

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2016-CP-40-1536

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SC Court of Appeals

Raymond J. Malejko and Cristine Malejko, individually and in the interests of a minor child, Appellants,

v.

Todd Corley, Janet Loper, NextGen Real Estate, LLC, Thomas Humphries, Dr. Roofs, Inc., Ray Mooneyham, Mooneyham Solar & Electric, Professional Home Inspections, Inc., Corley Enterprises, Inc. of South Carolina, and DBR Franchising, LLC, Defendants,

Of whom Janet Loper and NextGen Real Estate, LLC are Respondents.

INITIAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. Appellants' issues are preserved for appeal.

In its order the lower court provided four grounds for granting summary judgment. They were: (1) [Appellants'] claims against [Respondents] fail to state a cause of action as a matter of law; (2) [Appellants] have failed to make a showing sufficient to establish the requisite elements needed to prevail on any of the causes of action levied against [Respondents]; (3) [Appellant] Cristine Malejko does not have privity of contract needed to demonstrate breach of contract or breach of contract accompanied by a fraudulent act; and, (4) [Appellant] Raymond Malejko waived all claims versus [Respondents] with the Buyer Agency Contract, Designated Agency Contract, Dual Agency Contract and the Contract for Sale that he signed. (Order Granting Summary Judgment, pp. 1-2). Respondents argue that Appellants did not properly preserve their arguments raised on appeal because they were not presented to the trial court for consideration during the hearing on their motion for summary judgment, but were only placed before the trial court by way of their motion for reconsideration.

Prior to the July 26, 2017, hearing before the lower court on Respondents motion for summary judgement, Appellant filed the affidavits of Raymond Malejko and Carlton Segars. In addition, Appellants filed a ninety-seven page document captioned Plaintiff's Response to Defendant Janet Loper/NextGen Real Estate's Motion for Summary Judgment. The Response document contained nineteen captioned sections of deposition excerpts and other documents in support of Appellants' contention that a genuine issue of material fact existed as to Appellants' causes of action against Respondents for actual and constructive fraud, negligent misrepresentation, breach of contract, breach of contract accompanied by a fraudulent act, negligence and breach of fiduciary duty. (Plaintiffs' Response to Defendant Janet

Loper/NextGen Real Estate's Motion for Summary Judgment, pp. 3-92). In addition to handing these materials up to the lower court during the hearing, Appellants handed up additional excerpts from the depositions of Carton Segars and Raymond Malejko. (Motion for Summary Judgment Hearing Transcript, p. 3). Appellants' counsel referenced the materials presented to the lower court several times during the summary judgment hearing. (*Id.*, p. 29, ll. 13-14; p. 30, ll. 16-17; p. 30, ll. 19-20; p. 30, line 25 - p. 31, line 1; p. 32, ll. 9-11; p. 35, ll. 15-16). Portions of Mr. Segars' deposition were read to the lower court as part of Appellants' hearing presentation. (*Id.*, pp. 35-43). Applicants also presented oral argument at the hearing in opposition to Respondents' motion. After receiving the lower court's order granting Respondents' motion, Appellants submitted a timely motion for reconsideration. All of the evidentiary support for the arguments contained in Appellants' motion for reconsideration, except as to the issue of waiver, were presented to the lower court at the hearing on the motion for summary judgment.

Appellants began their review of the evidence before the lower court supporting the existence of genuine issues of material fact in Section IV(C) of their motion for reconsideration. (Plaintiffs' Motion for Reconsideration, p. 7). The excerpts from the deposition testimony of Carlton Segars which were presented on pages 8 through 12 were handed up to the lower court at the hearing and read to the lower court during the hearing. (Motion for Summary Judgment Hearing Transcript, p. 3; p. 36, line 7 - p. 41, line 23). The arguments contained in the first full paragraph of page 12 of the motion for reconsideration all were contained in the affidavit of Carlton Segars filed with the lower court and handed up at the hearing. (Affidavit of Carton Segars; Motion for Summary Judgment Hearing Transcript, p. 35, ll. 15-16). In addition, his affidavit was incorporated into the Appellants' response to Respondents' motion. (Plaintiff's Response to Defendant Janet Loper/NextGen Real Estate's Motion for Summary Judgment, p.

