

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
THE FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-07-5059

COASTALSTATES BANK,)
)
Plaintiff,)

vs.)

HANOVER HOMES OF SOUTH)
CAROLINA, LLC; HANOVER)
HOMES, INC.; GEORGE COSMAN,)
)
Defendant.)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
AMENDED MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT COSMAN'S MOTION
FOR SUMMARY JUDGMENT**

GEORGE COSMAN,)
)
Third-Party Plaintiff,)

vs.)

PHILLIP PETRUZZELLI,)
)
Third-Party Defendant.)
_____)

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APR 28 2017
SC Court of Appeals

This matter comes before me on cross Motions for Summary Judgment filed by the Plaintiff, CoastalStates Bank (“Bank”), and Defendant, George Cosman (“Cosman”). The Plaintiff’s Amended Motion for Summary Judgment as to Cosman’s Counterclaims was filed on July 13, 2016. Cosman’s Motion for Summary Judgment was filed on February 23, 2016. An initial hearing was held before the Court on July 25, 2016, and a supplemental hearing was held on February 22, 2017. Appearing on behalf of the Plaintiff was Russell P. Patterson, Jennifer Dempsey, and Lauren P. Williams. Appearing on behalf of the Defendants was Richard D. Gleissner.

As discussed below, it is the decision of the Court to grant Plaintiff's Amended Motion for Summary Judgment as to the issue of Cosman's counterclaims asserted in his January 10, 2012 Answer ("Answer") and to deny both Plaintiff's Amended Motion for Summary Judgment and Cosman's Motion for Summary Judgment as to the issue of the Bank retaining its right to proceed against Cosman under the three guaranty agreements.

A. FACTUAL BACKGROUND

The following facts are undisputed. In 2007, in connection with the development of residential acreage at the Traditions development located in Beaufort County, the Defendant, Hanover Homes of South Carolina, LLC ("Borrower"), Petruzzelli (the developer), and Cosman (the contractor) applied for development loans from the Bank. On July 19, 2007, the Borrower executed three promissory notes made payable to the Bank in the principal amounts of \$2,600,000 ("\$2,600,000 Promissory Note") (Cosman Deposition, June 25, 2012, "Cosman Depo", pp. 76-77; Exhibit 16), \$520,000 Promissory Note (pp. 88-89; Ex. 22 to Cosman's Depo.), and \$512,000 ("512,000 Promissory Note") (Cosman Depo, pp. 90-91, Ex. 25), in which the Borrower promised to pay the Bank according to the terms of the notes.

At the same time, Cosman, Petruzzelli, and Hanover Homes, Inc. executed unconditional, continuing guarantees guaranteeing the payment and performance of all current and future debts of the Borrower to the Bank, including but not limited to the obligations and debt arising out of the \$2,600,000, the \$520,000, and the \$512,000 Promissory Notes (collectively "Cosman Guaranties"). (Cosman Depo at pp. 77-79, 89, 91-92; Exs. 17, 23, 26).

A summary of the three loans is as follows:

	Date	Amount	Borrower	Guarantors	Real Estate Collateral
1.	7/19/07	\$2,600,000	Hanover Homes of South Carolina, Inc.	Cosman; Petruzzelli; Hanover Homes	21 vacant lots at the Traditions
2.	7/19/07	\$520,000	Hanover Homes of South Carolina, Inc.	Cosman; Petruzzelli; Hanover Homes	Model home to be constructed on Lot B-48 Traditions
3.	7/19/07	\$512,000	Hanover Homes of South Carolina, Inc.	Cosman; Petruzzelli; Hanover Homes	Model home to be constructed on Lot B-47

During the 2008 economic downturn, the Borrower ceased paying the interest payments due on the loans, and the Borrower went into default. (Affidavit of Buzzy Lawson at ¶ 11). As a result of the default, the entire indebtedness under the promissory notes became due and payable in full. *Id.* The three loans were never paid in full. (Affidavit of Ed Kubec, at ¶ 4).

On September 17, 2010, the completed model home funded with the \$520,000 loan was sold by the Borrower to a third party for \$259,000. (Affidavit of Buzzy Lawson at ¶ 15). \$220,386 of the sales proceeds were applied to the \$520,000 loan. (*Id.* at ¶ 15).

