THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Circuit Court Case No. 2017-CP-10-4112
Appellate Case No.: 2018-000249

Chris Khamnei,.....Appellant,

v.

Columbus Street Holdings, LLC;
Roy T. Willey, IV; and Eric M. Poulin,.....Respondents.

# RESPONDENTS' MOTION TO DISMISS

March 30, 2018

Stefan B. Feidler
S.C. Bar No.: 101918
Anastopoulo Law Firm, LLC
32 Ann Street
Charleston, SC 29403
(843) 614-8888

**ATTORNEY FOR RESPONDENTS**

**COME NOW**, the Respondents, who respectfully move for dismissal of this appeal as interlocutory and premature. In support of this Motion, Respondents would show as follows:

## INTRODUCTION

Appellant is the Plaintiff in the underlying action. On September 5, 2017, Appellant filed suit in the Charleston County Court of Common Pleas alleging causes of action against Respondent Columbus Street Holdings, LLC for breach of contract, and against all Respondents for breach of contract accompanied by a fraudulent act.

On September 13, 2017, Respondents filed a motion for partial dismissal, seeking dismissal of the second cause of action (breach of contract accompanied by a fraudulent act) in its entirety, or in the alternative, dismissal of at least the individual defendants. Respondents argued that Appellant failed to adequately plead a cause of action for breach of contract accompanied by a fraudulent act pursuant to SCRCP 12(b)(6) and/or failed to adequately plead personal liability of the individual Respondents such as to pierce the corporate veil.

On December 14, 2017, Judge Nicholson issued and filed a formal Order granting Respondents' Motion in part. Judge Nicholson refused to dismiss the breach of contract accompanied by a fraudulent act cause of action in its entirety, but did dismiss the individual Respondents. However, Judge Nicholson dismissed the individual Respondents **without prejudice** and with leave for Appellant to amend and properly plead facts alleging the right to pierce the corporate veil should such facts come to light during discovery. **[Exhibit A]**

Appellant filed a Motion to Reconsider on December 28, 2017, which was denied on January 18, 2017. This appeal followed.

## LEGAL STANDARD

It is well settled that only a final order or judgment is immediately appealable. See, Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996) ("As a general rule, only final judgments are appealable."). Further, Rule 201(a) SCACR, provides that an: "[a]ppeal may be taken, as provided by law, from any final judgment or appealable order."

## ARGUMENT

Here, Appellant seeks review of an interlocutory Order. While the law provides for certain exceptions to the final order rule, none of the exceptions apply to the present case. In fact, this exact issue was clarified by the South Carolina Court of Appeals in 2017. Tillman v. Tillman, 420 S.C. 246, 801 S.E.2d 757 (Ct.App. 2017).

In Tillman, the Court was presented with the question of whether an order that grants a 12(b)(6) motion yet simultaneously grants leave to amend the pleadings is immediately appealable. The Tillman Court answered in the negative, holding "Appellant's rights have yet to be finally determined by the circuit court. Appellant has not reached the end of the road, however long and winding he may have made it. The order is not immediately appealable." Tillman, 420 S.C. at 251.

The present issue is identical to that presented in Tillman. Here, the trial court dismissed only certain defendants, and simultaneously granted leave to amend and re-add the dismissed defendants following discovery. Appellant did not move to amend, but rather immediately appealed the order. The appeal is therefore premature and should be dismissed.

## CONCLUSION

For the foregoing reasons, Respondents respectfully seek dismissal of this appeal. Respondents further reserve the right to seek costs pursuant to SCACR 222 should this motion be granted.

Respectfully Submitted,

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**ATTORNEY FOR RESPONDENTS**

Dated at Charleston, SC
This 30 day of 3, 2018.

Counsel of Record for Appellant:

W. Westbrook Wills, III
The Law Office of W. Westbrook Wills, III
Post Office Box 822
Folly Beach, SC 29439

**ATTORNEY FOR APPELLANT**

IN THE STATE OF SOUTH CAROLINA )
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO: 2017-CP-10-4112

CHRIS KHAMNEI,

Plaintiff,

v.

COLUMBUS STREET HOLDINGS, LLC; ROY T. WILLEY, IV; and ERIC M. POULIN,

Defendants.

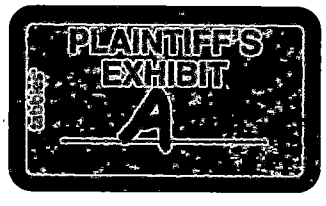
**ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL DISMISSAL IN PART**

FILED
2017 DEC 14 PM 2:43
JULIE J. ARNOLD
CLERK OF COURT

This matter came before this Court by way of Defendants' Motion for Partial Dismissal. Having thoroughly considered the motion, supporting, and opposing materials and arguments, and based on the same the Court grants Defendants' Motion in part as follows:

SUMMARY OF FACTS

Defendant Columbus Street Holdings, LLC ("LLC") is a duly registered South Carolina Limited Liability Company. Roy T. Willey and Eric M. Poulin are members of the LLC. The LLC contracted to purchase a piece of real property from the Plaintiff. However, the property was encumbered by a *lis pendens* and occupied by several squatters. An agreement was made where once the *lis pendens* was resolved and the squatters evicted, $50,000 held in escrow would be released to Plaintiff. Plaintiff did eventually get the *lis pendens* dissolved. After doing so, Plaintiff demanded the escrow money be released. However, the LLC refused because not all of the squatters had been evicted. When the LLC refused to release the escrow money, Plaintiff filed this action, alleging breach of contract for failure to release the funds. Conversely, the LLC believes that the Plaintiff breached the contract by failing and refusing to evict the squatters and, as such, the LLC alleges it was legally justified in not releasing the escrow funds.



