STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF CLARENDON	)	DOCKET NO. 2016-CP-14-00417
Joyce Strothers,	)	
	)	
Plaintiff,	)	**ORDER GRANTING SUMMARY JUDGMENT TO CLARENDON COUNTY COUNCIL ON AGING**
	)	
vs.	)	
	)	
Clarendon County Council on Aging,	)	
	)	
Defendant.	)	
	)	

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This matter is before me pursuant to the Motion for Summary Judgment filed by the Defendant Clarendon County Council on Aging (hereinafter "Defendant") on April 10, 2018.

BACKGROUND

Taking the facts in the light most favorable to Joyce Strothers (hereinafter referred as "Plaintiff"), the Plaintiff began her employment with Clarendon County Council on Aging (hereinafter referred to as "Defendant"), on April 23, 2013 in the position as a part-time Program Coordinator. She worked in conjunction with Wisteria Way, a senior housing community. On or about July of 2015, Wisteria Way terminated the Plaintiff's employment and she became a full-time employee of the Defendant. The Plaintiff was a full-time Program Coordinator at the time she became a full-time employee of the Defendant.

On February 28, 2016, the Executive Director, Tom Mahoney, was terminated from his employment with the Defendant. The Plaintiff alleges that she was told by Board Members that she would serve as the Interim Director. She alleges that she was advised of this at a staff meeting. The Plaintiff also alleges that there was no extra compensation for these extra duties.

The Plaintiff's allegation that she was Interim Executive/Finance Manager, in addition to her role as Program Coordinator seems to be contradicted to some degree by the employment position document that was executed by the on May 6, 2016. This document stated that her job title was Program Coordinator well after she claimed that she was declared the Interim Executive Director.

On or about June 18, 2016, the Defendant hired Ruth McBride as the new Finance Manager. The Plaintiff was instructed by the Board to report to Ms. McBride. The Plaintiff, in her Complaint, claimed that this was a breach of the terms and conditions of her employment contract.

The Plaintiff also alleged in her Complaint and her Memorandum that Ms. McBride removed the checks and balances in terms of the Defendant's obligations to be in compliance with the Procurement Code and State Law. Despite the numerous blanket allegations of the Plaintiff, there was never any specific allegations demonstrated in the record regarding violations of law. The Plaintiff also alleged in her Complaint that the Executive Director position was posted in a covert manner by the Board in an effort to deprive her of the ability to apply for the position. However, the Plaintiff did apply for the position on July 19, 2016.

On July 18, 2016, the Plaintiff was in a Board Meeting in which the Board voted to sell a pickup truck that was in their parking lot. On the same date, the Plaintiff contacted her husband (who had a different last name than the Plaintiff) to come purchase the truck. He paid $600.00 on the same day as the Board Meeting and the Plaintiff was the one who wrote the receipt to her husband. The minutes of the Board Meeting reflect that the meeting was commenced at 11:30 a.m. and concluded at 1:34 p.m. Somewhere between

the conclusion of the Board Meeting and the closing of the office, the Plaintiff contacted her husband, he came to the office and paid $600.00 for the truck.

The Plaintiff alleges that a Board Member told her to sell the truck for $600.00 to anybody. She also claimed that the Defendant routinely conducted business with the Plaintiff knowing that he was her husband.

On August 19, 2016, the Plaintiff was given a termination notice from the Board Chairman. The Board terminated the Plaintiff effective August 19, 2016 for selling the truck. The Board specifically mentioned that the Board had identified two potential buyers for the truck. Immediately following the Board Meeting, the Plaintiff sold the truck to her husband which was not approved nor directed by the Board of Directors. They cited that this was a conflict of interest. The Plaintiff alleges that there was not a conflict of interest policy maintained by the Defendant. Thus, she was following the direction of the Board Members and not violating any policy that existed for conflicts of interest.

The Plaintiff's Deposition testimony contradicts a lot of allegations in the Plaintiff's Complaint concerning violations of law. The Plaintiff stated that she did not develop any procurement policies within the agency. **(Plaintiff's Deposition at Page 72, Lines 24 -25 and Page 73, Lines 1-5).** The Plaintiff further testified that the Defendant was subject to the Procurement Act of the State of South Carolina. **(Plaintiff's Deposition at Page 119, Lines 10-16).**

The Plaintiff also testified that when she made complaints about the procurement policies of the Defendant, and she provided suggestions for improvement, those suggestions were enacted by the former Executive Director as well as the new Finance

Manager, Ruth McBride. **(Plaintiff's Deposition at Page 111 through Page 112 and Page 120, Lines 14-24).**

The Plaintiff alleges that her reasons for termination were pretextual and retaliatory for raising issues about their violations of law and of the Procurement Policies. She also testified that the Defendant violated her job description by placing additional duties on her. She claimed that the basis of her contract was the job description and personnel policy of the Defendant.