2). The references to deposition excerpts contained in the paragraph which carried over from page 12 to page 13 were from deposition excerpts which were all also contained in Appellants' response to Respondents' motion. (Id., pp. 3-18). Likewise, the references to excerpts from Raymond and Cristine Malejko's deposition transcripts found on pages 13 through 15 of the motion for reconsideration were before the lower court at the summary judgment hearing. (Id., pp. 19-52). The excerpts from Ray Malejko's July 24, 2017, affidavit, which detailed his factual allegations supporting Appellants' causes of action against Respondents found on pages 15 and 16 of the motion for reconsideration were part of an affidavit filed with the lower court on July 24, 2017, and incorporated into Appellants response to Respondents' motion for summary judgment. (Id., p. 2; Affidavit of Raymond Malejko). Furthermore, the excerpts from Ray Malejko's deposition testimony referenced on pages 22 and 23 of the motion for reconsideration were also included in Appellants' response to Respondents' summary judgment motion. (Plaintiff's Response to Defendant Janet Loper/NextGen Real Estate's Motion for Summary Judgment, pp. 79-87).

In addition to the affidavits and deposition testimony presented to the lower court during the summary judgment hearing Appellants counsel also presented factual and legal arguments in support of each of Appellants' causes of action. Counsel pointed the lower court to evidence in the record indicating that Respondents, rather than providing Appellants with recommendations for an HVAC and roof inspectors from whom they could choose, had, instead, arranged for an unlicensed HVAC inspector and a roofer about whom she had no previous knowledge to perform the needed inspections. Counsel explained that Respondents, while assuming the duty to bring these individuals to the transaction, failed to determine whether they were qualified to perform their respective services, and, furthermore, failed to inform Appellants that they had not done so,

and, instead, made overt statements praising the qualifications of each and the quality of their inspections. (Motion for Summary Judgment Hearing Transcript, p. 28, line 6 - p. 29, line 21; p. 30, line 6 - p. 33, line 7; p. 34, ll. 17-20; p. 45, ll. 16-20; p. 48, ll. 7-8; p. 50, line 25 - p. 51, line 13; p. 52, ll. 3-6; p. 63, line 13 - p. 64, line 3). Although these facts and arguments were included in Appellants motion for reconsideration as evidence of the existence of genuine issues of material fact as to Appellants' fraud, negligent misrepresentation, breach of contract, breach of contract accompanied by a fraudulent act, negligence, and breach of fiduciary duty causes of action, they were not presented for the first time in said motion. (Plaintiffs' Motion for Reconsideration, pp. 17, 18, 19, 21, 24 and 25).

In addition, at the summary judgment hearing counsel referenced Respondents' representations to Appellants that the roof was only three years old and their presentation to Appellants of a document purporting to be a roofing letter from Commercial Services on a letterhead which Mrs. Loper created herself as examples of overt acts supporting Appellants' claims. (Motion for Summary Judgment Hearing Transcript, p. 44, ll. 7-11; p. 44, ll. 15-20; p. 44, line 25 - p. 45, line 6; p. 47, ll. 20-25). The facts concerning the false roofing letter were also before the lower court via the affidavits of Carton Segars and Raymond Malejko. (Affidavit of Carton Segars, ¶ 23(c), Affidavit of Raymond Malejko, ¶ 17(f)). These facts were cited as support for Appellants' claims of fraud, constructive fraud, negligent misrepresentation, breach of contract, breach of contract accompanied by a fraudulent act, negligence, and breach of fiduciary duty in their motion for reconsideration, and, again, were not presented for the first time in the motion. (Plaintiffs' Motion for Reconsideration, pp. 17, 18, 19, 21, 24 and 25).

