

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
Civil Action No. 2016-CP-18-01706

Molly Morpew)
)
Plaintiff,)

**ORDER GRANTING
DEFENDANT DAVID COLLINS'S
MOTION TO DISMISS**

vs.)

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SC Court of Appeals

Stephen Dudek, Doreen Cross, David)
Collins, Allison Williams, First Federal,)
Michael Scarafile, Susan Nicholson,)
Carolina One Real Estate, Carrie Boyer,)
Woody Law Firm,)
)
Defendants.)

This matter is before the court on Defendants' Joint Motion to Dismiss. For the reasons set forth herein, the Court **GRANTS** Defendant's Motion to Dismiss, which was treated as a Motion for Summary Judgment, as to David Collins.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

According to Plaintiff, the present litigation arises out of fraud perpetrated by the Defendants, all of whom were involved in some way in a prior real estate transaction. In 2012, Defendants Stephen Dudek and Doreen Cross had a real estate contract for property located in Summerville, South Carolina. Shortly after, Plaintiff entered into a back-up sales contract with the sellers for the same piece of property. Defendants Woody Law Firm and Carrie Boyer, a paralegal at Woody Law Firm, acted as the closing attorney for Defendants Dudek and Cross. Defendant Carolina One Real Estate was the real estate agent for Defendants Dudek and Cross, and Defendants Michael Scarafile and Susan Nicholson, as employees of Carolina One Real

Estate, performed similar activities. Likewise, Defendant David Collins was employed as the attorney for Defendants Dudek and Cross to perform certain legal functions related to the purchase of the property. Lastly, Defendants First Federal and Allison Williams, a lender officer employed by First Federal, acted as the lender for Defendants.

Plaintiff previously sought enforcement of the contract for the purchase of the property located in Summerville, SC. The Honorable James E. Chellis, Master-in-Equity, Dorchester County, issued an order finding that while Plaintiff had an enforceable contract, it was conditional on the termination of Defendants Dudek and Cross's contract and ordering specific performance of Defendants Dudek and Cross's contract. Plaintiff commenced this litigation on September 8, 2016, alleging that shortly before and during trial, all of the Defendants perpetrated fraud on both her and the court by making fraudulent misrepresentations and failing to disclose material facts.

In January of 2017, the Honorable Deadra Jefferson dismissed several of Plaintiff's claims pursuant to Rule 12(b)(6), SCRPC. As to Defendant David Collins, the following claims remain pending: (1) Plaintiff's First Cause of Action, identified as "Fraud, Extrinsic Fraud, and Fraud on the Court;" (2) Plaintiff's Seventh Cause of Action, identified as "Bad Faith and Unfair Dealings and/or Accompanied by Fraudulent Action, Conspiracy to Defraud;" (3) Plaintiff's Seventeenth Cause of Action, identified as "Intentional Infliction of Emotional Distress;" and (4) Plaintiff's Eighteenth Cause of Action, identified as "Tortious Interference with Existing Contractual Relations."

STANDARD OF REVIEW

Rule 56 of the South Carolina Rules of Civil Procedure provides that summary judgment is warranted when "the pleadings, depositions, answers to interrogatories, and admissions on file,

together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56, SCRPC. Furthermore, when an party moves for summary judgment, an adverse party is not allowed to simply rest upon the allegations of his pleadings and, instead, “must set forth specific facts showing that there is a genuine issue for trial.” Rule 59(e), SCRPC. “[O]n a defendant’s motion for summary judgment such as the one at issue here, a court cannot properly deny the motion after *only* finding that genuine issue of material fact exists as to *one* element of the plaintiff’s claim; rather, under Baughman, the court must determine that a genuine issue of material fact exists for *each* essential element of the plaintiff’s claim. *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007) (emphasis added). Lastly, a trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside the pleadings as long as the parties are given notice and an opportunity to respond. *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 699 (1987); see also *Bowen & Smoot v. Plumley*, 301 S.C. 262, 391 S.E.2d 558 (1990).

