and maintains that she is the sole legal and equitable owner of the Property is abundantly clear from both parties' pleadings. (R. p. 17, pars. 19-20 (Complaint alleging that Respondent is the sole legal owner of the Property under the current deed); (R. 83, par. 194) (Answer alleging that Appellant and his wife should be declared to be legal and equitable owners of the Property)). While Appellant submits that while it is proper to infer from his fraud pleading that Respondent refused to convey title to the Property to Appellant and his wife, it was erroneous to require that Appellant plead that averment as an express condition precedent to a claim for fraud and misrepresentation.

The particularity required under Rule 9(b) in a fraud pleading is met by the Appellant's express pleading that (i) Respondent made a the false statement that she would re-convey title to the Property to Appellant after the closing; (ii) that this statement was made before a January 21, 2011 closing on the Property by which Respondent ended up with legal title to the Property under a sales contract designating Appellant and his wife, not Respondent, as purchasers; and (iii) that Respondent's false statement was made to induce Appellant and wife to satisfy a mortgage they had recorded against the Property so that Respondent's bank would issue a new loan and become the first mortgagee. *Hansen v. DHL Laboratories, Inc.*, 316 S.C. 505, 512 450 S.E.2d 624, 628 (Ct. App. 1994), *clarified*, 319 S.C. 79, 459 S.E.2d 850 (1995) ("[I]n all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity."). As set forth in *Hansen, supra*, "sufficient facts," setting forth the circumstances of an alleged fraudulent misrepresentation, must be plead. *Id.* In

describing the background to the alleged statement, the specifics of the false statement, the motivation behind the statement, the result before, as well as, after of the false statement, Appellant has plead fraud with particularity and respectfully submits that the trial court erred in failing to recognized the same, as well as, by imposing additional unnecessary pleading requirements a proper claim for fraud under South Carolina law.

IV. THE TRIAL COURT ERRED IN REFUSING THE APPELLANT'S REQUEST FOR LEAVE TO REPLEAD ANY CLAIMS THAT THE TRIAL COURT DETERMINED WERE INSUFFICIENTLY PLEAD

At the January 29, 2015 hearing and also in his pre-hearing January 28, 2015 pre-hearing memorandum of law, Appellant requested leave to re-plead any cause of action that the trial would dismiss after Respondent's Rule 12(b)(6) Motion to Dismiss. (R. pp. 142, 117). Appellant's May 12 2015 Motion for Reconsideration also expressly raised this argument to the trial court. (R. p. 161). Under well established rules of practice, a party should be afforded opportunity to re-plead a cause of action which a trial court found insufficient under Rule 12(b)(6) Motion to Dismiss. *Dockside Ass'n v. Detyens, Simmons, et al.*, 297 S.C. 91, 95, 314 S.E.2d 907, 909 (Ct. App. 1988) ("[W]here complaint is dismissed under Rule 12(b)(6), plaintiff should be granted leave to file an amended pleading.").

The trial court's original April 29, 2015 Order denied Appellant the right to re-plead on the stated basis that the Appellant had been in default previously. (R. p. 12). Yet, when the circumstances of that previous "default," which was vacated by Judge Maite Murphy, are examined, there is no dispute that the previous "default" referenced in the trial court's April 29, 2015 was for a *pro se* litigant's technical Rule 11 violation in not co-signing the Answer which his wife timely filed after Respondent's counsel refused to answer repeated requests for an extension in order to retain counsel. (R. pp. 69-70). As

determined by Judge Murphy, the Appellant, as then a *pro se* litigant seeking time to retain counsel, was unaware of the signature requirements of Rule 11 when his wife filed an Answer on stated behalf of the "defendants." (R. p. 70). Clearly, as recognized by Judge Murphy, the circumstances of the previous "default" of the Appellant did not warrant upholding the technical default of a *pro se* litigant, with whom Respondent's counsel refused to communicate in response to a timely request for an extension to retain counsel. (R. p. 71).