The Plaintiff filed an action for a Breach of Contract, a Breach of Contract with Fraudulent Intent and Wrongful Discharge in Violation of Public Policy.

PLAINTIFF'S ASSERTION THAT SUMMARY JUDGMENT IS PREMATURE

The Plaintiff alleged that the Summary Judgment Motion was premature. The Plaintiff stated at this procedural juncture, discovery was still ongoing, and the Plaintiff had not had an opportunity to fully and fairly conclude discovery. The Plaintiff requested a date to depose Ruth McBride. The Plaintiff contends that the Motion for Summary Judgment is improper at this time because it is an extreme remedy to be cautiously evoked, and it "must not be granted until the opposing party has had a full and fair opportunity to complete discovery". *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E. 2d 543 (1991).

The Court agrees that Summary Judgment should be cautiously invoked only after a full and fair opportunity to complete discovery. The Court notes that the Complaint was filed by the Plaintiff on or about November 9, 2016. The parties exchanged written discovery and the Deposition of the Plaintiff was taken by the Defendant's attorney on October 17, 2017. The defense attorney represented to the Court that the Plaintiff's

attorney never requested a Deposition until Monday, September 17, 2018. The Court was advised that the request was in the alternative to a Mediation. The defense attorney represented that the Mediation was going to continue and was cancelled the last minute. There was never any further request by the Plaintiff's attorney to take a Deposition. The Plaintiff's attorney did not dispute that allegation.

Furthermore, the Defendant's attorney stated that the Summary Judgment Motion was previously on the Non-Jury Motion's Roster. The Plaintiff's attorney requested for it to be continued from May due to the fact that he had some recent health issues and was unable to conduct discovery. The Defendant's attorney consented to this request for a continuance. There was no further request for discovery during that interim period.

The case was recently on the Jury Trial Roster in which the Plaintiff had it continued in order to schedule Mediation and conclude discovery. There still has been no discovery conducted since that time.

The Plaintiff has not advanced any good reason why there no discovery was conducted after the filing of this Motion. Five (5) months has elapsed since the filing of the Summary Judgment Motion and conducting the Hearing. As the Court stated in *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison*, 320 S.C. 470, 479-80, 465 S.E. 2d 765, 771-72 (Ct. App. 1995), there was no good reason why there was insufficient time under the facts of the case to develop documentation in opposition to the Motion for Summary Judgment. The Plaintiff could not articulate any such reason. Furthermore, since the case was already continued on one occasion, the Plaintiff was hardly caught by surprise. As in *Middleborough,* the Plaintiff never made a formal Motion

for Continuance or pointed out any specific manner how she would be prejudiced by her inability to conduct discovery.

This Court finds that there has been no good reason advanced why there was insufficient time under the facts of the case to develop documentation in opposition to this Motion for Summary Judgment. Furthermore, this Court finds that further discovery was unlikely to create any genuine issue of material fact. See, Baughman, 306 S.C. at 112, 410 S.E. 2d 537 (a non-moving party must demonstrate that further discovery will likely uncover additional relevant evidence); (See also, *George v. Fabri*, 345 S.C. at 452, 548 S.E. 2d at 874; Purpose of Summary Judgment is to dispose of cases which do not require a fact finder).

With all that being considered, this Court finds there was not an appropriate demonstration that further discovery would likely uncover additional relevant evidence or a good reason why there was insufficient time under the facts of the case to develop documentation in opposition of this Motion since the filing of the same. Lastly, the Plaintiff has not filed a formal Motion for a Continuance of this Hearing. Therefore, this Court respectfully declines to find that Summary Judgment is premature.

STANDARD OF REVIEW

Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (quoting Watson v. S. Ry. Co., 420 F.Supp. 483, 486 (D.S.C.1975)). An appellate court reviews the grant of summary judgment under the same standard applied by the circuit court. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The circuit court should grant summary judgment "if

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 fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David, 367 S.C. at 250, 626 S.E.2d at 5.

