

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2015-CP-10-2050

Robert and Marie Larsen  
PLAINTIFF(S)

FILED

Nudo Nympha LLC, DBA Three Southern Belle  
DEFENDANT(S)

2017 APR 3 PM 2:05

Submitted by:

JULIE J. ARMSTRONG  
CLERK OF COURT

Attorney for:  Plaintiff  Defendant  
or  
 Self-Represented Litigant

DISPOSITION TYPE (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.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- STAYED DUE TO BANKRUPTCY
- 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 (formal order to follow)  Statement of Judgment by the Court: Plaintiff's Motion to Alter/Amend filed on 3/20/17 is respectfully denied without a rehearing.

ORDER INFORMATION

This order  ends  does not end the case.  
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

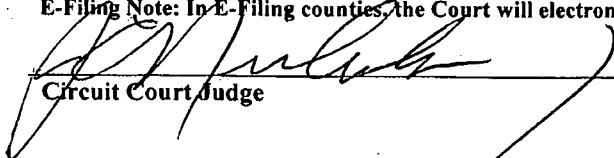
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

  
Circuit Court Judge

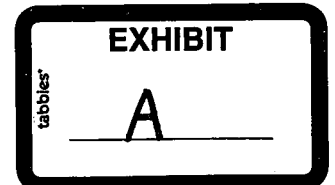
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SC Court of Appeals



STATE OF SOUTH CAROLINA )

COUNTY OF CHARLESTON )

ROBERT LARSEN AND MARIE )  
LARSEN, )

Plaintiffs, )

v. )

NUDO NYMPHA LLC, D/B/A THEE )  
SOUTHERN BELLE AND )  
GENTLEMAN'S CLUB AND WET AND )  
WILD, ROBIN ROBINSON, RED DOG, )  
LLC, VINCENT DESTASO AND FINE )  
HOUSING, INC., )

Defendants. )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-10-2050

**ORDER GRANTING MOTION FOR  
SUMMARY JUDGMENT FOR  
DEFENDANTS VINCENT DESTASO  
AND FINE HOUSING, INC.**

2017 MAR 14 AM 11:32  
J. J. ARMSTRONG  
CLERK OF COURT

**FILED**

*gan*  
The Defendants, Vincent Destaso and Fine Housing, Inc., moved for Summary Judgment regarding the Complaint brought by the Plaintiffs. A hearing was conducted on January 24, 2017. After considering the Motion, Destaso and Fine Housing's Memorandum in Support of Summary Judgment, the Plaintiffs' Reply to Destaso and Fine Housing's Motion, discovery in the case and the arguments of counsel, I conclude that there is no genuine issue as to any material fact and that Destaso and Fine Housing are entitled to a judgment as a matter of law and grant the motion.

**FACTS**

On or about January 11, 2014, Plaintiff Robert Larsen was involved in a physical altercation in or near a parking lot located at 2028 Pittsburg Avenue, South Carolina. As a result of this altercation Plaintiff allegedly sustained injuries and he and his wife, Marie Larsen, filed this lawsuit against the Defendants alleging they were various owners and operators of the businesses and of the property where the altercation occurred. The Plaintiffs' theory of liability

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SC Court of Appeals

**EXHIBIT**  
**B**

against Destaso and Fine Housing, the moving parties, is that in addition to owning the property, that they managed the day to day operations of Nudo Nympha, LLC, which included security for the nightclub.

Destaso and Fine Housing admit that Fine Housing, Inc. was the owner of the property and that it leased the property to Robin Robinson and RRJR, LLC. Destaso and Fine Housing deny that they played any role in the management or operation of the businesses or parking lot on the property and that Fine Housing, Inc.'s only role was that of landlord. Destaso and Fine Housing admit that Vincent Destaso was the sole shareholder of Fine Housing, Inc. but deny that he played any role individually as a landlord of the property, was not a party to the lease, and was not an owner or manager of the businesses or parking lot.

#### LAW AND ANALYSIS

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Café Assocs., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). Further, summary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusion to be drawn therefrom. MacFarlane v. Manly, 274 S.C. 392, 264 S.E.2d 838 (1980). In a negligence action, a plaintiff must show the (1) defendant owed 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) the plaintiff suffered injury or damages. Dorrell v. South Carolina Dept. of Transp., 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004). Whether the

law recognizes a particular duty is an issue of law to be determined by the court. Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996).

Defendant Destaso is a resident of New York State and the President of Defendant Fine Housing, Inc. As stated in his Affidavit, Fine Housing Inc., has owned the subject property located at 2028 Pittsburg Avenue, South Carolina since December of 2013 (See Exhibit A – Destaso Affidavit). At the time of the incident, Fine Housing, Inc. leased the subject property to Robin Robinson and RRJR, LLC per a lease agreement. (See Exhibit “B” – Lease Agreement). Mr. Destaso was not a party to the lease agreement and did not have any control over anything related to the operation of Ms. Robinson’s business. This includes no personal control over employees, security personnel, parking lot supervision, patrons, alcohol, safety procedures or any other business practice (See Exhibit “A” – Destaso Affidavit). Similarly, Fine Housing, Inc. had no control over anything related to the operation of Ms. Robinson’s business. Fine Housing, Inc. simply had a Landlord-Tenant Relationship with Robin Robinson, the owner of RRJR, LLC with a Lease Agreement in place. (See Exhibit “B” – Lease Agreement).