Also, the theory that Respondents' failure to disclose to Appellants that they knew two individuals who had lived in or maintained the house from 1989 to 2010 was a breach of the

duties Respondents' owed to Appellants was also presented to the lower court at the summary judgment hearing through arguments of counsel. (Motion for Summary Judgment Hearing Transcript, p. 52, line 20 - p. 54, line 2; p. 58, line 13 - p. 59, line 5; p. 59, ll. 7 - 25; p. 60, ll. 21-24; p. 61, line 13 - p. 62, line 3; p. 62, ll. 8-10; p. 62, line 20 - p. 63, line 13; p. 66, line 14 - p. 67, line 1; p. 74, ll. 15-20; p. 74, line 25 - p. 75, line 3). Although these facts and arguments were included in Appellants' motion for reconsideration in support of Appellants' causes of action for actual and constructive fraud, breach of contract, breach of contract accompanied by a fraudulent act, negligence and breach of fiduciary duty, they were not so included for the first time. (Plaintiffs' Motion for Reconsideration, pp. 17, 19, 21, 24 and 25).

Although not specifically raised by Respondents, Appellants also presented the lower court with evidence of proximate cause and damages. In his affidavit Raymond Malejko indicated they would have had licensed individuals perform their inspections had they known the ones who had performed the inspections were not licensed. (Affidavit of Ray Malejko, ¶ 17(c)). He also indicated that they would not have purchased the house had they been provided accurate information regarding its condition. (Id., ¶ 16). He also provided the lower court with evidence of the damages Appellants had suffered. (Id., ¶ 3-18).

Respondents' claim that Appellants' failed to preserve their arguments that Cristine Malejko was a third-party beneficiary of the contracts between her husband and Respondents and that the contractual provisions referenced by Respondents did not act as a waiver as to Ray Malejko's claims are without merit. The deed to 141 Fox Crossing, the Settlement Statement, and other associated documents referenced in footnote 12 of Appellants' motion for reconsideration were included in Appellants' response to Respondents' motion for summary judgment, and were, thus, before the lower court at the summary judgment hearing. (Plaintiffs'

Motion for Reconsideration, p. 20; Plaintiff's Response to Defendant Janet Loper/NextGen Real Estate's Motion for Summary Judgment, pp. 88-97). Moreover, because Respondents' claims of lack of privity and waiver are affirmative defenses, and Appellants do not bear the burden of proof regarding them, preservation rules do not require that they be raised at the summary judgment hearing to be properly preserved. See, Rule 8(c), SCRPC (waiver specifically mentioned as affirmative defense); Mountbatten Sur. Co. v. Town of Ware Shoals, 2008 U.S. Dist. LEXIS 52657 (Dist. S.C., July 9, 2008) (indicating lack of privity is affirmative defense); Donovan v. Philip Morris USA, Inc., 65 F. Supp. 3d 251 (D. Mass. 2014) (same); Allen v. G.D. Searle & Co., 708 F. Supp. 1142 (D. Or. 1989) (same); Iannarone v Gramer, 256 AD2d 443, 682 NYS2d 84 [1998] (same); In re Complaint of Hill, 935 F. Supp. 710 (E.D.N.C. 1996); Christensen v. Sears, Roebuck and Co., 565 N.E.2d 1103 (Ind. Ct. App. 1991)) (same); Stratemeyer v. West, 136 Ill. App. 3d 1095, 484 N.E.2d 399, 91 Ill. Dec. 840 (1985) (same); CitiMortgage, Inc. v. Just Mortgage, Inc., 2013 U.S. Dist. LEXIS 174962, 2013 WL 6538680 (E.D. Mo. Dec. 13, 2013) (same); Helm Fin. Corp. v. Iowa N. Ry. Co., 214 F. Supp. 2d 934, 976 (N.D. Iowa 2002) (same).

In Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 687 S.E.2d 714 (Ct. App. 2009), plaintiff, Plantation A.D., LLC, filed an action against defendants, Gerald Builders of Conway, Inc. and Jimmy Gerald, a corporation and its president, asserting claims for breach of contract, breach of contract with fraudulent intent, fraud, unfair trade practices, unjust enrichment, constructive trust, and conversion relating to the enforceability of a memorandum of understanding between the parties concerning a purchase of land. Defendants filed a motion for summary judgment as to all claims, which was granted by the trial court. Plaintiff filed a motion

for reconsideration and an amended motion for reconsideration. The trial court denied plaintiff's motion for reconsideration, and plaintiff appealed.