On October 22, 2010, the Bank, Borrower and Petruzzelli reached an agreement, ("Petruzzelli Agreement"), whereby the Borrower executed a short sale of the collateral, and agreed to sell the 21 lots securing the \$2,600,000 Promissory Note to a third party in exchange for Bank agreeing to release the Borrower and Petruzzelli from their obligations under all three (3) loans. (p. 198; Ex. 33 to Deposition of Buzzy Lawson). Ultimately, the 21 lots were sold by the Borrower on October 31, 2011, and the net proceeds of \$604,295 were applied to the Bank's debt. (Affidavit of Buzzy Lawson at ¶ 18). Under the Petruzzelli Agreement, the Bank expressly reserved its rights against the remaining guarantor, Cosman. (Cosman Depo, Ex. 58).

On April 29, 2011, the second model home funded with the \$512,000 loan was sold by Borrower to a third party. (Affidavit of Buzzy Lawson at ¶ 16). The net sales proceeds of \$181,667 were applied to the loan balance. (Affidavit of Buzzy Lawson).

After applying the proceeds from these three voluntary sales by Borrower to its loans, the Bank was still owed over \$3,228,000, which is the subject of this action by the Bank against the remaining guarantors, Cosman and Hanover Homes, Inc. (Affidavit of Buzzy Lawson at ¶ 19). After the Bank demanded payment, Cosman never paid, and the amount is outstanding and continues to accrue interest. (Affidavit of Buzzy Lawson at ¶ 12).

Subsequently, the Bank filed this litigation to enforce the Cosman Guaranties and Cosman filed claims against the Bank for breach of contract accompanied by fraud and conspiracy. Initially, Cosman's claims asserted only that he was damaged in an amount to be determined by the Bank's alleged breach of contract and conspiracy to do so. After further discovery, the Bank learned on June 24, 2016, in Cosman's second deposition, dated June 24, 2016 ("Cosman Second Depo.") that he was claiming \$5.5 million in damages. Cosman explained that he bases his alleged \$5.5 million in damages solely on the fact that the Bank filed litigation against him, and because of that litigation, the allegations therein, and resulting credit issues, lenders allegedly refused to refinance his existing obligations and he lost money on several parcels of real estate. (Cosman Second Depo at pp. 52, 57, 67-68, 95, 101-02).

B. STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *SCRCP*, Rule 56(c). In an attempt to demonstrate the presence of a genuine issue

of material fact, the non-moving party may not rest upon the mere allegations or denials of his pleadings. *SCRCP*, Rule 56(e).

C. LEGAL DISCUSSION

I. The Litigation Privilege is an Absolute Privilege That Bars Cosman's Counterclaims and Claim for Damages Against the Bank.

As a matter of clear South Carolina law, the actions of the Bank in filing its claims in this lawsuit, and its allegations made in this lawsuit are absolutely privileged and Cosman cannot, as a matter of law, recover the damages he seeks. Cosman's counterclaims essentially assert that because of the allegations asserted in this action by the Bank, Cosman is entitled to \$5.5 million in damages. (Cosman Second Depo at pp. 52, 57, 67-68, 95, 101-02). This finding is further supported by the admission of counsel for Cosman at the February 22, 2017 hearing on the motion for summary judgment that all of Cosman's alleged damages were directly related to the Bank's actions in filing this litigation.

A. Litigation Privilege Attaches to All Communications in Judicial Proceedings Such That These Communications Cannot Serve as the Basis of a Lawsuit.

As recognized by numerous legal authorities, absolute immunity is necessary to ensure that the judicial process can progress without harassment or intimidation. *See e.g., Butz v. Economou*, 438 U.S. 478, 512 (1978) (providing in dicta that "[t]he cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process. . . . The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation."); *see also Brown v. DeBruhl*, 468 F. Supp. 513, 520 (D.S.C. 1979) (citing dicta from *Butz* with approval). Limiting the scope of litigation privilege to only libel and slander

actions would defeat the court's stated objective of ensuring the judicial process proceeds without harassment or intimidation in all cases.

In furtherance of this important objective, the South Carolina courts have made it clear on multiple occasions that the litigation privilege attaches to all communications in judicial proceedings, and cannot serve as the basis of a lawsuit to claim damages, whether the claim at issue sounds in defamation, negligence, or otherwise. See e.g., *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 30, 567 S.E.2d 881, 896 (Ct. App. 2002); see also *Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 135, 492 S.E.2d 103, 106 (1997); *Crowell v. Herring*, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990); *Rycroft v. Gaddy*, 281 S.C. 119, 124, 314 S.E.2d 39, 43 (Ct. App. 1984); *Arthur State Bank v. Broom*, 2015 WL 793120, at *2 (Ct. App. Feb. 25, 2015). Under recognized South Carolina law, there is simply no cause of action that can be brought for statements made in open court or in pleadings. The litigation privilege applies to any cause of action derivative of such statements. See 86 C.J.S. Torts, *Privilege or Immunity - Testimonial or Litigation Privilege*, § 36 ("This defense applies to almost all tort claims, except for malicious prosecution."); *Rycroft*, 281 S.C. at 119 (applying litigation privilege to action for invasion of privacy); *Arthur State Bank*, 2015 WL 793120 (Ct. App. 2015) (applying litigation privilege to action for negligence).