DISCUSSION

1. THE COURT CONCLUDES THAT THE PLAINTIFF HAS FAILED TO SHOW A GENUINE ISSUE OF MATERIAL FACTS AS IT RELATES TO THE CAUSES OF ACTION ALLEGED BY THE PLAINTIFF.

A. PLAINTIFF'S BREACH OF CONTRACT CAUSE OF ACTION

The Plaintiff alleges that there was a breach of the contract. She alleged in her Complaint that there was an Employee Handbook which formed a contract in her Complaint. However, in her Deposition, she claims that there was an Employment Manual but does not remember the exact details of the Manual. The Plaintiff further testified that she was told not to use the handbook because it was "out of date, out of compliance, and it was going to be revised and nothing in the handbook was relevant." **(See, Plaintiff's Deposition at Page 115, Lines 17-25).**

The Plaintiff also alleges that she was orally promised a job as Interim Executive Director although she was not paid for the same. There are not any minutes or documentary evidence which reflect that arrangement.

In South Carolina, employment is presumed to be "at will", meaning that employment may be terminated at any time, for any reason, with or without cause. (See, Hessenthaler v. Tri-County Sister Health, Inc., 365 S.C. 101, 616 S.E. 2d, 694, 697 (S.C. 2005). "The doctrine dictates that employment for an indefinite term is terminable by either the employee or the employer for any reason or for no reason without internal liability for wrongful discharge." Davis v. Orangeburg-Calhoun Law Enforcement Commission, 344 S.C. 240, 246, 542 S.E. 2d 755, 758 (Ct. App. 2001). One exception to this rule is that an employee has recourse if she can show that her employer contractually altered her at will employment and that her discharge was in violation of that contract. Id. at 246-247.

An oral promise might be sufficient to alter an employee at will status, but it must be definite and made with specific intent to create an employment contract. See, Prescott v. Farmer's Tel. Co.-Op., Inc., 355 S.C. 330, 336-337 (1999) (To be binding, an offer of employment must be definite. In addition, it must be one which is "intended of itself to create a legal relation on acceptance"). It has been well settled that under South Carolina Law, occasional promises that an employee will be terminated "for cause" or "just cause" are insufficient to alter an employee at will employment. (See Davis v. Orangeburg County Law Enforcement Commission's alleged statement from supervisor that Plaintiff could be terminated for just cause was insufficient to alter Plaintiff's status as an at will employee); Taliferro v. Associates Corp. of North America, 112 F. Supp. 2d 483, 497 (S.C. 1999). Aff'd 229 F. 3d 1144 (4th Cir. 2000). Indefinite assurances of job security are insufficient to

modify an at will employment arrangement. See, *Prescott v. Farmer's Telephone Co-Op Inc.* (Vague assurances of job security even if repeated, do not give rise to contractual rights), *Sullivan v. Cato Corp.*, No. 8: 04-651-Gra-Bhh, 206 WL 644469 at 16 (D.S.C. March 9, 2006).

The Plaintiff's allegations center around the Personnel Policy and her Job Description. Those are the two documents that the Plaintiff testified to in her Deposition that formed the basis of her contract. First, her Job Description, (which was produced by the Plaintiff in discovery), states "Not a Contract" on the bottom of the document. The document provides qualification for the position. The further requirements are, who the Plaintiff is responsible to reporting and the job requirements. It also states, "the Job Description is subject to modification at the discretion of the Executive Director".

To be enforceable in contract, general policy statements must be definitive in nature, without promising specific treatment in specific situations. See, e.g. Ex Parte *Amico Fabrics and Fiber Co.*, 729 So. 2d 336, 339 (ALA 1998). ("To become a binding promise, the language used in the handbook.... Must be specific enough to constitute an actual offer rather than a mere general statement of policy"). Quoted in *Hessenthaler v. Tri-County Sister Health Inc.*, 365 S.C. 101, 616 S.E. 2d 694 (2005).

The Court further stated in *Hessenthaler*, quoting *Ross v. Times Mirror, Inc.*, 164 Ut. 13 665 A. 2d 580, 584 (1995). ("Only those policies which are definitive in form, communicated to the employees, and demonstrated in an objective manifestation of the employee's intent to bind itself will be enforced."). See also, *Bookman v. Shakespeare Co.*, 314 S.C. 146, 148-149, 442 S.E. 2d 183, 184 (Ct. App. 1994).

