THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Circuit Court Case No. 2017-CP-10-4112
Appellate Case No.: 2018-000249

Chris Khamnei,.....Appellant,

v.

Columbus Street Holdings, LLC;
Roy T. Willey, IV; and Eric M. Poulin,.....Respondents.

INITIAL BRIEF OF RESPONDENTS

March 8, 2019

Stefan B. Feidler
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ATTORNEY FOR RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. **Should this appeal be dismissed as premature and interlocutory?**

II. **Did the Trial Court err in dismissing Appellant's cause of action against the Individual Respondents?**

STATEMENT OF THE CASE

Appellant filed the original Complaint in this action on August 11, 2017. Compl. The original Complaint named only Columbus Street Holdings, LLC ("the Corporate Respondent") as a Defendant an alleged only one cause of action, that being breach of contract. Id. Prior to serving the original Complaint, Appellant filed an Amended Complaint on September 5, 2017. Am. Compl. The Amended Complaint retained the original breach of contract cause of action (as against only the Corporate Respondent) and included a second cause of action (as against all Respondents), that being breach of contract accompanied by a fraudulent act. Id. Mr. Willey and Mr. Poulin ("the Individual Respondents") were named in the Amended Complaint. Id. The individual Respondents were named only in the cause of action for breach of contract accompanied by a fraudulent act. Id.

On September 13, 2017, Respondents filed an Answer and Counterclaim. Answer. Respondents also filed a partial motion to dismiss, seeking dismissal of the cause of action for breach of contract accompanied by a fraudulent act in its entirety. Mot. Dismiss. The motion to dismiss was heard by the honorable J.C. Nicholson, Jr. on November 17, 2017. On December 14, 2017, the Trial Court issued an Order dismissing the cause of action for breach of contract accompanied by a fraudulent act as to the individual Respondents only, but allowing the cause of action to survive against the Corporate Respondent. Order. The Order dismissed the Individual Respondents without prejudice. Id. The Trial Court noted "I will give [Appellant] relief to refile a motion with the Court to reinstate the parties, if during discovery they come up with any sufficient facts to establish a tortious act outside the confines of acting on behalf of the LLC during the discovery process; he's at liberty to make a motion to add them back." Hr'g Tr. 14:14-19.

Respondent moved for reconsideration which was denied on January 18, 2018. Subsequently, Respondent served his Notice of Appeal on February 14, 2018.

STATEMENT OF FACTS

Columbus Street Holdings, LLC is a duly registered South Carolina Limited Liability Company. Respondents Willey and Poulin are members of the LLC. The LLC contracted to purchase a piece of real property from the Plaintiff. The contract for sale was ratified on or about March 17, 2017 for a purchase price of $226,000. However, during the due diligence period, Respondents discovered that the property was encumbered by a *lis pendens* and occupied by several squatters. Rather than cancelling the contract, the Respondents agreed to continue their pursuit of purchasing the property, but insisted that the closing be delayed until the *lis pendens* was dissolved and the squatters were evicted. However, Appellant insisted that he needed to close quickly because he needed the money. Therefore, Respondents agreed to modify the contract. The parties executed an addendum to the contract on April 14, 2017 whereby the purchase price was reduced to $200,000, and requiring that $50,000 of the purchase price was to be held in escrow until the *lis pendens* was dissolved and the squatters evicted. Appellant was to be responsible for remedying these issues. Once the *lis pendens* was dissolved and the squatters evicted by Appellant, the escrow money was to be delivered to the Appellant. The sale closed on April 20, 2017, and the $50,000 was placed in escrow.

The Amended Complaint makes the following allegations.[1] Appellant alleges that he had the *lis pendens* cancelled on June 1, 2017. Am. Compl. ¶ 29. Appellant further alleges that one of the squatters was evicted and vacated the premises on June 1, 2017. Am. Compl. ¶ 32. Appellant further alleges that, upon cancellation of the *lis pendens* and the eviction of one of the squatters, he sought to have the escrow money released and notified Respondents that Appellant

[1] Naturally, Respondents deny and dispute many of these allegations. However, for purposes of the motion to dismiss, the Court must take these allegations as true and determine, if true, whether they properly allege the elements necessary to sustain the cause of action.

