

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

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SC Court of Appeals

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

Toni Lynn Tillman,

Respondent

v.

Timothy Troy Tillman and Crystal Tillman,

Defendants

Of whom Timothy Troy Tillman is the Appellant

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

1. This case arises from a dispute between two siblings (the Respondent and the Appellant) and the wife of the Appellant.

2. The principal subject of the litigation is a residence and property, which are commonly known as 526 West Butternut Road, Summerville, S.C. (herein "the Property").

3. In a prior case in Dorchester County, Magistrate Shelbourne made the following findings (R. p. 31-32), which are binding on the parties in this action under the doctrine of res judicata:

- a. The Respondent purchased the subject property on January 21, 2011 for \$216,051.05.
- b. The parties [Respondent and Defendants] entered into an oral agreement by which the Defendants were to pay the amount of the mortgages and taxes and insurance for the subject property until the Defendants could obtain a loan to pay off the balance.
- c. At some point, the Defendants stopped paying the mortgages, taxes, and insurance, which has forced the [Respondent] to utilize her own funds to pay for the outstanding payments for the mortgages, taxes, and insurance.

Complaint, Exhibit 1 (R. p. 14-30 and 31-32).

4. The Appellant filed an Answer and Counterclaim in response to the Complaint (R. p. 73-91). His Counterclaim included six claims against the Respondent. Answer and Counterclaim, October 10, 2014 (R. p. 82-90).

5. On April 29, 2015, the Trial Court dismissed four of the claims (R. p. 1-12), which the Appellant had asserted in his Counterclaim (R. p. 73-91). The dismissed claims were for: (a) Fraud and Misrepresentation (Third Claim – ¶¶ 203-217) (R. p. 84-87); (b) Constructive Trust – 526

West Butternut Road (Fourth Claim – ¶¶ 218-222) (R. p. 87-88); (c) Constructive Trust (Fifth Claim – ¶¶ 223-228) (R. p. 88-89); and (d) Promissory Estoppel (Sixth Claim – ¶¶ 229-233) (R. p. 89-90). Answer and Counterclaim, October 16, 2014 (R. p. 73-91); Judgment, April 29, 2015 (R. p. 1-12).

6. This appeal concerns only the Appellant's Third, Fifth, and Sixth Claims (R. p. 84-90). The Appellant did not appeal the dismissal of his Fourth Claim (R. p. 87-88).

7. Originally, the Appellant based his Third Claim (R. p. 84-87) and Fourth Claim (R. p. 87-88) on two theories: (a) circumstances arising from the 1992 Charleston County probate proceedings of the Mother of the Appellant and the Respondent; and (b) circumstances arising from the Respondent's January 2011 purchase of a home, which is commonly known as 526 West Butternut Road, Summerville, S.C. (herein "the Property").

8. The Appellant's counsel stated in his Initial Brief that the Appellant withdrew his Fourth Claim to the extent to which it concerned the 1992 probate proceeding and property (1392 New Castle, Charleston) that the Respondent received as a consequence of such proceeding. Initial Brief of Appellant, p. 6.

9. The Appellant made no argument or reference in his Initial Brief regarding the 1992 probate proceeding or 1392 New Castle, Charleston. Since the Appellant has offered no basis for this Court to reverse the decision of the Trial Court to enter judgment regarding the Appellant's Third and Fourth Claims to the extent to which those Claims may have concerned the 1992 probate proceeding and 1392 New Castle, Charleston, this Court should affirm that portion of the Trial Court's decision (R. p. 84-88).

10. This Court should, likewise, affirm the Trial Court's judgment dismissing the Appellant's Third, Fifth, and Sixth Claims regarding the Property (R. p. 84-90).

II. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S CLAIMS FOR FAILURE TO PLEAD FRAUD WITH SUFFICIENT PARTICULARITY.

11. The Appellant failed to allege a fact that is essential to the proof of fraud or misrepresentation for his third, fifth, and sixth claims. Specifically, the Appellant failed to allege that the Appellant and his wife (co-Defendant Crystal Tillman) were ever prepared or able to refinance the existing loan on the Property. In the absence of such allegations, the Appellant failed to plead fraud with sufficient particularity and the Trial Court properly entered judgment against those claims.

12. Not only did the Appellant fail to allege that the Appellant had failed to allege that he had obtained the financing to purchase the Property, the Trial Court found the Appellant and his co-Defendant had not obtained a new mortgage loan to replace and refinance the mortgage, which the Respondent had obtained to permit the Respondent to purchase the Butternut Property. Judgment, April 29, 2015, ¶ 17 (R. p. 3). In the absence of such factual allegation, the Appellant failed to state a claim for relief in his Third, Fifth, and Sixth Claims for Relief.

III. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DECISION TO DISMISS THE APPELLANT'S THIRD CLAIM FOR FRAUD AND MISREPRESENTATION.

13. The Appellant asserted a claim for fraud and misrepresentation as his Third Counterclaim.

14. Rule 9(b) of the South Carolina Rules of Civil Procedure requires that a party must plead fraud with particularity.

15. The Trial Court found with regard to the Third Claim that the Appellant had failed to plead fraud with particularity. Order, ¶¶ 25-30 (R. p. 7-10).

16. To satisfy the requirements of Rule 9(b), a party asserting a fraud claim must set out clearly

the facts and circumstances, which constitute the alleged fraud. *Bookhart et al. v. Central Electric Co-op., Inc.*, 222 S.C. 289, 72 S.E.2d 576 (1951). Cited with approval *Tommy L. Griffin Plumping & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 463 S.E.2d 85, 320 S.C. 49 (S.C. 1994). The party must allege facts which would afford a basis upon which a jury could properly find support for each of the elements of a fraud claim. *Gordon v. Fidelity & Cas. Co. of NY*, 120 S.E.2d 509, 238 S.C.438, 444 (1961). If the party fails in the claim to allege facts to support any one of the elements of fraud, the claim is fatally defective and should be dismissed. *Able v. Equitable Life Assur. Society of United States*, 195 S.E. 652 (S.C.1938) and *Warr v. Carolina Power & Light Co.*, 115 S.E.2d 799, 802, 237 S.C. 121, 126-27 (1960).

17. The Court in *Kiriakides v. Atlas Food Systems & Serv.*, 527 S.E.2d 371, 338 S.C. 572, 586 (S.C. Ct. App. 2000) set forth the nine elements, which must be shown to establish a fraud claim. Those elements are: “1) a representation or nondisclosure of a material fact, 2) its falsity, 3) its materiality, 4) either knowledge of its falsity or a reckless disregard of 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. See *Manning v. Dial*, 271 S.C. 79, 245 S.E.2d 120 (1978); *Lawson v. Citizens and Southern National Bank of South Carolina*, 259 S.C. 477, 193 S.E.2d 124 (1972); *Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E.2d 601 (1967); *Hurst v. Sandy*, 329 S.C. 471, 482, 494 S.E.2d 847, 853 (Ct.App.1997). The ‘[f]ailure to prove any element of fraud is fatal to the action.’ *Sorin Equipment Co. v. The Firm*, 323 S.C. 359, 366, 474 S.E.2d 819, 823 (Ct.App.1996) (citing *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct.App.1984)).”

18. Many of the necessary elements of a fraud claim are not even mentioned within the Third Cause of Action. “Where the complaint omits allegations on any element of fraud, the trial court

should grant the Appellant's motion to dismiss the claim." *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993).

19. In the second sentence of paragraph 210 of his Counterclaim, the Appellant alleged the fact on which he based his Third, Fifth, and Sixth Claims. The Appellant asserted there:

Plaintiff [Respondent] further represented to defendant [Appellant] that plaintiff would convey title to the property known as 526 W. Butternut Road, Summerville, S.C. **immediately after defendant informed the plaintiff that defendant and Crystal Tillman were ready to refinance said property by obtaining a new loan** against said property which would satisfy the existing mortgage on said property which was in plaintiff's name.

Counterclaim, ¶ 210 (R. p. 86). Emphasis added. *See also* Counterclaim, ¶¶ 224 and 230 (R. p. 88 and 89-90).

20. It is highly significant that the Appellant acknowledged in his Counterclaim that the Respondent did not have a duty to convey the Property until the Appellant had informed the Respondent that the Appellant was ready to refinance the existing mortgage debt with a new loan.

21. Under the Appellant's theory of this claim, the Respondent would have committed fraud if and only if: (a) the Respondent knew when she made the alleged representation that it was false; (b) the Appellant had informed the Respondent that the Appellant was ready to refinance the mortgage for the Property; (c) the Respondent failed to convey title to the Property to the Appellant after being informed that the Appellant was prepared to refinance the Property; and (d) the Appellant suffered an injury that was caused by the Respondent's failure to convey title to the Property after being informed that the Appellant was prepared to refinance the mortgage.

22. The Appellant did not allege anywhere in his Counterclaim that:

- a. the Appellant was ready on one or more specific dates to refinance the existing mortgage on the Property;

- b. the Appellant had informed the Respondent on one or more specific dates of his readiness to refinance the mortgage; or
- c. the Respondent had thereafter refused on one or more specific dates to convey the Property to the Appellant in exchange for the Appellant refinancing the mortgage debt into his name.