The Plaintiffs argue that both Destaso and Fine Housing were the landlords and that both played an active role in managing the business located on the property through an agent at the business by the name of Anthony Fogle. Plaintiffs assert that Fogle was the operations manager for the business, had been a friend of Robin Robinson, who was the previous owner of the property and business and that when Fogle learned that Robinson was in financial trouble that Fogle put Robinson in touch with Defendant Destaso. Plaintiffs set forth the following testimony from the deposition of Anthony Fogle to support these positions:


“The only way he was going to do the loan is if I was involved as operations manager, per se, over the club, Southern Belle, over that property, 2028 Pittsburgh Avenue, A, B, and C,

which is Gentleman's Quarters, Southern Belle, and the Beverage Station, and he would loan her the money . . . "(Fogle p.8, L 4-10).

"He wants -- he wanted me to be like the overseer to be sure he got paid. He wanted to be sure he was getting his money, and he was concerned that if she had her people in place previous to the loan that he wouldn't get paid, because she wasn't paying anybody. So he wanted to be sure he was getting paid, and so he had me sign as a guarantor for the loan, and that I would be -- understanding with her that I would be the operations person, to be sure he was getting paid, collecting the money to be sure she got paid." (Fogle p. 22, L. 23-25, p. 26, L.1-8).

Plaintiffs go on to set forth that Fogle testified that he managed the nightly operation of the club, that he hired and fired (Fogle at 29) and that he was responsible for the security at the night club. Regarding security, Plaintiffs set forth that Fogle replaced most of the previous staff, which had consisted of members of the Hells Angels motorcycle club with his own people and set forth the following deposition testimony:

Q. But once Vincent took over, you told him that you would get these bikers out?

 A. I told him we would get the club running the proper way. He said: Well, can you get the bikers out, was one of the questions he has, can you get the bikers out, number one, can you pay me, number two, because you can't pay me if you can't get the bikers out. I said yes. (Fogle p. 15 L 15-22).

Destaso and Fine Housing do not argue that Anthony Fogle was not operating the club, but that he was doing so for Robin Robinson and not for either Fine Housing, Inc. or Vincent Destaso and that Fogle was never an agent for either. In fact, as pointed out by Mr. Fogle above, he was a Guarantor for Robin Robinson's obligations. Destaso and Fine Housing assert that the deposition testimony of Anthony Fogle must be examined in total in lieu of a few select lines. In particular, when asked about his knowledge of the business relationship between Fine Housing, Inc. and the clubs, the following testimony exists:

Q. Is it your understanding that when Fine Housing, Inc. came into the picture, so to speak, that it was buying the property and not the businesses on them?

A. Absolutely.

Q. And the businesses that were on the property, they remained the ownership of Robin Robinson and/or her LLC, however that was set up. Is that correct?

A. Yes, sir.

(Fogle p. 84, L.11-20)

So, Mr. Fogle makes clear that Robin Robinson and/or her LLC was the owner of the businesses.

As far as who directed Mr. Fogle regarding the operation of the club, the following testimony is important:

Q. But as far as Mr. Destaso telling you: You must do X, Y, and Z to operate those businesses, he never told you any of those things. Is that correct?

A. No. The only thing he, Vincent, really was very adamant about, Mr. Destaso, was that (a) that he gets paid, that's the bottom line. He said that every time we talked, I just want to get paid. (b) is that I don't want to be in the strip club business. I have no desire to be in the strip club business. And (c) I need to be sure you're there so I get paid. That's the only reason why I'm doing this.

Q. And as far as the monthly payments being made on the lease, did Robin Robinson ever cut any checks to make those payments, or was that something you always did?

A. I did it. I did it. I made the only payments ever made to Vincent Destaso. He'll tell you that, I believe.

Q. And so you had check-writing authority on the account?

A. Yes. I was a signator on the account, yes, sir.

Q. And as far as the ability to hire or fire any of the employees at any of the businesses, do you think that Fine Housing, Inc. or Mr. Destaso would have had the ability to walk in and say you're fired or you're hired?

A. I don't believe so. I mean, I don't believe so.

Q. That never occurred, did it?

A. Never occurred.

So, the only thing that Anthony Fogle was ever told by Vincent Destaso was what any landlord would tell a tenant – I want to get paid. Other than that, there was no instructions on how to operate the business or hiring or firing decisions.