To the extent that any of the Appellant's pleadings were insufficient as a matter of law, there is no dispute that Respondent was well aware of the crux of Appellant's contentions concerning the breach of Respondent's alleged promise to convey title to the Property to Appellant and wife following the January 21 2011 closing. Accordingly, there is no credible argument that Respondent would be prejudiced by allowing Appellant, in accordance long standing South Carolina law, the right to file an amended pleading remedying any specific deficiency that was not expressly plead in Appellant's original counterclaim.

Respondent was well aware that Appellant claimed she had defrauded him in gaining his agreement to satisfy his mortgage lien on the Property prior to the January 21, 2011 closing so said closing could proceed. While Appellant contends that the trial court's objection to the sufficiency of Appellant's fraud counterclaim were erroneous, that objection would have been satisfied by allowing Appellant to re-plead a new paragraph stating, in effect, that Appellant notified Respondent he wanted to re-finance Respondent's mortgage, that he requested Respondent to convey title and Respondent refused to do so - all matters which were plainly obvious to the parties and the trial court. (R. p. 142, lines 2-14) ("It's implicit in the whole pleading that they did not have an

opportunity to refinance it. That's why title is in her name. If that's a material point, Your Honor, it can be remedied by a sentence. I mean, I think we are here for notice pleading. I think ... plaintiff knows exactly why ... there's a claim for fraud against her, because she lied about a something and my people relied upon it. And essentially what I've asked for, if there's a defect in my pleading, I think it's only proper that I'm entitled to amend it.").

While the trial's court's June 4, 2015 Order in response to Appellant's Motion to Reconsider "clarified" the Appellant could file a motion to amend his Answer (R. p. 13), it cannot be denied that by the time said motion was calendared for a hearing, the trial of this action, filed 11 months before the date of the trial court's order on Appellant's Motion for Reconsideration, could have been called for trial. Certainly, Respondent would claim prejudice that addressing an amended pleading on the eve of trial was grounds to claim prejudice, and Appellant's motion to amend could have been denied by a trial court for that reason alone given that this action had been pending for 11 months at the time of the trial court's June 4, 2015 Order. For these reasons, the trial court's "clarification" that it was not precluding the Appellant from filing a motion to amend his answer afforded no real relief to the Appellant and necessitated this Appeal. Given that a party should be afforded opportunity to re-plead a cause of action which a trial court found insufficient under Rule 12(b)(6) Motion to Dismiss, *Dockside Ass'n v. Detyens, Simmons, et al.*, 297 S.C. 91, 95, 314 S.E.2d 907, 909 (Ct. App. 1988), Appellant respectfully submits that the trial court's decision not afford leave to file an amended answer was erroneous, prejudicial and should be reversed.

Conclusion

For the aforementioned reasons, the Appellant respectfully submits that the trial court's Orders which are the subject of this appeal should be reversed and otherwise that the Appellant be granted leave to file an Amended Answer.

Dated: Mount Pleasant, S.C.
November 4, 2015

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William B. Jung", is written over a horizontal line.

William B. Jung, Esq.
1156 Bowman Road, Ste. 200
Mount Pleasant, S.C. 29464
(843) 576-4200

Attorney for the Appellant T. Troy Tillman

CERTIFICATION

The undersigned hereby certifies that the Appellant's Final conforms and complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Dated: Mount Pleasant, S.C.
November 6, 2015

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William B. Jung", is written over a horizontal line.

William B. Jung, Esq. (#0068788)
1156 Bowman Road, Ste. 200
Mount Pleasant, S.C. 29464
(843) 576-4200

Attorney for the Appellant T. Troy Tillman

RECEIVED

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PROOF OF SERVICE

SC Court of Appeals

I, William B. Jung, Esq., certify under penalty of perjury that on November 6, 2015, I served a copy of the Appellant's Final Brief by mailing a true and complete copy thereof to the Respondent's counsel:

Kenneth Peck, Esq.
The Peck Law Firm
2040 Ewall Street, Ste. G
Mount Pleasant, S.C. 29464

Dated: November 6, 2015



William B. Jung, Esq.
Attorney for the Appellant