would suffer financial harm if the escrow money was not released by June 6, 2017. Am. Compl. ¶ 35-37. Specifically, Appellent alleges that he required the funds in order to pay off another loan and avoid a late payment penalty. Id. Appellant alleges that Respondents believed the escrow agreement required Appellant to evict all the squatters, not just the one squatter, and therefore refused to release the escrow funds until the remaining squatters were evicted. Am. Compl. ¶ 38. Appellant alleges that Respondents offered to settle the matter by releasing $40,000 of the escrow funds to Appellant and allowing Respondents to retain the remaining $10,000 in escrow funds so that Respondents could use that money to evict the remaining tenants on their own. Am. Compl. ¶ 41. Finally, Appellant alleges that Respondents' intentionally breached the contract, that the settlement offer was made in bad faith and for the purpose of forcing Appellant to choose between allowing Respondents to keep $10,000 of the escrow money or incurring the late payment penalty on the other loan. Am. Compl. ¶ 60. Appellant alleges that this settlement offer was Respondents' attempt to wrongfully gain financial advantage and extort money from Appellant through dishonesty in fact and unfair dealing. Am. Compl. ¶ 61. Appellant therefore contends that Respondents are liable not only for breaching the contract, but for breaching the contract through an accompanying fraudulent act.

STANDARD OF REVIEW

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6) SCRCP. See Doe v. Marion, 373 S.C. 390, 395 (2007) (discussing the standard of review of a motion to dismiss under Rule 12(b)(6), SCRCP); Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 122 (Ct. App. 2006) (discussing the standard of review of a motion for judgment on the pleadings). A ruling on a Rule 12(b)(6) motion must be based solely on the allegations set forth on the face of the complaint. Toussaint v. Ham, 292 S.C. 415, 416, (1987).

ARGUMENT

I. The appeal should be dismissed as premature and interlocutory.

Appellant seeks review of an interlocutory Order. While the law provides for certain exceptions to the final order rule, none of the exceptions apply to the present case. In fact, this exact issue was clarified by the South Carolina Court of Appeals in 2017. Tillman v. Tillman, 420 S.C. 246, 801 S.E.2d 757 (Ct.App. 2017).

In Tillman, the Court was presented with the question of whether an order that grants a 12(b)(6) motion yet simultaneously grants leave to amend the pleadings is immediately appealable. The Tillman Court answered in the negative, holding "Appellant's rights have yet to be finally determined by the circuit court. Appellant has not reached the end of the road, however long and winding he may have made it. The order is not immediately appealable." Tillman, 420 S.C. at 251.

The present case is identical to that presented in Tillman. Here, the trial court dismissed only certain defendants, dismissed them without prejudice, and simultaneously granted leave to amend and re-add the dismissed defendants following discovery. Appellant did not move to amend, but rather immediately appealed the order. The appeal is therefore premature and should be dismissed.

II. The Trial Court did not err in dismissing Appellants' claims against the Individual Respondents.

a. Appellant failed to plead facts sufficient to sustain a cause of action for breach of contract accompanied by fraudulent act.

At its core, this is a simple breach of contract action. Appellant contends that he was due the escrow money once he evicted one squatter and had the *lis pendens* cancelled. Respondents contend that Appellant was required to evict all the squatters and that Appellant failed to do so. Although Respondents deny the breach of contract allegations, Respondents concede that such allegations were properly pled and, as such, did not move to dismiss that cause of action.

Respondents instead moved only to dismiss the cause of action for breach of contract accompanied by a fraudulent act.

Breach of contract accompanied by a fraudulent act requires proof of 3 elements: (1) A breach of contract; (2) Fraudulent intent relating to the breach; and (3) A fraudulent act accompanying the breach. Harper v. Ethridge, 220 S.C. 112(1986). A simple breach of contract, standing on its own, is not enough to recover on the second cause of action. See, Calder v. Commercial Casualty Ins. Co., 182 S.C. 240 (1936)(Holding that a mere violation of a contract will not support an allegation of fraud). See, also, Patterson v. Capital Life & Health Ins. Co., 228 S.C. 297 (1955)(Holding punitive damages are not recoverable for the mere refusal to pay a debt). Indeed, the cause of action does not survive even if it is proven that a defendant breached the contract willfully. Vann v. Nationwide Ins. Co., 257 S.C. 217 (1971). Instead, "[i]t has been consistently held that where a complaint states a cause of action for breach of contract, allegations charging the defendant with fraudulent intent or purpose in breaching the contract do not give rise to a right to recover punitive damages; that such damages are recoverable **only** where, in addition to or independently of the fraudulent intent that brought about the breach there was some fraudulent act on the part of defendant accompanying the breach." Welborn v. Dixon, 70 S.C. 108 (1904).

