THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FRON LEXINGTON COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Judge

Appellate Case No. 2018-001449
Case No. 2018-CP-32-000079

Flint Equipment Company, Respondent,
v.

North Edisto Logging, Inc. and Paul Gunter, Appellants.

FINAL BRIEF OF APPELLANT

D. Randolph Whitt
Fleming & Whitt, P.A.
S.C. Bar No. 13068
344 Blossom View Ct.
West Columbia, SC 29170
(803) 422-2176 Tel
dwhitt2001@aol.com
Attorney for Appellants

December 13, 2018

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3. DID THE TRIAL COURT ERR IN DISMISSING APPELLANTS' CLASS ACTION CLAIMS BEFORE ANY DISCOVERY HAD BEEN CONDUCTED?

STATEMENT OF THE CASE

This action was commenced by the Respondent's filing of a Summons and Complaint on July 2, 2018.(R. p. 8) Appellant served an Answer and Counterclaims alleging respondent had breached the implied duty of good faith under several contracts (R. p. 22)

Respondent has not served a Reply to the Counterclaims. Rather, Respondent filed a motion to dismiss(R. p. 34) Appellant filed a memorandum in opposition to the motion (R. p. 44).

The Circuit Court granted the motion to dismiss (R. p. 2). A notice of appeal was filed and served (R. p. 46) .

STATEMENT OF FACTS

In this Appeal of a ruling under SCRCP Rule 12(b)(6), the following allegations from the counterclaim are deemed to be true:

Respondent tendered an invoice for repairs to Appellants which contained charges that were "inflated and improper"(Answer and Counterclaims ¶ 7 , R. p. 23)

Appellants believed that the repairs were covered by a warranty arising from the credit transaction resulting from the purchase of the unit in question. Respondent did not advise Appellants that they contended that the repairs were not covered until the work had already been done.(Answer and Counterclaims ¶ 6 , R. p. 23)

As a result of Respondent's conduct, Appellants assert no amount is due for the repairs. (Answer and Counterclaims ¶ ¶ 7, 9, and 10 , R. p. 23)

That in the course of several financing transactions that Respondent has submitted one set of figures to Appellant and inconsistent set of figures to John Deere Financial which was the ultimate lender on these transactions. (Answer and Counterclaims ¶ 12 , R. p. 23)

That in two of these transactions, where an extended warranty was included in the figures provided to Appellant, but excluded from the figures provided to John Deere Financial with the other amounts being increased to keep the total amount the same.(Answer and Counterclaims ¶ 13, R. p. 23)

STANDARD OF REVIEW

Respondent sought dismissal of the counterclaims pursuant to Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action. In ruling on such a motion, the inquiry does not proceed beyond the four corners of the counterclaim. *Baird v. Charleston County,* 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) Moreover, the factual allegations of the counterclaim must be deemed to be true for purposes of this motion. The Motion should be denied if the facts stated provide a basis for relief under any theory of the case. *Gentry v. Yonce,* 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). Finally, the motion should not be granted solely because of doubts that the claimant will prevail at trial. *Gentry.* 337 S.C. at 5, 522 S.E.2d at 139.

ARGUMENT 1

THE TRIAL COURT ERRED IN CONCLUDING THAT A BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING IS ONLY ACTIONABLE IF THERE IS ALSO A BREACH OF AN EXPRESS TERM OF THE CONTRACT.

In the Motion to Dismiss Respondent relied primarily on *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597S.E. 2d 881 (Ct. App. 2004). However, the trial court found more in the RoTec decision than is there. While RoTec found that there is no special cause of action for breach of the duty of good faith and fair dealing, it does not make the breach of the duty no longer actionable. Rather, it makes clear that violation of the implied term requiring good faith and fair dealing is no different that breach of any of the express terms of the contract. The series of cases cited by the trial court all involve situations where the claimants attempted to advance both a cause of action for breach of contract and a second cause of action for breach of the duty of good faith and fair dealing. Therefore these cases are not dispositive in this matter, in which the Appellants have brought a single cause of action for breach of contract.

The order appealed from contains the following language: "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 breached 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. " (emphasis added, Order filed July 2, 2018 R. p.__). The trial court's finding that it is necessary to have violated one of the express terms of the contract in order to make a violation of the implied duty of good faith and fair dealing actionable, cannot be sustained.