The provisions of the Job Description are not specific and do not make any promise concerning the Defendant's employment. Therefore, this Court cannot find this Job Description is an enforceable contract.

The Defendant concedes that the disclaimer language does not comply with the requirements of S.C. Code Ann. §41-1-110. However, the Plaintiff cannot point to anything contained within the personnel policy that would create a contract or a breach of the same.

The Plaintiff's Deposition testimony focused on the promotion policy. The promotion policy stated, "it shall be the policy of the Council on Aging to fill vacancies on the basis of merit and fitness and, in so far as is possible, to promote employees into higher positions." The Plaintiff alleges that she should have been promoted to Executive Director.

The Plaintiff's attorney, throughout his argument, did not identify any specific breaches of contract. The fact that the promotion policy states that vacancies will be on the basis of merit with vacancies being promoted from within, insofar as possible, does not mandate an automatic promotion from current employees. This Court finds that such an interpretation would strain the credulity of the promotion policy.

This Court finds that there was not any specific breach as it relates to the promotion policy, personnel policies, job description or any handbook that has been specifically identified by the Plaintiff in the record or in her argument. Rather, the Plaintiff argued that the handbook's policy disclaimers are insufficient as a matter of law. While the Court agrees that the policy disclaimer does not comply with the terms of S.C. Code Ann. §41-1-110, that does not automatically create a contract. Rather, the presumption of any policies and/or handbooks not being a contract is not afforded to the Defendant since they did not comply with the aforementioned Statute. However, the burden of proof still remains upon

the Plaintiff to demonstrate a contract. They must establish all the elements of a contract in order to proceed with their Breach of Contract Claim.

The Plaintiff has failed to identify any specific contractual promises provided in the personnel policies. The fact that the contract is found not to be in compliance with S.C. Code Ann. §41-1-110 does not, in and of itself, create a contact between the employer and employee.

Furthermore, even if this Court found that the personnel guidelines were an appropriate basis for the formation of an employment contract between the Plaintiff and the Defendant, the Plaintiff cannot identify any specific Breach of Contract. The promotion policy states that the vacancies will be on the basis of merit and fitness. There is a policy to promote from within but that is not a mandate which is specifically stated in the policy. Furthermore, this Court notes that the Plaintiff applied for the Executive Director position on July 19, 2016 and was terminated on August 2, 2016 for selling the truck to her husband. The Executive Director position was not filled on the date of the Plaintiff's termination. In fact, the Plaintiff has not even established that the interview process had begun.

To the extent that the Plaintiff would allege there was a violation of the grievance procedure, her own Deposition testimony demonstrates that she did not follow the grievance procedure. The Plaintiff testified that she did not exercise an Appeal. She received mixed signals from the secretary and wrote a letter **(See, Plaintiff's Deposition testimony at Page 110, Lines 13-25 and Page 111, Lines 1-12).**

The Court concludes that the evidence in this case leads to only one inference, that the job description and personnel policies do not constitute a contract. Therefore, since the

issue of whether the personnel policy and job description constitute a contract should lead to only one conclusion, it now becomes a matter of law. See, *Small v. Springs Industries, Inc.*, 292 S.C. 481, 485, 357 S.E. 2d 452, 455 (1987). (Holding the issue of whether a contract existed should be submitted to a jury only when the existence of a contract is in question and the evidence is either conflicted or a mix of more than one inference.) These two policies and the Plaintiff's allegations do not conflict nor are they subject to more than one inference. Therefore, your Defendant is granted Summary Judgment on the Plaintiff's Breach of Contract Cause of Action.

B. DEFENDANT HAD A "REASONABLE GOOD FAITH BELIEF" FOR ITS DECISION TO TERMINATE THE PLAINTIFF

Further, even assuming for the sake of argument that the Plaintiff had produced evidence of an employment contract containing a provision requiring your Defendant to have just cause to terminate her employment (which the Plaintiff has failed to do), the record nonetheless shows that your Defendant possessed a "reasonable good faith belief for believing that such cause existed to terminate the Plaintiff."

