IN THE NINTH JUDICIAL CIRCUIT COURT

APPEAL FROM COURT OF COMMON PLEAS FOR CHARLESTON COUNTY

Case No. 2016-CP-10-4984
(Appellate Case No. 2018-001353)

BOUCHELLE INCORPORATED,

Appellant,

Vs.

CANOPIUS US INSURANCE, INC., SENECA SPECIALTY INS. CO., THE BRINSON AGENCY and JOHN BRINSON,

s,

OF WHOM THE BRINSON AGENCY and JOHN BRINSON are the

Respondents.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. **DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS THERE WAS EVIDENCE THAT THERE EXISTED GENUINE ISSUES AS TO MATERIAL FACTS IN THIS CASE?**

STATEMENT OF THE CASE

On or about July 14, 2015, Appellant Bouchelle Incorporated, a general contracting company (S.C. License #111062), hired a subcontractor, Charleston Wrecking, Inc., to demolish a rear commercial building located behind a main commercial building at property located at 7350 Industry Drive, North Charleston, South Carolina.. Said buildings shared one wall.

Despite Appellant's warnings to Charleston Wrecking, Inc.'s employees and owner, and contrary to their contract, on July 14, 2015, Charleston Wrecking, Inc. crew partially demolished the shared wall between the rear building and the main building, thereby causing severe structural damage to the shared wall and main building. (Complaint) (R. p. 6).

At the time of the incident, Appellant's insurance agent was Respondent John Brinson, owner of Respondent The Brinson Agency. Through Respondents' actions, Appellant had general liability insurance with Canopious US Insurance, Inc.. Charleston Wrecking, Inc. had general liability insurance with Seneca Specialty Ins. Co.. (Complaint) (R. p. 5).

Appellant presented a claim to Canopius US Insurance, Inc. for damage caused by Charleston Wrecking, Inc. to the buildings. Canopius US Insurance, Inc. denied insurance coverage for this accident because its' general liability insurance policy was for "carpentry services" and not for "general contractor" services. (Complaint) (R. p. 6).

Prior to Canopius US Insurance, Inc.'s denial of Appellant's insurance claim, Appellant did not know that he had obtained inadequate coverage from Respondents. (Complaint) (R. p. 7). Seneca Specialty Ins. Co. denied coverage for the accident by stating that its' coverage for Charleston Wrecking, Inc. did not include demolition services.

On September 20, 2016, Appellant filed a Summons and Complaint against the Respondents, Canopius US Insurance Inc. and Seneca Specialty Ins. Co. for breach of contract, declaratory judgment and statutory attorney's fees. (Complaint) (R. pp. 4-10).

In the Complaint, Appellant alleged Respondents John Brinson and The Brinson Company were his insurance agent and insurance company at the time of the accident; that Appellant had entered into an agreement with Respondents to obtain and maintain general commercial liability for Appellant; that Respondents failed to disclose that Appellant's insurance coverage was for carpentry services only, until after the accident; and that at no time did Appellant authorize Respondents to notify Canopius that Appellant's commercial liability policy was to be for carpentry service and not general contractor services.(Complaint) (R. pp. 6-7).

On April 11, 2017, Respondents filed an Answer wherein Respondents admitted that they had sold a Canopius insurance policy and procured coverage for Appellant for carpentry services. Respondents alleged that Appellant was aware of the carpentry services insurance coverage; and that Appellant intended to purchase, and did purchase and renew the policy for coverage for carpentry services. (Respondent's Answer) (R. p. 16).

On September 6, 2017, Respondents filed a Motion for Summary Judgment and filed a Supplemental Brief in Support of the Motion for Summary Judgment on or about December 7, 2017. (Respondent's Motion #1) (Supplemental Brief) (R. pp. 37- 79).

On October 11, 2017, Appellant filed its' Response to Respondents' Motion for Summary Judgment citing that there existed genuine issues of material facts and a scintilla of evidence existed to sustain Appellant's breach of contract claim. (Appellant's Response) (R. pp. 80-105).

On December 14, 2017, Hon. J.C. Nicholson, Jr. ruled in favor of Appellant. The Court

denied Respondents' Motion for Summary Judgment upon a finding of a scintilla of evidence giving a genuine dispute of material fact. (Judge Nicholson's First Order) (R. pp. 105)).

