STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT **FLOYD HARGROVE** Plaintiff v. **ANTHONY E. GRIFFIS, SR.,** Defendant	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2018-CP-07-01449 **ORDER GRANTING MOTION TO DISMISS**

This matter came before the Court on January 8th, 2019 upon the Motion of Defendant Anthony E. Griffis seeking an Order pursuant to SCRCP 12(b)(6) dismissing the claims of Plaintiff. Present were Mr. Griffis, representing himself, and James A. Brown for the Plaintiff. After hearing argument by the parties, I find as follows:

1) **The Plaintiff's claims do not incorporate an affidavit of an expert as required by S.C. Code Ann. §15-36-100.**

South Carolina Code section 15-36-100(B) provides, in pertinent part:

> [I]n an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) …, the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

Here, the Plaintiff alleges in his first cause of action a claim for "breach of fiduciary duty" arising out of Defendant's representation of the Seller in a real estate closing. (Complaint # 75-81). The Complaint does not allege that Defendant acted in any capacity other than as an attorney representing the Seller in the closing.

The second cause of action incorporates and adopts the same allegations and "by express reference are made a part of this cause of action" (Complaint #83).

"Professional negligence" as used in §15-36-100, is a breach of a duty owed to Plaintiff which proximately causes damage to Plaintiff. Because of the nature of the attorney-client relationship, this duty is usually a "fiduciary duty". In *RFT Mgmt Co. v. Tinsley and Adams*, 732 S.E.2d 166 (S.C. 2012) our court held that all claims arising out of the "attorney-client" relationship should be merged with the malpractice claim (which would be subject to S.C. Code Ann. §15-36-100), even if pled as "breach of fiduciary duty" against the attorney. This issue was further clarified in 2013 in the case of *H&H Johnston v. Old Republic National Title Co, and Henry Bufkin* (405 SC 469). In this case the Plaintiff alleged that the defendant real estate closing attorney (Bufkin) breached his duties as a title insurance agent by failing to explain to Plaintiff what exceptions were in the title insurance policy. Bufkin filed a Motion to Dismiss based on 15-36-100(B), and the Plaintiff argued that 15-36-100 did not apply because they were suing Bufkin as a title agent, not as an attorney. However, the circuit court held that "insofar as the complaint attempts to assert any claim against Bufkin in his capacity as an attorney, the same is dismissed for failure to state a claim pursuant to section 15-36-100". The Court of Appeals affirmed, finding that Bufkin was acting as an attorney at the closing, and that section 15-36-100 applied. Here, Plaintiff was required to file an expert affidavit with the Complaint, because all claims against Mr. Griffis arose solely out of his legal representation of the Seller in the closing (and in no other capacity other than as an attorney).

Therefore, Plaintiff's failure to file an expert affidavit with the Complaint is fatally defective to the claims against Defendant, pursuant to S.C. Code Ann. §15-36-100(C)(1).

2) The applicable period of limitations for Plaintiff's claims has expired.

Plaintiff is seeking to collect a real estate commission from a closing occurring on May 7, 2009 (Complaint #12). Defendant was not served with the Complaint (filed July 18, 2018) until October 30, 2018.

The "discovery rule" of S.C. Code Ann. §15-3-535 provides that "all actions must be commenced within 3 years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action". Plaintiff alleges (Complaint #53) that he did not discover his claims against Defendant until receiving a letter dated July 19, 2017, from the Buyer's attorney stating that Defendant had informed the Buyer's attorney that no commission was payable at closing. However, this Court finds that the Plaintiff knew, and certainly by the exercise of reasonable diligence, should have known that he had a cause of action, when no commission was paid at closing on May 7, 2009, and not paid after a formal 15 day demand letter for payment on October 29, 2009. (Complaint # 20-21).

Commencement of the period of limitations begins when Plaintiff "could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Dorman v. Campbell*, 331 S.C. 179, 500 S.E.2d 786 (S.C. App. 1998) at page 789. Although Plaintiff alleges he exercised "reasonable diligence" (Complaint paragraph 53), *Dorman, p.789,* states:

> The exercise of reasonable diligence means that an injured party must act promptly where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought or a full-blown theory of recovery developed.