South Carolina case law holds that when an employer possessed "a reasonable good faith belief that sufficient cause existed for the employee's termination, the employer will not be liable for breaching an employment contract with an employee even if the contract only allows termination for cause." In determining whether "just cause" or "good cause" existed for employee's termination, the South Carolina Supreme Court observed in Conner v. City of Forest Acres, 363, S.C. 460, 473, 611 S.E. 2d 905, 911 (2005), that "the fact finder must not focus on whether the employee actually committed misconduct; instead, the focus must be on whether the employer reasonably believed it had cause to terminate." Citing, Conner v. City of Forest Acres and Prescott v. Farmer's Telephone Co-op Inc., 328 S.C. 379,

491 S.E. 2d 698, 705 (Ct. App. 1997) , Rev'd. on other grounds, 335 S.C. 330, 516 S.E. 2d 923, (1999). The South Carolina Court of Appeals reiterated that "employers cannot be expected to act as judges, so the test is not whether the employee actually committed misconduct, but rather the employer had a reasonable good faith belief that it had cause to terminate."

Importantly, to defeat the Plaintiff's breach of contract claim in the Complaint, your Defendant is not required to show that the Plaintiff actually committed any misconduct whatsoever. In other words, it is not necessary for the employer to prove that the Plaintiff committed the misconduct in order for it to prevail on the Summary Judgment Motion. Instead, the employer's is entitled to judgment as a matter of law if it simply shows that had "a reasonable good faith belief" that causes the Plaintiff's termination.

Despite the Plaintiff's allegations to the contrary, the Board met July 18, 2016. In the Board Minutes, it states on Page 2, "Mr. Aaron Jones asked if the Board gives it okay to sell the pickup truck that we have just sitting in the parking lot. Mr. Woody Haynes made a motion that we sell the truck. Clara Nelson seconded. Motion carried." Plaintiff's own Deposition testimony confirmed that the Board Meeting began at 11:30 a.m. The adjournment was at 1:34 p.m. The Plaintiff then sold the truck to her husband somewhere between 1:30 p.m. and the time the facility closed.

The Board Minutes do not reflect, nor is there any way possible for the Board to determine how they could receive the most money for this truck be decided upon by the time the Plaintiff contacted her husband to purchase the truck. The Plaintiff's own Deposition testimony states that she is the one that contacted her husband. **(See, Plaintiff's Deposition at Page 94, Lines 22-25 and Page 95, Lines 1-6).** Furthermore,

the personnel policy which the Plaintiff alleges formed the basis of her contract, contained a definition of immediate family. The Plaintiff testified she was not aware that as in her role as a procurement expert, that nepotism and self-dealing was not in violation of the Internal Revenue Code or the Procurement Code. **(See, Plaintiff's Deposition at Page 101 through 103.)**

Under South Carolina case law, this evidence is more than enough to provide your Defendant with a reasonable good faith belief that cause existed for the Plaintiff's termination. Even assuming that she had an employment contract with your Defendant that prevented termination upon just cause, the alleged self-dealing with her husband is a good faith reason for termination by the Board. For example, the Court of Appeals in Lingard v. Carolina V-Prods., 361 S.C. 442, 605 S.E. 2d 545 (Ct. App. 2004) held that the conclusions of the employer do not have to be uncontested facts but must simply be supported by enough evidence to support their good faith belief in the cause for termination. *Id.* at 550. The Court went on to state that although the disputed facts would normally present a jury question as to the existence of an employment contract, the employer demonstrated a good faith belief that sufficient cause existed to justify the employee's termination and that "South Carolina Law does not allow judges and juries to appear unchecked into employment decisions." Id. The Court ruled that the good faith belief was a matter of law.

The Court finds that the Defendant had a good faith belief in regards to the termination of the Plaintiff.

C. THE PLAINTIFF'S BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT CLAIM FAILS AS A MATTER OF LAW

1. First, the Plaintiff cannot maintain a cause of action of Breach of Contract accompanied by a Fraud because there was no contract upon which to base that claim. See Cain v. United Ins. Co., 232 S.C. 397, 402, 102 S.E. 2d 360, 362 (1958). (Holding that the Plaintiff could not maintain an action for Fraudulent Breach of Contract because the alleged contract was invalid or did not exist); Anthony v. Atlantic Group, Inc., 909 F. Supp. 2d 455, 472 (D.S.C. 212) affirmed (July 12, 2013) (finding that there was no employment contract for which to base the Plaintiff's claim for fraudulent breach of contract).

