

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Flint Equipment Company,

Plaintiff,

v.

North Edisto Logging, Inc. and Paul  
Gunter,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE ELEVENTH JUDICIAL CIRCUIT

Civil Action Nos. 2018-CP-32-00079

**ORDER GRANTING PLAINTIFF'S MOTION TO  
DISMISS DEFENDANT'S COUNTERCLAIMS**

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**SC Court of Appeals**

This matter comes before the Court pursuant to Plaintiff's Motion to Dismiss or, in the Alternative, Strike Defendants' Counterclaims, filed on March 28, 2018. A hearing was conducted at the Lexington County Judicial Center on May 8, 2018, at which time Plaintiff was represented by M. Drew DeMott, Esquire. Defendants North Edisto Logging, Inc. and Paul Gunter, were represented by D. Randolph Whitt, Esquire.

For the reasons set forth below, Plaintiff's Motion to Dismiss is GRANTED.

**RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff alleges that on or about November 19, 2010, Defendants executed and entered into a Credit Application with Plaintiff. Pursuant to the terms of the Application, Plaintiff contends it agreed to provide Defendants goods and services. In approximately April 2017, Plaintiff alleges Defendant requested services and/or repairs of Defendant's 753J Feller Buncher. Plaintiff further alleges it provided Defendants with certain goods and services related to Defendants' 753J Feller Buncher. Plaintiff contends on or about May 15, 2017, it issued an invoice in the amount of \$10,483.53 to Defendants. Plaintiff further contends the invoice became due and payable on or about June 10, 2017.

On January 9, 2018, Plaintiff initiated a civil action against Defendants in the Lexington County Court of Common Pleas asserting a cause of action for breach of contract. On February 26,

2018, Defendants filed an Answer and Counterclaims asserting causes of action for class action pursuant to Rule 23, SCRPC, breach of revolving credit contract-duty of good faith and fair dealing, and breach of loan contracts-duty of good faith and fair dealing. This Court now rules as follows.

### CONCLUSIONS OF LAW

#### **I. Defendants have failed to allege their own contractual performance.**

Under South Carolina law, a plaintiff seeking to establish a claim for breach of contract “must establish three elements: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage as a direct and proximate result of the breach. Advanced Pain Therapies, LLC v. Hartford Fin. Servs. Group, Inc., No. 3:14-CV-0050-MGL, 2014 WL 4402800, at \*2 (D.S.C. Sept. 3, 2014) (citing Bank v. How Mad, Inc., No. 4:12-CV-3159-RBH, 2013 WL 5566038, at \*3 (D.S.C. Oct. 8, 2013)).

One who seeks to recover damages for a breach of contract must demonstrate that he has performed his part of the contract, “or at least that he was, at the appropriate time, able, ready, and willing to perform it.” Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) (quoting Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951)). In Sharpe v. Household Fin. Corp. II, No. 8:09-cv-02784, 2010 WL 3893846, at \*2 (D.S.C. Sept. 30, 2010), the court found that the plaintiffs’ failure to point to a provision of the settlement agreement that was actually breach by the defendant precluded the court from drawing “a reasonable inference that [defendant] is liable for a breach of contract.” Similarly, the same court dismissed a breach of contract claim when in part the plaintiff failed “to set forth sufficient facts regarding how the contract was breached.” Advanced Pain Therapies, LLC v. Hartford Fin. Servs. Grp., Inc., No. 3:14-cv-00050, 2014 WL 4402800, at \*2 (D.S.C. Sept.3, 2014).

Here, the facts supporting Defendants’ breach of contract claim references Plaintiff’s duty of good faith and fair dealing under the alleged contract between the parties. Defendants do admit in their

Answer that repairs were requested on their behalf, and that Plaintiff provided the requested goods and services. Defendants do not allege that they have performed or were able, ready and willing to perform. As such, Defendants' counterclaim fails to set forth sufficient facts regarding how the contract was breached or to provide sufficient facts to demonstrate how or if Defendants performed under the contract. Thus, Defendants' have not provided the necessary facts needed to support a breach of contract claim, and that claim must be dismissed.