23. In the absence of such allegations, the Appellant failed to allege facts with sufficient particularity to state a claim for fraud or misrepresentation.

24. The Appellant also failed to allege with particularity necessary facts to show that the Respondent's alleged representation regarding conveyance of the Property was: (a) false (i.e., the Appellant had informed the Respondent that the Appellant was prepared to refinance the mortgage and the Respondent refused to convey title to the Property); or (b) made with a reckless disregard for the truth or falsity of such statement. Likewise, the Appellant did not allege with particularity that he had suffered a proximately caused injury (i.e., injury resulting from the failure of the Respondent to convey the Property after the Appellant refinanced the mortgage for the Property). Indeed, the Appellant could not have suffered a proximately caused injury because he never informed the Respondent of his readiness to refinance the mortgage. Judgment, April 29, 2015, ¶ 17 (R. p. 3).

**IV. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DECISION TO
DISMISS THE APPELLANT'S FIFTH CLAIM FOR CONSTRUCTIVE FRAUD.**

25. The Appellant inappropriately asserted a "claim" for "constructive trust" as his Fifth Claim. Counterclaim, ¶¶ 223-228 (R. p. 88-89).

26. South Carolina does not recognize a cause of action in law or equity for "constructive trust." *Hale v. Finn*, 388 S.C. 79, 694 S.E.2d 51 (Ct. App. 2010). A constructive trust is an

equitable *remedy*, not a *cause of action*. *Ibid*.

27. Since South Carolina does not recognize a cause of action for “constructive trust,” this Court should affirm the Trial Court’s dismissal of the Appellant’s attempt in his Fifth Claim to assert a claim for constructive fraud.

28. Our Supreme Court held in *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559 (1987) that proof of fraud is an essential element of a request for a constructive trust to be imposed on property. “A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution. *Searson v. Webb*, 208 S.C. 453, 38 S.E. (2d) 654 (1946). Fraud is an essential element, although it need not be actual fraud. *Whitmire, supra; Wolfe, supra; Dominick, supra.*”

29. The Appellant’s Fifth Claim (R. p. 88-89) may, therefore, be viewed – despite its label as a claim for “constructive trust” – as a restated version of his Third Claim for fraud and misrepresentation (R. p. 84-87). The only substantive distinction between the claims is that the Appellant: (a) sought damages as his remedy for his Third Claim (R. p. 87); and (b) requested imposition of a constructive trust as the remedy for his Fifth Claim (R. p. 89).

30. To the limited extent to which the Appellant attempted to assert a claim for fraud as his Fifth Claim (R. p. 88-89), it suffers from the same Rule 9(b) failure to plead fraud with particularity, which defeats his Third Claim (R. p. 84-87).

31. Although the Appellant slightly reworded his factual allegations in his Fifth Claim (*compare* R. p. 84-87 and 88-89), he did not allege that:

- a. the Appellant was ready on one or more specific dates to refinance the existing mortgage on the Property;
- b. the Appellant had informed the Respondent on one or more specific dates of his

readiness to refinance the mortgage; or

- c. the Respondent had thereafter refused on one or more specific dates to convey the Property to the Appellant in exchange for the Appellant refinancing the mortgage debt into his name.

32. Likewise, the Appellant failed to plead with particularity necessary facts to show that the Respondent's alleged representation regarding conveyance of the Property was: (a) false (i.e., the Appellant had informed the Respondent that the Appellant was prepared to refinance the mortgage and the Respondent refused to convey title to the Property); or (b) made with a reckless disregard for the truth or falsity of such statement. Further, the Appellant did not plead with particularity that he had suffered a proximately caused injury (i.e., injury resulting from the failure of the Respondent to convey the Property after the Appellant refinanced the mortgage for the Property).

33. While the Appellant is free to argue what remedy the Trial Court should order in considering the equities in a fraud case, the Trial Court lacks jurisdiction to consider a fraud claim, where – as here – the moving party fails to plead fraud with particularity.

**V. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DECISION
DISMISSING THE APPELLANT'S SIXTH CLAIM FOR PROMISSORY
ESTOPPEL**

34. The Appellant's attorney has misstated the facts, which the Appellant alleged in his Counterclaim.

35. In paragraph 230 of his Counterclaim, the Appellant alleged that the Respondent would not be obligated to convey title to the Property until the Appellant had informed the Respondent that his wife and he were ready to refinance the loan.

Plaintiff made a promise and agreement with the defendant that plaintiff would convey title to the property known as 526 W.