2. Alternatively, assuming that there was a contract, the Plaintiff's claim for a Breach of Contract Accompanied by a Fraudulent Act fails. To prove a claim for Breach of Contract Accompanied by a Fraudulent Act, a Plaintiff must prove (1) a breach of contract; (2) Fraudulent intent regarding the breach of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. Armstrong v. Collins, 366 S.C. 204, 223 at 621 S.E. 2d 368, 377 (Ct. App. 2005).

The Plaintiff, in her Complaint, alleges a number of issues for her Breach of Contract with Fraudulent Intent which were rebutted by her in her Deposition. Specifically, that she relied upon promises in the Defendant's handbook and policies and procedure as well as violations of the Procurement Code.

The crux of the Plaintiff's claim for fraudulent actions was that the Defendant's decision to terminate her employment for the sale of the pickup truck to her husband without the permission of the Board was false and pre-textual.

It is well settled that Summary Judgment is appropriate on claims of Breach of Contract accompanied by fraud when alleged breach arises out of an at will employment contract. See, Grant v. Mt. Vernon Mills, Inc., 370 S.C. 138, 152, 634 S.E. 2d 15, 23 (Ct. App.

2006) (Granted Summary Judgment on employee's Breach of Contract Accompanied by Fraud Claim after finding at will employment status); The Defendant argued that the Plaintiff even executed another employment status form on May 6, 2016 (before her termination) in which she acknowledged that she was an at will employee.

The Plaintiff's claim fails as a matter of law for two reasons. First, there was no contract altering her status as an at will employee. As explained above, the Plaintiff was an at will employee of the Defendant. Additionally, the Plaintiff has not produced sufficient evidence to show that the at will nature of the employment was altered by the Defendant. Because there is no contract modifying the Plaintiff's at will employment, her Breach of Contract Claim Accompanied by Fraudulent Intent cannot survive Summary Judgment. See. e.g. *Grant,* 370 S.C. 138, 152.

Second, the Plaintiff has failed to allege any independent fraudulent act accompanying the breach. The Plaintiff's claim is that the Defendant breached their alleged promises to Plaintiff by terminating her employment based on her alleged issues concerning the procurement policies. The Plaintiff's argument is that the stated reasons for her termination are not the true reasons (i.e. pretextual). The Plaintiff further alleges that those same pretextual reasons are the fraudulent acts that support her claim. The law states that an accompanying fraudulent act must to "separate and distinct from the acts constituting the breach of contract". *Smith v. Canal Insurance Company*, 275 S.C. 256, 260, 269 S.E. 2d 348, 359 (1980); *D.R. Horton, Inc. v. Westcott Land Co., LLC*, 398 S.C. 528, 526 730 S.E. 2d 340, 355 (Ct. App. 2012). Aff'd. in part as modified, vacated in part, 410 S.C. 319, 764 S.E. 2d 701 (2014). There must be a separate and distinct fraudulent act accompanying the breach.

The South Carolina Court of Appeals' reasoning in D.R. Horton is instructive on this point. That case involved a dispute between person and real estate developer over a conveyance of real property. On appeal, the real estate developer sought to overturn a lower court's grant of Summary Judgment, among other things, its claim for Breach of Contract Accompanied by Fraud. The developer argued that the purchaser breached a conveyance agreement by stringing along the transaction and refusing to abide by the agreement for pre-textual reasons. Id., 550, 556. The Appellate Court found that while the purchasers "shift in reasons" for refusing to abide by the contract might evidence purchaser's intentional breach of the agreement, it was not evidence of an independent fraudulent act. D.R. Horton, Inc., 398 S.C. at 556. The Court found that the same alleged pre-textual reasons constitute an alleged Breach of Contract cannot also form the basis of the fraudulent act. The same is true in this case. The Plaintiff cannot rely on the same pre-textual reasons to prove both the elements of Breach of Contract and the Fraudulent Act Accompanying the Breach.

A showing of fraudulent intent relating to the breach of contact "requires proof of fraudulent intent relating to the breaching of the contract and not merely to its making". Harper v. Etheridge, 290 S.C. 112, 119, 348 S.E. 2d 374, 378 (Ct. App. 1986). It must be separate and distinct from the breach itself. Moreover, it must be "an act" as the South Carolina Court of Appeals noted in Foxfire Village, Inc. v. Black and Veatch, Inc. 304, S.C. 366, 375, 404 S.E. 2d 912, 918 (Ct. App. 1991). "No decision of this Court or the Supreme Court has ever held that either nonfeasance for a mere statement without more satisfies a requirement that the breach must be accompanied by a fraudulent act." Foxfire at 376, 404 S.E. 2d at 918.