See Martin v. Companion Healthcare Corp., 357 S.C. 570, 575-76, 593 S.E.2d 624, 627 (Ct. App. 2004) (stating under the discovery rule, "the three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct"); *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (explaining reasonable diligence means "simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party **might** exist").

The "Injury or Claim" of Plaintiff is the non-payment of the Sales Commission by the Seller at the closing on May 7, 2009. Plaintiff admits that his Broker-in-Charge sent a written demand to both attorneys for the Seller and Buyer on October 29, 2009, providing 15 days to pay the Commission, and admits that this demand was not met (Complaint # 19-21). Plaintiff also admits that he knew that the demand had not been met by the 15 day deadline. (Complaint #22-24). The latest date that Plaintiff would have been put "on notice" that he had a claim against another party for the Commission would have been November 13, 2009, the 15 day deadline lapse of the October 29, 2009, demand letter. The three (3) year statute of limitations would have expired no later than November 13, 2012. However, no legal action was ever filed against the Seller or closing attorneys, until this lawsuit was filed on July 18, 2018, after expiration of the Statute of Limitations.

3) Plaintiff's claims for a commission are illegal and void as against public policy.

Plaintiff admits (Complaint paragraph 16) that:

"By regulation and law, the Commission could not be paid directly to the Plaintiff but must instead had to be made to the Broker in Charge for the realty for whom he was working".

Further, the Contract dated August 2, 2007 (Complaint #9), under which Plaintiff claims a commission, provided that any commission must be paid to the Broker in Charge and not to Plaintiff.

Plaintiff cannot maintain this action to recover any commission, when the laws, regulations and contract forbid any direct payment to him of said commission.

4) Plaintiff lacks standing to bring this action.

The proper party to bring an action for the sales commission, pursuant to the admitted laws and regulations, and the contract, must be the Broker-in-Charge of the realty company, not the Plaintiff.

5) The Conspiracy claim also fails by not being a separate and distinct claim with "special damages".

The allegations of the Second Cause of Action (Paragraphs 84-86 of the Complaint) contain the exact same acts in the preceding Cause of Action (Paragraphs 79-81), with the exception of naming the Seller as a participant in the alleged actions which resulted in the purported damages (ie, omitting payment of the commission) to Plaintiff. *Hackworth v. Greywood at Hammet, LLC*, 385 S.C.110, 682 S.E.2d 871 (S.C. App 2009), states that, if the plaintiff simply reiterates the allegations in its other causes of action in its civil conspiracy claim, without being separate and distinct from the other claims, then the civil conspiracy claim would fail. c.f. *Todd v. S.C. Farm Bureau*, 276 S.C. 284, 278 S.E.2d 607 (1985).

Further, *Hackworth* holds that "if a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed. See *Vaught,* 300 S.C. at 209, 387 S.E.2d at 95, which held that "because no special damages are alleged aside from the breach of contract damages, we hold the conspiracy action is barred under *Todd".* Plaintiff's attempt to allege "special damages" by simply calling the same damages alleged in the First Cause of Action "special damages", does not make said damages "special". The only damages specified in both causes of action are money damages from non-payment of the commission and loss of investment. (Comparing Paragraphs 70, 71, and 86 with Paragraphs 81-82).

Therefore, because Plaintiff has failed to allege facts for his civil conspiracy claim separate and distinct from his other claims, and because he has failed to plead special damages arising from the civil conspiracy, there is an additional ground to dismiss the conspiracy claim.

In summary, the Court finds that (1) an expert affidavit is required by S.C. Code Ann. §15-36-100 and was not filed with the Complaint; (2) the applicable statute of limitations for the Complaint expired; (3) Plaintiff's claims are void as against public policy, the laws and regulations of South Carolina, and the underlying contract; (4) Plaintiff lacks standing to bring this action, and (5) additionally, the "Conspiracy" claim fails by not pleading separate and distinct "special damages". Accordingly, the entire Complaint is hereby dismissed, with prejudice.

IT IS SO ORDERED:

_____, South Carolina

_____, 2019

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Honorable Eugene C. Griffith, Jr.
Judge, Fourteenth Judicial Circuit

Beaufort Common Pleas

Case Caption: Floyd Hargrove VS Anthony E Griffis Sr

Case Number: 2018CP0701449

Type: Order/Dismissal

It is so ordered

Eugene C. Griffith, Jr. 2154