Butternut Road, Summerville, S.C. to the defendant **once defendant and his wife informed plaintiff that they were ready to obtain a new mortgage loan on said property and refinance said property to satisfy the loan** plaintiff's name on said property.

Answer and Counterclaim, ¶ 230 (R. p. 89-90). Emphasis added.

36. In contrast, the Appellant's attorney represented in the Initial Brief of the Appellant that the Respondent was obligated to convey title to the Property to the Appellant as a condition precedent to the obligation of the Appellant to refinance the loan.

[i]n his Answer, Appellant alleged that Respondent promised to convey title to the property **in advance of his seeking a mortgage refinance loan** (Answer at par. 230); . . .

Initial Brief of the Appellant, p. 9. Emphasis added.

37. The Appellant's attorney did not explain in the Initial Brief of the Appellant why he had reversed the sequence of events as alleged in the Counterclaim (*compare* R. p. 84-87 and Initial Brief of Appellant, p. 9).

38. As the Trial Court found (R. p. 11-12), the Appellant failed in his Sixth Claim (R. p. 89-90) to allege a necessary condition precedent to adequately plead his claim for promissory estoppel. Specifically, the Appellant failed to allege that the Appellant and his wife had informed the Respondent that they were "ready to obtain a new mortgage loan on said property and refinance said property to satisfy the existing loan." Answer and Counterclaim, ¶ 230 (*see* R. p. 89-90).

39. Moreover, as the Trial Court found in paragraph 17 of its Order: "it is undisputed that [the Appellant] and his wife, Ms. Crystal Tillman, never obtained a new mortgage loan to replace and refinance the mortgage, which the [Respondent] had obtained to permit the [Respondent] to purchase the [Property]." (R. p. 3).

40. The court found in *Barnes v. Johnson*, 402 S.C. 458, 469, 742 S.E.2d 6, 11 (2013) that the party asserting promissory estoppel must demonstrate: (1) a promise with unambiguous terms; (2)

reasonable reliance upon the unambiguous promise; (3) foreseeability of the promisee's reliance; and (4) injury sustained in relying on the promise because of the promisor's inconsistent disposition. *See Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005). Notably, neither meeting of the minds nor consideration is a necessary element. *Satcher v. Satcher*, 351 S.C. 477, 484, 570 S.E.2d 535, 538 (Ct. App. 2002).

41. The Appellant failed to allege one of the essential elements of his promissory estoppel claim – i.e., he had acted in reasonable reliance on the promise.

42. The Appellant could not have made that allegation for two reasons. First, the Magistrate had found in the prior proceeding that the Appellant had stopped making payments to the Respondent as required by the terms of their agreement. Complaint, Exhibit 1 (R. p. 31-32). Second, the Trial Court found that the Appellant had not obtained a loan to finance his purchase of the Property (R. p. 3).

43. Likewise, the promissory claim was properly dismissed because the Appellant's alleged injury (i.e. failure to obtain title to the Property) was caused by his conduct in failing to obtain the loan to purchase the Property. The injury was *not* caused by an inconsistent act of the Respondent, as is required to prove a claim for promissory estoppel. *Barnes v. Johnson, supra* at 12.

44. Since the Appellant did not reasonably rely on the Respondent's alleged promise to convey the Property to him and since the Appellant's injury was not caused by an inconsistent act of the Respondent, the Appellant failed to state a claim for promissory estoppel against the Respondent.

VI. THE TRIAL COURT HAS ENTERED AN ORDER PERMITTING THE APPELLANT TO FILE A WRITTEN MOTION TO AMEND HIS COUNTERCLAIM.

45. On June 12, 2015, the Trial Court issued an Order on Reconsideration. As part of that

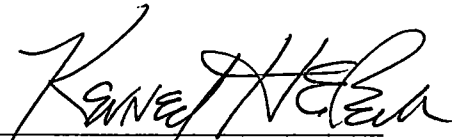
Order, the Court ruled that: "The oral motion to amend counterclaims was denied by the defendants may make a formal motion to amend their counterclaims. It would have been patently unfair to the plaintiff to allow the amendment of said counterclaims without giving the plaintiff the opportunity to see the amended counterclaims and be heard on the motion." (R. p. 13).

VII. CONCLUSION

This Court should sustain the decision of the Trial Court to dismiss the Appellant's Third, Fifth, and Sixth Claims.

Date: September 30, 2015

Respectfully submitted.

A handwritten signature in black ink, appearing to read "KENNETH E. PECK", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned attorney on behalf of the Respondent, Toni Tillman, hereby, certifies that, on November 13, 2015, a true and correct copy of the foregoing Brief was delivered via electronic transmission and U.S. Mail, first-class postage prepaid to the attorney for the Appellant, addressed as follows:

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