The Plaintiff has specifically alleged a fraudulent act and accompanying alleged breach is the "are false and pre-textual reasons and done for the purposes of eliminating her position as a result of her attempt to report the illegal practices committed by the Defendant". The Plaintiff cannot prevail on the fraudulent act theory because she testified in her Deposition that there was no report of the illegal practices committed by the Defendant and a mere statement as to why she was fired cannot satisfy the Breach of Contract for Fraudulent Intent.

Thus, the Plaintiff cannot satisfy any of the three prongs of the cause of action. The Plaintiff cannot show that there was a contract that was breached; that there was fraudulent intent relating to the breach; and that there was any fraudulent act directly connected to the breach.

Thus, the Defendant is entitled to Summary Judgment as a matter of law on the Plaintiff's Breach of Contract with Fraudulent Intent Claim.

D. THE PLAINTIFF'S CLAIM FOR WRONGFUL TERMINATION FAILS BECAUSE SHE WAS AN AT WILL EMPLOYEE AND THE PUBLIC POLICY EXCEPTION DOES NOT APPLY

In South Carolina, employment at will is presumed absent the creation of a specific contract of employment. *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614, 713 S.E. 2d 634, 636-37 (2011). Citing, *Mathis v. Brown & Brown of S.C. Inc.*, 389 S.C. 29, 310, 698 S.E. 2d, 773, 778 (2010). An at will employee may be terminated at any time for any reason or for no reason, with or without cause. *Mathis*, 389 S.C. at 310, 698 S.E. 2d at 778. Nevertheless, the Plaintiff advances her claim for wrongful termination under the "Public Policy Exception" to the At Will Employment Doctrine.

Under the public policy exception as quoted to the At Will Employment Doctrine, "an at will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at will employee in violation of a clear mandate of public policy". *Barron* at 614, 713 S.E. 2d at 637.

The primary source of the declaration of the public policy of the State is the General Assembly; (the Court assumes this prerogative only in the absence of legislative declaration). *Citizens Bank v. Heyward*, 135 S.C. 190, 133, S.E. 2d 709, 713 (1985). See, *Barron*, 393 S.C. at 617, 713 S.E. 2d at 638. (Stating the determination of what constitutes public policy for the purposes of the Public Policy Exception to the At Will Employment Doctrine is a question of law for the Courts to decide).

The Public Policy Exception applies in cases whether either (1) the employer requires the employee to violate the law, or (2) the reason for the employer's termination itself is a violation of the criminal law. *Barron*, 393 S.C. at 614, 713 S.E. 2d at 637; See, *Ludwick v. The Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E. 2d 213, 216 (1985). (Holding the Public Policy Exception is invoked when an employer fires an at will employee, as a condition of retaining employment, to violate the law); *Culler v. Blue Ridge Elec. Co-Op., Inc.*, 309 S.C. 243, 246, 422, S.E. 2d 91, 93 (1992). (Finding an employee would have a cause of action for wrongful discharge if he was discharged because he refused to contribute to a political action fund). The *Barron* Court found that the Public Policy Exception is not limited to these situations; however, an exception has not yet been extended beyond them. 393 S.C. 614, 713 S.E. 2d at 637.

The Courts have essentially created a third prong when the Court determines there was a violation of public policy. The determination of what constitutes a public policy is a question of law for the Courts to decide. *Barron,* 393 S.C. at 617, 713 S.E. 2d at 638.

The Plaintiff does not allege that the Defendant required the Plaintiff to violate the law. She stated they were violating the law with the failure to follow the South Carolina Procurement Code in her Complaint. However, her Deposition testimony, as referenced herein, disputes that the Defendant was even required to follow the South Carolina Procurement Code. Furthermore, her complaints concerning their policy of how purchasing was performed was the reason leadership adopted her recommendation for improvement.