There are, however, limited recognized exceptions to the litigation privilege in South Carolina. The most notable are an action in violation of the South Carolina Frivolous Civil Proceeding Sanction Act (§ 15-36-10 et. seq. of the S.C. Code of Laws (1976)) and an action filed without a valid basis in violation of Rule 11(a), *SCRPC*. Here, there is no question that there was a valid and good faith basis for the filing of the litigation. This conclusion is borne out

by the fact that Judge Kinard initially granted Summary Judgment in the Bank's favor in his order dated September 24, 2012.

Immunity from damages, such as those alleged by Cosman, is recognized under South Carolina law so that parties can bring non-frivolous lawsuits without fear of later harassment or additional litigation. Accordingly, Cosman's counterclaims for breach of contract and conspiracy and the associated alleged damages are barred by this absolute privilege, and those counterclaims are dismissed.

B. The Bank Has Acted in a Timely Manner in Arguing that Cosman's Counterclaims and Damages Are Barred by the Litigation Privilege.

During the first hearing on these motions before this court on July 25, 2016, counsel for Cosman raised the argument that the litigation privilege is an "affirmative defense" that the Bank should have pled in the Bank's answer to Cosman's counterclaims. The Bank has now pled the litigation privilege as an affirmative defense to Cosman's counterclaims, as reflected in its Amended Answer to Defendant Cosman's Answer and Counterclaim, dated January 20, 2017. I find this issue is now moot.

Moreover, the facts show that the Bank's assertion of this defense was timely because Cosman's damage claims were unclear and uncertain at the inception of this litigation. These damage claims continued to evolve and were not asserted in a way that created the need to assert the defense of the litigation privilege until the summer of 2016.

Initially, Cosman's claims asserted only that he was damaged in an amount to be determined by the Bank's alleged breach of contract and conspiracy to do so. It was not until 2016, after much discovery, including numerous interrogatories and deposing Cosman, the Bank learned, in Cosman's second deposition on June 24, 2016, that Cosman was claiming \$5.5 million in damages. During that deposition, Cosman asserted on several occasions that because

of this litigation, the allegations therein, and resulting credit issues, lenders refused to refinance his existing obligations and he lost money on several parcels of real estate. (Cosman Second Depo at p. 52, 57, 67-68, 95, 101-02). Thereafter, on July 13, 2016, the Bank promptly and timely amended its motion for summary judgment to include the defense of the litigation privilege and filed a motion seeking this court's permission to amend its answer to Cosman's counterclaim to add the defense of the litigation privilege.

Accordingly, the Bank timely asserted the defense of the litigation privilege as to Cosman's counterclaims and damages after learning of Cosman's contention that his damages were solely caused by the existence of this litigation. Further, I find that any delay in the Bank's assertion of the litigation privilege is the result of Cosman's own delay of several years in articulating the damages he now seeks in this matter.

II. In Addition to Litigation Privilege, Cosman's Claim for Damages Fails Because Cosman Failed to Produce Competent Evidence.

Moreover, in addition to the litigation privilege, Cosman's claim for damages fails because Cosman has failed to prove any legally recognized or accepted element of damages, failed to produce any evidence that the damages alleged were actually or proximately caused by the Bank, and failed to produce any evidence that the damages were a foreseeable consequence of any alleged breach of the guaranties. Cosman offered only speculation insufficient to support recovery. *See e.g., Gray v. S. Facilities*, 256 S.C. 558 (1971), *Vortex Sports & Ent. v. Ware*, 378 S.C. 197 (Ct. App. 2000). As to damages related to the Hanover Homes property, the undisputed evidence shows that Cosman did not own the Hanover Homes property or have an interest in it, and accordingly, Cosman does not have standing and cannot as a matter of law, claim damages related to the short sale of the property. *See United States v. Jones*, 200 F. App'x 231, 233 (4th

Cir. 2006); *Remax The Mountain Co. v. Tabsum, Inc.*, 280 Ga. App. 425, 427, 634 S.E.2d 77, 79 (2006).