On appeal plaintiff contended that the trial court had erred in finding that the memorandum of understanding contained two conditions precedent. Defendants argued that plaintiff had failed to properly preserve this issue for appellate review and was, thus, precluded from raising it. Plaintiff did not address the issue of the conditions precedent at the summary judgment hearing, and only did so in its motion for reconsideration. Defendants argued that plaintiff's failure to make its argument regarding the conditions precedent issue at the summary judgment hearing prevented plaintiff from doing so on appeal. The Court of Appeals disagreed with defendants and found that since defendants had the burden of proof on the conditions precedent issue and the issue was addressed by plaintiff in its motion for reconsideration, it was properly preserved:

[Defendants] assert this argument is not preserved because Plantation A.D. failed to make it when [defendants] raised the issue at the summary judgment hearing. Plantation A.D. did not address the issue of conditions precedent at the hearing but did fully address the issue in its Rule 59 motion. The [defendants] had the burden of proof on this issue. See Youmans v. S.C. Dep't of Transp., 380 S.C. 263, 281-82, 670 S.E.2d 1, 10 (Ct. App. 2008) (stating defendant asserting an affirmative defense bears the burden of its proof), cert. granted (July 9, 2009); Floyd v. St. Paul Fire & Marine Ins. Co., 285 S.C. 148, 150, 328 S.E.2d 132, 132 (Ct. App. 1985) (noting defendant asserted as an affirmative defense plaintiff had not complied with condition precedent). Plantation A.D. is not attempting to raise a new theory of law but rather simply asserts that there is a genuine issue of material fact as to whether the agreement between the parties actually includes the conditions precedent as found by the trial court. As the issue of whether the Memorandum included the conditions precedent was raised to and ruled on by the trial court, we find the issue properly before this court.

Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. at 207, 687 S.E.2d at 719 (Ct. App. 2009). Given the ruling in Plantation A.D., even if Appellants had not presented evidence to the lower court at the summary judgment hearing on lack of privity, because

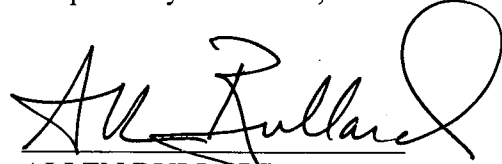
Respondents bear the burden of proof as to the affirmative defenses of lack of privity and waiver and Appellants fully addressed each of those issues in their motion for reconsideration, they are preserved and properly before this Court for consideration. (Plaintiffs' Motion for Reconsideration, pp. 20, 25-28).

The essential purpose of issue preservation rules is to give the trial court a fair opportunity to rule on the issues and provide the appellate court with a platform for meaningful appellate review. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). Since this purpose was satisfied, the issues before this Court are properly preserved. Notably, the lower court found the matters in Appellants' motion for reconsideration properly presented at the hearing, since the motion was denied on the grounds that Appellants were not permitted to "repeat the same arguments previously presented" or to "seek[] to have the [lower court] rethink its decision." (Order Denying Motion for Reconsideration, p. 3).

CONCLUSION

For the foregoing reasons, Appellants submit that the issues before the Court in this appeal are properly preserved for appellate review.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Allen Bullard", with a large, stylized loop at the end of the name.

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Of whom Janet Loper and NextGen Real Estate, LLC are Respondents.

PROOF OF SERVICE

I certify that I have served Appellants' Initial Reply Brief on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on March 19, 2018, addressed to their attorneys of record, David Anderson and Michelle P. Kelly, P.O. Drawer 7788, Columbia, South Carolina 29202.



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March 19, 2018

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: *Raymond J. Malejko v. Todd Corley*
Appellate Case No.: 2017-001939
Our File No.: 2145732

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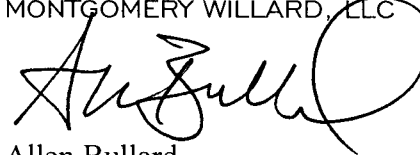
Dear Ms. Kitchings:

Enclosed please find Appellants Initial Reply Brief in the aforementioned matter. I am, by copy of this letter, serving a copy on Respondents.

Please feel free to contact me if you have any questions or concerns.

Sincerely,

MONTGOMERY WILLARD, LLC



Allen Bullard

cc: David Anderson, Esquire
Michelle P. Kelly, Esquire
Raymond and Cristine Malejko