Regarding Mr. Fogle's compensation, there is the following testimony:

Q. Did you get paid by Destaso separately?

A. Never, never.

Q. Your payment was coming from the club?

A. Nudo Nympha, correct.

(Fogle p. 45, L. 22-25, p. 46, L. 1)

Q. And you've never been paid by Fine Housing, Inc. -

A. Never.

Q. - or Mr. Destaso, correct?

A. He never gave me one penny.

(Fogle p. 89, L. 4-8)

And finally, to show the overview of the relationship, is the following testimony:

Q. And just to refresh my memory here, your first involvement with Vincent Destaso and/or Fine Housing was after Robin asked you to see what you could do with her

financial situation. That led to you talking to your friend, the broker in Chicago, who then put you in touch with some other people who turned down the opportunity, and that led to a conversation with Vincent Destaso, correct?

A. Correct.


Q. During those conversations you had with Vincent Destaso, were you authorized to speak on behalf of Robin Robinson or her LLCs which owned the property?

A. Well, I mean, yeah, pretty much. I mean, she told him, you know, during the thing whatever conversation you need to have or any questions you've got, you need to talk to him about it. He's handling everything for me.

Q. So she turned everything over to you?

A. Yes, sir.

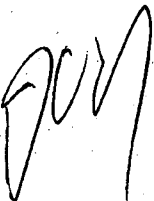
(Fogle p. 91, L. 2 – 22).



Plaintiffs apparently concede that if Fine Housing, Inc. and Vincent Destaso are considered to be landlords only that no duty is owed to the Plaintiffs and thus summary judgment should be granted. The Lease between Fine Housing, Inc. and Robin Robinson and RRJR, LLC does not set forth any requirement that Fine Housing, Inc. was responsible for security of the premises or had any role other than that of a landlord.

Plaintiffs instead seek to pursue an agency theory and assert that Anthony Fogle was the alleged agent for Destaso and Fine Housing. However, the deposition testimony does not support this theory. “In an actual agency case, the question is not whether the purported principal could have exercised control over its agent, but whether it did so.” Jamison v. Morris, 385 S.C. 215, 684 S.E. 2d 168, 171 (2009). What is clear is that Anthony Fogle acted as an agent for Robin Robinson when she ran into financial difficulties and was authorized to speak on

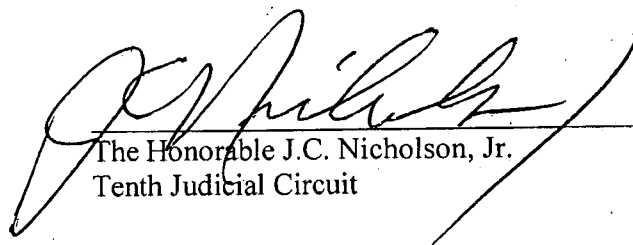
her behalf during discussions with Fine Housing, Inc., through its sole shareholder Vincent Destaso. As a result, Fine Housing, Inc. purchased the property where the incident in the lawsuit occurred from Robin Robinson and then leased it back to Robin Robinson and RRJR, LLC. Anthony Fogle was a Guarantor on behalf of Robin Robinson in this deal and began managing the club, where he was paid for his work by the club and never received any compensation from Fine Housing, Inc. or Vincent Destaso. Anthony Fogle had check-writing authority to make the lease payments and was the only person who ever wrote the lease checks. Vincent Destaso never hired or fired any employees and never told Anthony Fogle how to operate the club. Additionally, as to Vincent Destaso, individually, he was not the owner of the property nor a landlord and thus had no authority regarding the operation or security of the property and thus no duty. From the testimony presented, it is clear that Fine Housing, Inc., like most landlords one would presume, desired to have the monthly lease payments paid and that is what was requested of Robin Robinson's agent, Anthony Fogle.

 A landlord does not owe an affirmative duty to protect tenants from criminal activity merely by reason of the status of being a landlord. Cramer v. Balcor Property Management, Inc. 312 S.C. 440, 441 S.E. 2d 317 (1994). If the landlord has no duty to the commercial tenant in this case, the landlord could hardly have a duty to patrons of the leased commercial premises. The landlord in this case has neither possession nor control over the activities occurring inside or outside the club being operated by Robin Robinson, the owner of RRJR, LLC. Therefore Destaso and Fine Housing do not have a duty of care to the Plaintiff and the claims for negligence should be dismissed, regardless of the facts and a circumstances surrounding the Plaintiff's alleged injuries.

**FINDING**

Based on the evidence presented, there is no evidence that Vincent Destaso and Fine Housing, Inc. owed a duty to the Plaintiff. Further, there is no evidence of any negligence by Vincent Destaso and Fine Housing, Inc. Accordingly, Vincent Destaso and Fine Housing, Inc. are not liable to the Plaintiffs and are entitled to Summary Judgment as a matter of Law.

AND IT IS SO ORDERED.



The Honorable J.C. Nicholson, Jr.  
Tenth Judicial Circuit

3/9, 2017  
Charleston, South Carolina