Although it is not necessary to reach the additional grounds asserted by the Bank in support of its motion for summary judgment as to Cosman's counterclaims, those grounds are well-founded and support summary judgment in the Bank's favor as well.

III. The Cross-Motions for Summary Judgment as To the Bank's Three (3) Causes of Action on the Cosman Guarantees Are Denied.

In the parties' cross-motions for summary judgment, each party seeks summary judgment as to the Bank's three (3) causes of action on the Cosman Guarantees. Upon review of the pleadings and the arguments of counsel, the Court denies the cross-motions for summary judgment as to the Bank's three (3) causes of action on the Cosman Guarantees.

THEREFORE, IT IS ORDERED AS FOLLOWS:

1. The litigation privilege asserted by the Bank is an absolute privilege that bars Cosman's Counterclaims for breach of contract accompanied by fraudulent act and conspiracy.
2. In addition to being barred by the litigation privilege, Cosman's claims for damages in his Answer for breach of contract accompanied by a fraudulent act and conspiracy fail as a matter of law since there is no legal recognized or accepted evidence of recoverable damages under said causes of action.
3. The parties' cross-motions for summary judgment as to the Bank's three (3) causes of action on the Cosman Guarantees are denied.

IT IS SO ORDERED.

April _____, 2017
Hilton Head, South Carolina

Hon. Marvin H. Dukes, III



Beaufort Common Pleas

Case Caption: Coastalstates Bank VS Hanover Homes Of South Carolina LLC ,
defendant, et al
Case Number: 2011CP0705059
Type: Order/Other

So Ordered:

s/Marvin H. Dukes III #3069

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

CASE NO: 2011-CP-07-05059

Coastalstates Bank,)

Plaintiff(s),)

vs.)

Hanover Homes of South Carolina LLC,)
et al.,)

Defendant(s).)

ORDER

(not ending case)

SEP 4 PM 12:26

This matter came before me on 8/18/2015, pursuant to Defendant Cosman's Motion to Enroll Judgment.

Specifically, Cosman takes the position that the Ruling of the SC Court of Appeals (Opinion 5211, refiled June 11, 2014), while not specifically granting Cosman's Motion for Summary Judgment, does so by implication.

I deny Cosman's motion for the following reasons:

- 1) The Court of Appeals did not specifically address the issue.
- 2) Had the Court of Appeals intended the outcome to be as asserted by Cosman, they did not need to address the Statute of Limitations issue.
- 3) In viewing the evidence in light most favorable to Cosman, the Court of Appeals, after and during a thorough analysis of ambiguity, agreed with the Appellant that the guaranties can "reasonably" be read and interpreted as asserted by Appellant.
- 4) I am aware of no case law or rule which requires automatically granting a Summary Judgment after a counter Summary Judgment has been reversed. In fact and practice, cross Summary Judgment motions are routinely both denied.

Cosman shall be permitted to refile his Summary Judgment motion if desired.

IT IS SO ORDERED:

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SC Court of Appeals


Marvin H. Dukes, III
Master in Equity and Special Circuit Court
Judge for Beaufort County

September 4, 2015
Beaufort, South Carolina

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-07-05059

COASTALSTATES BANK

HANOVER HOMES OF SOUTH CAROLINA LLC, ET AL.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : Plaintiff Defendant
 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.
- 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
- 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:

THIS CAME BEFORE ME ON DEFENDANT GEORGE COSMAN'S MOTION FOR RECONSIDERATION, FILED 9/17/2015. AFTER HEARING FROM PARTIES I HEREBY DENY THE MOTION.

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ORDER INFORMATION

APR 28 2017

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

SC Court of Appeals

INFORMATION FOR THE PUBLIC 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.

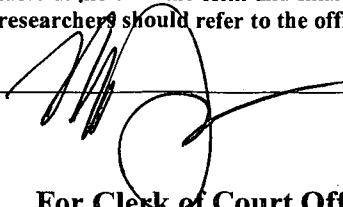
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

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.**

Circuit Court Judge



3069
Judge Code

11/10/15
Date

For Clerk of Court Office Use Only

This judgment was entered on the 10 day of Nov, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 12 day of Nov, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

RUSSELL P. PATTERSON

RICHARD R. GLEISSNER

ROBERT G. RIKARD

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

R. M. Nelson
CLERK OF COURT STAFF

Court Reporter: N/A