ANALYSIS

I. Plaintiff’s First Cause of Action, identified as “Fraud, Extrinsic Fraud, and Fraud on the Court”

Under South Carolina law, fraud on the court has been defined as “the species of fraud which does, or attempts to subvert the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.” *Chewning v. Ford Motor Co.*, 354 S.C. 72, 78, 579 S.E.2d 605, 608 (2003) (quoting *Evans v. Gunter*, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1998)). However, to prevail on a theory of fraud on the court, one must

allege extrinsic fraud, meaning “fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.” *Hilton Head Ctr. of South Carolina v. Pub. Serv. Comm.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987).

Noting the high threshold for establishing fraud on the court, the Supreme Court noted “[g]enerally speaking, only the most egregious misconduct, such as bribery of a judge or members of the jury, or fabrication of evidence by a party in which an attorney is implicated will constitute fraud on the court. Less egregious conduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.” *Chewning*, 354 S.C. at 78-79, 579 S.E.2d at 608. Lastly, successfully pleading fraud upon the court requires a showing of intent. In fact, the Supreme Court held “when there is no intent to deceive, the fact that misrepresentations were made to a court is not of itself sufficient basis for setting aside a judgment for ‘fraud on the court’.” *Id.* (quoting *U.S. v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002)). Speaking directly on the issue at hand, the Supreme Court held that the charge of perjury or false swearing on the part of a party or his witnesses “is a species of intrinsic, not extrinsic, fraud,” and affords no grounds for equitable interference with a judgment. *Corley v. Centennial Const. Co.*, 247 S.C. 179, 189, 146 S.E.2d 609, 614 (1966).

Plaintiff, both in her pleadings and her deposition, claims that Defendant Collins committed fraud on the court by falsely testifying and failing to disclose pertinent documents in a previous trial. As explained above, the Supreme Court held that nondisclosure of material facts, and even perjury, amount only to intrinsic, not extrinsic, fraud. This is especially true considering that the documents Plaintiff alleges were concealed were, in fact, provided to her attorney shortly before a previous trial. Pltf. Depo. p. 80, lns. 1-23. For these reasons, Plaintiff has been unable to create a genuine issue of material fact with respect to the essential elements of

fraud on the court and, thus, summary judgment with respect to this cause of action is appropriate.

II. Plaintiff's Seventh Cause of Action, identified as "Bad Faith and Unfair Dealings and/or Accompanied by Fraudulent Action, Conspiracy to Defraud"

While unclear from the pleadings, in the light most favorable to the Plaintiff, her pleadings could raise causes of action for (1) bad faith; (2) breach of duty of good faith and fair dealing; or (3) breach of contract accompanied by a fraudulent act; or (4) civil conspiracy. In South Carolina, the tort action for bad faith has only been recognized in the context of an and insured-insurer relationship, which is not present or even alleged. *See Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S.C. 286, 170 S.E.2d 346 (1933). Similarly, causes of action for both breach of duty of good faith and fair dealing and breach of contract accompanied by a contract require, at the very least, the showing of a contractual relationship, which is also not present here or even alleged. *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004); see also *Harper v. Etheridge*, 290 S.C. 112, 348 S.E.2d 374 (1986).

On the other hand, a civil conspiracy consists of three elements: (1) a combination of two or more persons; (2) for the purpose on injuring the plaintiff, (3) which cause him special damage. *Charles v. Texas Co.*, 192 S.C. 82, 5 S.E.2d 464 (1939). "[T]o be actionable, therefore, a conspiracy's *primary* purpose or object must be to injure the plaintiff." *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 10 344 S.E.2d 379, 382 (Ct. App. 1986) (emphasis added). The South Carolina Court of Appeals held "[i]f a plaintiff merely repeats the damages from another

claim instead of specifically listing damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed.” *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009).