The Plaintiff also does not allege that the reason for the employee's termination was itself a violation of the criminal law. Thus, the only determination is whether the Plaintiff's complaint of her termination as an at will employee was in violation of a clear mandate of public policy. That is a determination for the Court alone to determine. The Plaintiff stated that she did not see any blatant law violation in regards to the procurement practices of your Defendant. **(See, Plaintiff's Deposition at 137, Lines 6-9).**

Despite the Plaintiff's Deposition testimony, the Plaintiff alleged in her Complaint that the Defendant engaged in a "pattern and practice of systematically and covertly removing checks and balances in terms of Defendant's obligations to remain in compliance with the South Carolina Procurement Code and State Law which would result in Defendant being found in violation of the law itself in the even to an audit." **(Plaintiff's Complaint at Paragraph 51).** There is no testimony in the record concerning this allegation. The Plaintiff even agreed in her Deposition that there is no Statute in South Carolina that says

that the Defendant should have to follow the policy that the Plaintiff recommended to her leadership as it relates to purchasing. **(See, Plaintiff's Deposition at Page 137, Lines 24-25 and Page 138, Lines 1-2).** The Plaintiff even stated that, to her knowledge, there were no Statutes, State or Federal, relating to the Procurement Code that were violated while she was employed. **(See, Plaintiff's Deposition at Page 138, Lines 2-7).**

The Plaintiff's complaints do not contend that the Defendant demanded that she violate the law, or her termination violated any law. Her Complaint and Deposition testimony do not state sufficient facts in which the Court could determine a violation of any public policy.

As the Court stated in *McNeil v. South Carolina Department of Corrections*, 404 S.C. 186, 743 S.E. 2d 843 (2013). "Simply stated, a litigant must allege more than a general statement that her discharge violated public policy. The Complaint must set forth specific allegations that would enable the Court to determine what part of Public Policy was violated."

The Plaintiff's Complaint alleges that the violation was a failure to follow the South Carolina Procurement Code. As mentioned earlier, a 501(C)(3) Corporation is not required to follow the South Carolina Procurement Code. S.C. Code Ann. §11-35-40(2) states that only governmental bodies (as defined in S.C. Code Ann. §11-35-310(18)) are to abide by the South Carolina Procurement Code. The Council on Aging does not fit this definition of a government body.

Furthermore, the Plaintiff's own Deposition testimony states that your Defendant never violated any State or Federal Statutes while she was employed. Thus, the only allegation of the violation of public policy that is alleged in the record is that she was

discharged for personal, pretextual and scapegoating purposes. The Court has resoundingly stated in McNeil that these type of general allegations do not support a wrongful discharge action.

The Plaintiff continued to argue at trial and in her Memorandum in Opposition to Summary Judgment that she was retaliated against and fired for reporting the Defendant's illegal activities. The Plaintiff failed to produce any evidence from the record that shows any illegal activity committed by the Defendant or her attempts to report the same. In fact, her Deposition testimony contradicts that argument. Specifically, she testified that there were no statutes, State or Federal, relating to the Procurement Code that was violated during her employment. **See, Plaintiff's Deposition at Page 138, Lines 2 through 7.**

Based upon the record and arguments of counsel, this Court finds that the Plaintiff's claim for wrongful discharge in violation of public policy fails as a matter of law.

CONCLUSION

None of the evidence contained in the record supports the Plaintiff's causes of action for Breach of Contract, Breach of Contract with Fraudulent Intent, and Wrongful Discharge in Violation of Public Policy. The evidence in the record supports only one inference. That inference is that the Plaintiff has failed to establish the existence of a contract as well as the Defendant's breach. Furthermore, there is no evidence to establish that the Plaintiff was discharged in violation of Public Policy. Thus, the Defendant is entitled to Summary Judgment as a matter of law.

NOW, THEREFORE, based upon the foregoing, it is hereby

ORDERED that the Defendant, Clarendon County Council on Aging's Motion for Summary Judgment pursuant to Rule 56 SCRCP is hereby granted and that the Plaintiff's action is dismissed with prejudice as to the Defendant, Clarendon County Council on Aging.

AND IT IS SO ORDERED.

_____

George M. McFaddin, Jr.
Presiding Judge for the Court of Common Pleas
Third Judicial Circuit

At Chambers:

Sumter, South Carolina.

_____ 2018.

Clarendon Common Pleas

Case Caption: Joyce Strothers VS Clarendon County Council On Aging

Case Number: 2016CP1400417

Type: Order/Summary Judgment

So Ordered

S/George M. McFaddin, Jr., #2759