Here, Appellant does not even allege any fraudulent intent on behalf of Respondents. Instead, Appellant merely pleads that Respondents acted intentionally in order to gain a financial advantage. The word "fraud" does not appear anywhere in the Complaint. Appellant does not allege any act of dishonesty or deceit outside of the fact that Respondents refused to release the escrow funds because they believed Appellant had not satisfied the conditions precedent to such release. Indeed, even if fraudulent intent were pled, the Complaint fails to allege any act in

addition to or independent from the intent that brought about the breach. The only "act" alleged in the Complaint outside of the breach is that Respondents made a good faith effort to settle the dispute. Appellant likens this offer to "extortion." However, even if true, these allegations only suggest, at best, that Respondents acted intentionally. Willfulness or intentionality in breaching a contract does not rise to the level of fraud. Accordingly, the Court did not err in dismissing this cause of action as to the Individual Respondents.

b. Even if Appellant's Complaint were sufficient to sustain this cause of action, Appellant failed to plead facts sufficient to hold the Individual Respondents personally liable for the acts of the Corporate Respondent.

Even if the allegations were sufficient to support this cause of action, the Court dismissed only the Individual Respondents. Appellant alleges that the Corporate Respondent is a duly organized limited liability company and that the Individual Respondents are merely members of the company. Am. Compl. ¶ 2. Appellant further alleges that the contract of sale was between Appellant and the Corporate Respondent only, and that the individual Respondents were not personally parties to the contract. Am. Compl. ¶ 17.

Appellant does not allege that either Individual Respondent signed any personal guarantee, or otherwise undertook to form any agreement or contract in their personal capacities. Furthermore, Appellant failed to allege anywhere in the Complaint that the LLC is not operated in accordance with appropriate corporate formalities, and failed to plead or advance any theory of "alter ego" or "piercing the corporate veil." Moreover, as noted above, a key element to the cause of action for breach of contract accompanied by a fraudulent act is that the defendant must have actually breached a contract. Tellingly, in his first cause of action for breach of contract, Appellant does not even name the Individual Respondents. This is because the Individual Respondents were not a party to the contract that was allegedly breached. Without a breach, there can be no cause of action for fraudulent intent.

There is no allegation that the Individual Respondents were at any time acting outside the course and scope of their duties as members of the LLC. Accordingly, the Court did not err in dismissing these individuals from the suit, and the Court's findings should be sustained.

CONCLUSION

For the reasons stated herein, the Court should dismiss this appeal as interlocutory. Should the Court consider this case on the merits, the Court should sustain the Trial Court's dismissal because Appellant failed to plead facts sufficient to sustain a cause of action for breach of contract accompanied by fraudulent intent, and because Appellant failed to plead any facts whatsoever that would support individual liability on behalf of the Individual Respondents.

Respectfully Submitted,

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Dated at Charleston, SC
This 8 day of March, 2019.

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APPELLANT

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that I have served Respondents' Initial Brief and Designation of Matter to Be Included In the Record on Appeal on Appellant by depositing a copy of it in the United States Mail, postage prepaid, on March 8, 2019, addressed to his address of record as shown below.

March 8, 2019

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March 08, 2019

The Honorable Jenny Abbott Kitchings
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Columbia, SC 29211

RE: *Chris Khamnei v. Columbus Street Holdings, et al.*
Appellate Case No.: 2018-000249

Dear Ms. Kitchings::

Enclosed for filing, please find the original and one (1) copy of the Initial Brief of the Respondents and Respondents' Designation of Matter to be Included in the Record on Appeal, together with the original and one (1) copy of the Certificate of Service of the same on Appellant.

We would appreciate it if you would file the originals and returned the stamped copies to our office through the enclosed envelope. By copy of this letter, we are serving the same on Appellant at the address noted below.

If you should have any questions, please do not hesitate to contact us.

Sincerely,

Stefan B. Feidler

Enclosure

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