**II. Defendants' breach of contract claim is based solely on an alleged breach of the implied covenant of good faith and fair dealing, which is not an independent cause of action.**

In South Carolina, "the implied covenant of good faith and fair dealing is not an independent cause of action separate from a claim for breach of contract." RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004). Rather, it is another term of the contract at issue. Id. at 884. While every contract includes an implied covenant of good faith and fair dealing, "there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966); Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995).

In this case, Defendants did not allege in their counterclaims that Plaintiff breached an express term of the contract. Instead, Defendants' breach of contract claim is based solely on Plaintiff's alleged breach of an implied covenant of good faith and fair dealing. As stated above, under South Carolina law, a cause of action for breach of implied covenant of good faith and fair dealing cannot stand on its own. A breach of the implied covenant can only be alleged if a party's conduct in breaching the implied covenant is also a breach of the express terms. Here, Defendants have alleged no such facts. Therefore, Defendants' claims of breach of the implied covenant cannot stand alone as a cause of action and must be dismissed.

**III. Defendants' Counterclaim for class action fails to state facts sufficient to constitute a cause of action.**

Proponents of a class action bear the burden of proving five prerequisites pursuant to Rule 23 of South Carolina Rules of Civil Procedure.

The prerequisites are: 1) the class must be "so numerous that joinder of all members is impracticable;" 2) there must be "questions of law or fact common to the class;" 3) the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class;" 4) "the representative parties [must] fairly and adequately protect the interests of the class;" and 5) "the amount in controversy [must] exceed[] one hundred dollars for each member of the class."

Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 20, 577 S.E.2d 190, 200 (2003). In determining whether class certification is proper, this Court must "apply a rigorous analysis to determine if each prerequisite is satisfied." Id. at 21. Failure to satisfy one of the prerequisites is fatal to class certification. Id.

To establish adequacy, a party must show he will adequately represent a proposed class pursuant to Rule 23(a)(4), SCRCF. One factor the court must consider is whether the named party has interests that are antagonistic or adverse to those of the rest of the class. Waller v. Seabrook Island Prop. Owners Ass'n, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). If so, that party will not be considered an adequate representative of the class. "The issue of whether a named [party] will adequately protect the interests of the class members is a question of fact which depends upon the circumstances of each case." Id.

Here, Defendants have not shown that the representative parties will fairly and adequately protect the interests of the class. The fact that Defendants are debtors who entered into a purchase agreement with Plaintiff is not, in and of itself, facts which qualify them to bring a class action on behalf of remaining debtors. Defendants must demonstrate they have no interest antagonistic to or in conflict with the interests of the unnamed members of the class such that they are fairly and adequately

able to protect the interests of the purported class. As previously discussed, the failure to meet any one prerequisite of Rule 23(a) is fatal to the certification of a class.

Further, Defendants have failed to allege facts to support damages. Rule 23 states that “in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.” “The amount in controversy is the value of the object to be gained by the suit.” Gardner v. Newsome Chevrolet-Buick, Inc., 304 S.C. 328, 331, 404 S.E.2d 200, 202 (1991). In this case, Defendants failed to provide sufficient facts to support this prerequisite. Therefore, dismissal of this cause of action is proper.

IT IS THEREFORE ORDERED that Plaintiff’s Motion to Dismiss is GRANTED and DISMISSED with prejudice.

AND IT IS SO ORDERED.

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Jocelyn Newman  
Presiding Judge

July 2, 2018  
Columbia, South Carolina.



Lexington Common Pleas

**Case Caption:** Flint Equipment Company VS North Edisto Logging Inc , defendant,  
et al  
**Case Number:** 2018CP3200079  
**Type:** Order/Dismissal

So Ordered

Jocelyn Newman