On January 9, 2018, Hon. Alison Renee Lee granted Defendant Seneca Specialty Ins. Co.'s Motion for Summary Judgment. (Judge Lee's Order) (R. pp. 21-28).

On February 14, 2018, Respondents filed a second Motion for Summary Judgment in which Respondents argued legal theory- that there was no contract between Appellant and Respondents, that Appellant's failure to read his policy barred any claims against Respondents and that Appellant's request for attorney fees was an invalid claim. (Respondent's Motion #2) (R. pp. 106-218).

On March 19, 2018, Hon. J.C. Nicholson, Jr. granted Defendant Canopius US Insurance, Inc.'s Motion for Summary Judgment. (Judge Nicholson's Second Order) (R. pp. 29-36)..

On June 18, 2018, a hearing was held before Hon. Jennifer B. McCoy. Both parties presented oral arguments and relied upon prior filings to argue their positions. (Transcript) (R. pp. 234-247).

On June 26, 2018, Judge McCoy's law clerk, Alexandra Heaton, notified Appellant and Respondents' attorneys that the Court was granting Respondents' Motion for Summary Judgment and asked that the Respondents' attorney, Andrew Countryman, Esq., submit a proposed Order.

Upon receiving Mr. Countryman's proposed Order, Appellant's attorney, Karen M. DeJong, immediately notified the Court and Mr. Countryman, by letter dated June 27, 2018, via email and regular mail, that Mr. Countryman's Order did not address the first fundamental step of a Motion for Summary Judgment, i.e. a finding of fact and conclusion of law that the Court finds that there is no scintilla of evidence, that there is no material factual dispute to support the

granting of the Motion.(Proposed Order) (R. pp. 248- 255) and (Letter) (R. p. 256).

On June 29, 2018, the Court signed and filed Mr. Countryman's Order Granting Summary Judgment to Respondents. (Final Order) (R. pp. 259 – 265). This Appeal now follows.

STANDARD OF REVIEW

An appellate court reviews the granting of a summary judgment under the same standard applied by the trial court under Rule 56, SCRCP. *Quail Hill, LLC v. Cty. Of Richland*, 387 S.C. 223, 692 S.E.2d 499, 505 (2010).

Summary Judgment is proper only when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts." *Trivelas v. South Carolina Dep't of Transp.*, , 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party". *Schmidt v. Courtney*, 357 S.C. 310, 316-317, 592 S.E.2d 326, 330 (Ct. App. 2003) (*citing Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001).)

Accordingly, the appropriate standard of review is abuse of discretion. "An abuse of discretion arises where the circuit court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support." Steinke v. South Carolina Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999).

ARGUMENT

I. DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS THERE WAS EVIDENCE THAT THERE EXISTED GENUINE ISSUES AS TO MATERIAL FACTS IN THIS CASE?

On September 6, 2017, Respondent filed a Motion for Summary Judgment (Motion #1) (R. pp. 37-55) and on December 8, 2017, Respondent filed a Brief in Support of Motion for Summary Judgment (Brief) (R. pp. 56-79) . Respondent argued that there was no contract between the parties and that Appellant did not respond to Respondent's Requests to Admit in a timely manner. (Motion #1) (R. pp. 37-55) and (Brief) (R. pp. 56-79).

Appellant filed a Response to Respondent's Motion for Summary Judgment wherein Appellant explained that there were genuine issues as to material facts, discovery had not yet been completed and that Respondent's Requests to Admit were misleading and ambiguous. (Response) (R. pp. 80-104).

A hearing was held on December 12, 2017 before Hon. J.C. Nicholson, Jr.. An Order was subsequently filed on December 14, 2017, wherein Judge Nicholson DENIED Respondent's Motion for Summary Judgment stating, "Defendants Brinson Agency and John Brinson's Motion for Summary filed on September 6, 2017, is Denied upon a finding of a scintilla of evidence giving rise to a genuine dispute of material fact." (Judge Nicholson's First Order) (R. p. 105).