The trial court's citation of cases such as *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). for the proposition that the duty of good faith and fair dealing cannot prohibit conduct that is expressly approved by the terms of the contract has no bearing on this case. Neither the repair contract nor any other contract between the parties contains a provision which expressly authorizes Respondent to include "inflated and improper" charges in their invoices. Likewise the sales contract does not expressly authorize Respondent to provide one set of prices to Appellants, and to provide a different, contradictory set to the ultimate lender who financed the sale.

The Appellants have alleged the existence of a contractual provision, the implied duty of good fair and fair dealing. They have alleged conduct which a reasonable jury could conclude violated that duty, i.e. tendering an invoice to the Appellants which contained charges that are "inflated and improper" or providing sales prices to Appellant's . Finally, they have alleged that they suffered damages. See *Pilkington v. McBain,* 274 S.C. 312, 262 S.E. 2d 916(1980). At this stage in the proceeding, that is enough.

ARGUMENT 2

THE TRIAL COURT ERRED IN CONCLUDING THAT APPELLANTS' WERE REQUIRED TO PLEAD THEIR READINESS TO PERFORM WHEN THAT PERFORMANCE WAS EXCUSED BY RESPONDENT'S PRIOR BREACH.

The Trial court cites *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) and *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951) for the proposition that Appellants should have plead that they would have performed in the hypothetical situation in which Respondent's had not already breached the repair contract by tendering an inflated and improper invoice. In *Swinton Creek Nursery* there was an admitted breach of the contract in

question, before the alleged breach of the duty of good faith and fair dealing. Parks did not involve the duty of good faith and fair dealing, but rather an option, which the party alleging breach had previously indicated that he did not intend to exercise his rights under.

Respondent's breach of the repair contract by tendering an inflated and improper invoice excused any further performance by Appellants. Respondent cannot tender an inflated invoice and then impose a duty to guess as to what a fair price might be and then pay, or promise to pay this amount when they are caught behaving improperly. Similarly Respondent's misconduct in the sales transactions excuses further performance on those contracts. Further, Respondent has not identified or alleged any failure of performance due to Respondent in the context of the sales contracts.

Finally, even if such an allegation about what Appellants would have done if they had been presented with a fair invoice is necessary, the Trial Court should have allowed an opportunity for such an amendment to the counterclaims, rather than dismissing solely on a pleading issue, rather than a factual one.

ARGUMENT 3

THE TRIAL COURT ERRED IN DISMISSING APPELANT'S CLASS ACTION CLAIMS BEFORE ANY DISCOVERY HAD BEEN CONDUCTED.

The Trial Court cites several cases on class action issues including *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 331, 404 S.E.2d 200, 202 (1991). However, none of these cases are decided at an early stage, such as where the present case sits. The pleadings have not been joined and no discovery has taken place. The factual allegations that any party seeking class certfifcation can make in the absence of discovery are necessarily limited by the party's lack of access to the records that would allow precise pleading about the elements to be considered on the merits of a class certification motion.

At this stage Appellants have delineated two potential classes, following classes:

Customers of Flint who were presented invoices containing inflated and improper charges, and

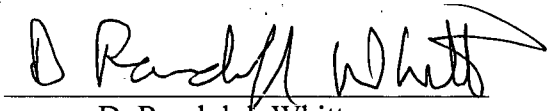
Customers of Flint who entered into financing transactions and were presented one set of figures by Flint, but a different set of figures were provided to the ultimate lender in the credit transaction.

In keeping with the mandate of *Gentry v. Yonce,* that a motion to dismiss should be denied if the facts stated provide a basis for relief under any theory of the case, the trial court should have allowed discovery to proceed on identifying whether either, or both of these proposed classes could meet the requirements for class certification.

CONCLUSION

For the foregoing reasons, the Order of the Circuit Court should be reversed and the case remanded to Lexington County, for further proceedings on Appellant's Counterclaims.

Respectfully submitted,



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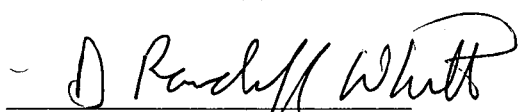
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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