Plaintiff's Amended Complaint alleged two causes of action. Count one is a breach of contract cause of action and is alleged against the LLC only. Count two is a breach of contract accompanied by a fraudulent act cause of action and is alleged against the LLC and both Mr. Willey and Mr. Poulin. Defendants moved to have the second cause of action dismissed in its entirety, or in the alternative dismiss Mr. Willey and Mr. Poulin. This Court grants Defendants' Motion in part, dismissing Mr. Willey and Mr. Poulin based on the following:

LEGAL ANALYSIS

In order to have a claim for breach of contract accompanied by a fraudulent act, the plaintiff must establish three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374 (Ct. App. 1986). There mere violation of a contract will not support an allegation of fraud, even where it is proven that a defendant breached the contract willfully. See, Calder v. Commercial Casualty Ins. Co., 182 S.C. 240 (1936); Vann v. Nationwide Ins. Co., 257 S.C. 217 (1971). Instead, "[i]t has been consistently held that where a complaint states a cause of action for breach of contract, allegations charging the defendant with fraudulent intent or purpose in breaching the contract do not give rise to a right to recover punitive damages; that such damages are recoverable **only** where, in addition to or independently of the fraudulent intent that brought about the breach there was some fraudulent act on the part of defendant accompanying the breach." Welborn v. Dixon, 70 S.C. 108 (1904).

It is also generally recognized that "the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. S.C. Code Ann. §33-44-303(a). A member or manager is not

personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager. Id. Thus, the actions of a principal's agent are afforded a qualified privilege from liability in the absence of an officer or agent of the corporation acting on behalf of the corporation and within the scope of his employment. See Bradburn v. Colonial Stores, Inc., 273 S.C. 186, 188, 255 S.E.2d 453, 455 (1979); CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 385 (3d Cir. 2004)l see also 3A William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations, Chapter 11, XXVIII, § 1117 (West 2012) ("[A] director is not personally liable for the corporation's contractual breaches unless he or she assumed personal liability, acted in bad faith, or committed a tort in connection with the performance of the contract."). "Scope of authority" is defined as "[t]he range of reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal's business." Black's Law Dictionary (9th ed. 2009).

In the case at hand, Plaintiff failed to plead facts sufficient to show that Mr. Willey and/or Mr. Poulin acted outside of the scope of their authority, and that they breached the contract accompanied by a fraudulent act. As an initial matter, the contract is between the Plaintiff and LLC, and neither Mr. Poulin nor Mr. Willey are parties to the contract. There was also no showing that the Mr. Willey and/or Mr. Poulin were acting outside the scope of their authority and not on behalf of the corporation. Finally, Plaintiff failed to show that Mr. Willey or Mr. Poulin committed fraudulent intent relating to the breach of the contract and a fraudulent act accompanied that breach. Harpe, 290 S.C. at 112, 348 S.E.2d at 374. Therefore, based on those reasons this Court dismisses Mr. Willey and Mr. Poulin.

**IT IS, THEREFORE, ORDERED** that Eric M. Poulin and Roy T. Willey, IV, are dismissed without prejudice.

**The parties and the Clerk of Court are directed to amend the caption to reflect this dismissal by removing the individuals as named Defendants.**

**IT IS SO ORDERED!**

This 14 of DEC, 2017
CHARLESTON, South Carolina

The Honorable J.C. Nichols.
Presiding Judge for the Ninth Circuit

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
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Chris Khamnei,.....Appellant,

v.

Columbus Street Holdings, LLC;
Roy T. Willey, IV; and Eric M. Poulin,.....Respondents.

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PROOF OF SERVICE

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I certify that I have served Respondents' Motion to Dismiss on Appellant by depositing a copy of it in the United States Mail, postage prepaid, on March 30, 2018, addressed to his attorney of record as shown below.

March 30, 2018

Stefan B. Feidler
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**ATTORNEY FOR RESPONDENTS**

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APR 04 2018
SC Court of Appeals

March 30, 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court, SC Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: *Chris Khamnei v. Columbus Street Holdings, et al.*
*Appellate Case No.: 2018-000249*

Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven (7) copies of Respondents' Motion to Dismiss, together with the original and one (1) copy of our Proof of Service of the same on Appellant's attorney.

Also enclosed is our check in the amount of $25.00 and a self-addressed and stamped envelope. We would appreciate it if you would file the originals and return one stamped copy of each document through the provided envelope.

If you should have any questions, please do not hesitate to contact us.

Sincerely,

Stefan B. Feidler

Enclosure

Cc: W. Westbrook Wills, III

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The Honorable Jenny Abbott Kitchings
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