Respondent then filed a Second Motion for Summary Judgment using the same arguments, case law and statutes as contained within his First Motion for Summary Judgment. As Judge Nicholson had already denied Respondent, Respondent should not now be able to benefit from a different judge.

Judge McCoy was not familiar with this case or Judge Nicholson's ruling as is evidenced by the wording in the Final Order signed by Judge McCoy. She adopted the same legal arguments and citations in Mr. Countryman's proposed Order, which repeated his same legal arguments and citations in his first Motion for Summary Judgment which Judge Nicholson denied. (Final Order (R. pp. 259-265), (Proposed Order) (R. pp. 248- 255)), (First Motion for Summary Judgment) (R. pp. 37 – 79) and (Judge Nicholson's First Order) (R. p 105).

And Respondent got a different result, the one that Respondent was seeking. Judge McCoy ruled there was no breach of contract between the parties. In fact, she provided only three (3) sentences on page six (6) of the Final Order as to whether or not a genuine issue of material fact existed. The Court granted Respondent's Motion for Summary Judgment based upon the Court's dismissal of the very material issue that is in dispute in this matter. (Final Order) (R. pp. 259-265).

The material issue in dispute is that the Appellant did not give Respondent permission to sign his name to the 2015- 2016 Insurance Renewal Application. Appellant did not give Respondent permission to obtain general commercial liability insurance for "carpentry services". Appellant has been a licensed contractor for many years. Respondent knew or should have known that Appellant was a general contractor. Respondent stated at his deposition that he had verbal permission from Appellant to sign Appellant's name to the 2015-2016 Insurance Renewal Application and that he had permission to obtain general commercial liability insurance for "carpentry services". However, Respondent has provided no written evidence to support his allegations during the course of this litigation. (Appellant's Complaint) (R. pp. 4- 14) and (Appellant's Opposition to Respondent's Motion for Summary Judgment) (R. pp. 219-233)

(Letter dated June 27, 2018) (R. pp. 256-258)

The Final Order says that "regardless of whether Mr. Bouchelle gave Brinson specific permission to sign Mr. Bouchelle's name on the application, Bouchelle knew Brinson was submitting renewal applications on the company's behalf annually". (Final Order, p.6) (R. p. 264). This assumption has no foundation. Upon information and belief, Appellant has never testified that he knew that Respondent was submitting renewal applications on the company's behalf annually. The Appellant is a general contractor and not an insurance agent. Appellant did testify that he relied upon Respondent to obtain proper coverage over the years and only after the accident, when Appellant filed an insurance claim did Appellant become aware that the insurance coverage was for "carpentry services" and not "general contractor services". (Deposition Transcript of David Bouchelle) (R. p. 100, line 8 – p. 101, line 10) and (Respondents' Motion for Summary Judgment) (R. p. 181, line 12- p. 184, line 25).

The Final Order also states that "Even if the Court accepts as true that Brinson did not have specific permission to sign Mr. Bouchelle's name on the renewal applications, this does nothing to create a basis for a breach of contract claim by Bouchelle against Brinson". (Final Order, p. 6) (R. p. 269). If the Court accepts as true that Respondent did not have specific permission to sign Appellant's name to the renewal applications, that would mean that Respondent signed Appellant's name (which Respondent admitted) to an insurance renewal application that lead to an insurance contract with Canopius US Insurance, Inc.. Respondent, by fraudulently signing Appellant's name, made himself a party to this 2015- 2016 insurance contract for "carpentry services". (Brinson Deposition Transcript) (R. p. 231, lines 5-11).

However, Appellant would respectfully argue that to rule on a breach of contract theory

and deny attorney fees and cost to Appellant is premature. First there needs to be a fact-finding decision as to whether or not there exists genuine issues as to material facts.

CONCLUSION

Appellant asks that the Appellate Court find that there exists genuine issues as to material facts regarding this matter and that the Appellate Court overrule and/or reverse the lower's court order.

January 15, 2019

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s,

OF WHOM THE BRINSON AGENCY and JOHN BRINSON are the

Respondents.

APPELLANT'S CERTIFICATION

I hereby certify that Appellant's Final Brief complies with SCACR Rule 211(b).

Dated: January 18, 2018
Mount Pleasant, SC

Respectfully submitted,

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