Similarly, to support Plaintiff’s claim, she claims Defendant David Collins perpetuated fraud on the court and, as a result, her by concealing documents and making fraudulent misrepresentations concerning whether co-Defendants Stephen Dudek and Doreen Cross had been able to obtain financing. Assuming *arguendo* that these mere allegations were sufficient to satisfy the first two elements of civil conspiracy, Plaintiff has not made a showing, or even alleged, special damages, which is an essential element for a cause of action for civil conspiracy. In fact, Plaintiff, in her deposition, admitted that all of the causes action, together, support her claim for damages and that if the civil conspiracy claim were dismissed, the damages sought would not change. Pltf’s Depo., pgs. 298-99,

III. Plaintiff’s Seventeenth Cause of Action, identified as “Intentional Infliction of Emotional Distress”

To recover for a claim of intentional infliction of emotional distress, plaintiff must show extreme and outrageous conduct which intentionally or recklessly causes severe emotional distress to another. *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981). The conduct complained of must be “so ‘extreme and outrageous’ as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized society.” *Gattison v. S.C. State College*, 318 S.C. 148, 151, 458 S.E.2d 414, 416 (Ct. App. 1995). The question of whether the conduct arose to the level of “extreme and outrageous is a question of law reserved for the court. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 321 S.E.2d 602 (Ct. App. 1984).

Plaintiff fails to raise a genuine issue of material fact as to each essential element of this

claim. First, dishonesty, especially without the existence of any special relationship, cannot rise to the level of “extreme and outrageous” conduct. Next, and most importantly, Plaintiff has also failed to raise a genuine issue of material fact as to whether her “emotional distress” is sufficiently severe. *See Hansson*, 374 S.C. at 358, 650 S.E.2d at 72 (“[i]t is for the court to determine whether on the evidence severe emotional distress can be found . . .”). Instead, Plaintiff has relied solely on mere bald assertions of distress, providing not even a mere scintilla of evidence from a third-party witness or any other corroborating evidence to show severe emotional distress. *Id.* (“[t]o permit a plaintiff to legitimately state a cause of action by simply alleging, “I suffered emotional distress” would be irreconcilable with this Court’s development of the law in this area.”). In particular, Plaintiff attempt to establish emotional distress on her testimony that she discussed stress-related symptoms with both a gynecologist and an eye doctor, and that she was prescribed medication for ulcers roughly twelve yerars ago, well before the conduct complained of in this litigation. For these reasons, Defendants’ Motion for Summary Judgment as to Plaintiff’s cause of action for Intentional Infliction of Emotional Distress is granted.

IV. Plaintiff’s Eighteenth Cause of Action, identified as “Tortious Interference with Existing Contractual Relations”

To recover under a cause of action for tortious interference with an existing contract are (1) a contract; (2) knowledge of the contract by the tortfeasor; (3) intentional procurement by the tortfeasor of the contract’s breach; (4) absence of justification; and (5) resulting damages. *Vortex Sports & Entm’t, Inc. v. Ware*, 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008).

“Generally, there can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party.” *Edelco, Inc. v. Charleston County*

School Dist., 372 S.C. 470, 642 S.E.2d 726 (2007) (quoting *Southern Contracting, Inc. v. H.C. Brown Constr. Co.*, 317 S.C. 95, 102, 450 S.E.2d 602, 606 (Ct. App. 1994). Lastly, and rather obvious, “where there is no breach of contract there can be no recovery.” *Id.*

Plaintiff has failed to set forth evidence to make a showing to establish any of these elements, which are essential to Plaintiff’s case. As discussed above, while Plaintiff had a contract, her contract was contingent upon the termination of the Dudek and Cross contract. Since specific performance was ordered on the Dudek and Cross contract, Plaintiff’s contract was not enforceable and thus could not have been, and was not, breached. Thus, Defendants’ Motion for Summary Judgment as to Plaintiff’s cause of action for Tortious Interference with Existing Contractual Relations is granted.

CONCLUSION

Based on the aforementioned reasons, the Court hereby **GRANTS** Defendant’s Motion to Dismiss, which was treated as a Motion for Summary Judgment, as to all remaining causes of action.

IT IS HEREBY ORDERED.

The Honorable Maite Murphy

_____, 2018.

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Dorchester Common Pleas

Case Caption: Molly M Morpew VS Stephen Dudek , defendant, et al

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So Ordered.

s/ Maite Murphy 2166