THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge

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

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Chris **Khamnei**, ... Appellant,

v.

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

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APPELLANT'S FINAL BRIEF

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July 22nd, 2019

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STATEMENT OF THE CASE

1. On or about March 17th, 2017, Chris C. Khamnei and Columbus Street Holdings, LLC (Eric Poulin and Roy Willey being members of the LLC) entered into a standard South Carolina Real Estate Purchase and Sales Agreement ("P&S") which described that Appellant would sell to Respondents a property located at 1 Drews Alley, Charleston, SC ("Property") for the sum of $226,000 and close on or about April 21st, 2017. The P&S was signed by Chris C. Khamnei as seller and Roy Willey & Eric Poulin as buyers. The P&S states that if Buyer defaults the Contract for any reason then the Seller is entitled to costs of litigation. *See* Record on Appeal for Chris C. Khamnei v. Columbus Street Holdings Pages 67-85 ("R. pp. 67-85").
2. Appellant experienced complications due to his own family members delaying the sale and closing of the Property. Specifically, a Lis Pendens [2017LP100240] was filed on the property and tenants occupied the property without Appellant's knowledge or consent. The Appellant is a resident of Vermont. The Respondents are residents of Charleston where the Property is situated. The Respondents were involved with the property and the spoke with all the tenants. They offered all but one tenant leases to continue their residency at the Property. They never alerted Appellant they would like additional tenants evicted (ejected).
3. In exchange for Respondent closing on the same day as previously agreed using a Quit Claim Deed, Appellant agreed to reduce the price of the property by $26,000 and hold an additional $50,000 in escrow to be released upon the successful cancellation of the Lis

Pendens and the eviction of Travis Davis (whom was involved with the Lis Pendens) that Respondents identified as a tenant they wished to have removed. *See* R. p. 9, lines 7-14.

4. On or about May 20th, 2017, Appellant completed both tasks and requested the escrow funds to be released. On or about June 2nd, 2017, Appellant begged Respondents to release the funds because he would incur $15,000 in penalties on a different obligation if it was not paid on or about June 6th, 2017. The Respondent, specifically Roy T. Willey, being informed about Appellant's financial obligation, offered to release the funds if Appellant forfeited an additional $10,000 unjustly enriching Respondents. There was no justification for their request only that they were in a position of power and believed they could take money from the Appellant thereby constituting a fraudulent act.
5. On or about August 10th, 2017, Appellant filed a complaint for Breach of Contract. *See* R. pp. 7-28.
6. On or about September 5th, 2017, Appellant amended the complaint and included Breach of Contract with a tortious act. *See* R. pp. 29-51.
7. On or about September 13th, 2017, Respondent's filed a Motion for Partial Dismissal which requested that the very people that breached the contract with fraudulent intent be dismissed from the case because they were merely members of the LLC. *See* R. pp. 52-56.
8. On or about November 15th, 2017, Appellant filed an Opposition to Defendant's Motion for Partial Dismissal. *See* R. pp. 57-63.
9. On November 17, 2017, the Trial Court heard Respondent's Motion for Partial Dismissal and improperly granted dismissal of the Respondent as parties to the case and improperly struck a well-pleaded claim but granted Appellant relief to bring back the claim if it could proven to the court during discovery to be factual.

STANDARD OF REVIEW

In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). A 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Id.* The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.*

"We think that the pleading should not have been stricken and that the ultimate questions raised by the alleged defense should be decided in the light of all of the facts and circumstances adduced upon the trial, rather than being decided simply on the pleadings." The Defendant's strategy is to avoid having a trial in light of all of the facts because it is simply not to their advantage. *Sams v. Sams*, 247 S.C. 467 (1966).

A motion to dismiss a counterclaim must be based solely on the allegations set forth in the counterclaim. See Rule 12(b)(6), SCRCP; *Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "A Rule 12(b)(6) motion may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the [complainant] to any relief on any theory of the case." *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602–3 (1995).

"A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the

factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true." *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (*quoting Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013)). If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Clearwater Tr. v. Bunting*, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006). "Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 650, 780 S.E.2d 263, 271 (Ct. App. 2015); *Spence v. Spence*, 368 S.C. 106, 116-17, 628 S.E.2d 869, 874 (2006).

An action for breach of contract accompanied by a fraudulent act is an action ex *contractu*, not *ex delicto, Cain v. United Insurance Company of America*, 232 S.C. 397, 102 S.E.2d 360; *Ross v. American Income Life Insurance Company*, 232 S.C. 433, 102 S.E.2d 743; however, it partakes of elements of both contract and tort. *Lister v. Nations Bank of Delaware, N.A.*, 329 S.C. 133, 141-42, 494 S.E.2d 449, 454 (Ct. App. 1997).

To establish a claim for breach of contract accompanied by a fraudulent act, a party must show: (1) a breach of contract; (2) fraudulent intent relating to the breaching or the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Conner v. City of forest Acres,* 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002).

"Fraudulent act" is broadly defined as "any act characterized by dishonesty in fact or unfair dealing."' *Id.* at 466, 560 S.E.2d at 612. "Fraud, in this sense, assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat and allow the facts and circumstances peculiar to each case to bear heavily

upon the conscience and judgment of the court or jury in determining its presence or absence." *Id.* (*quoting Sullivan v. Calhoun*, 117S.C. 137, 139, 108 S.E. 189, 189(1921)).

Breach of contract accompanied by a fraudulent act requires fraudulent intent relating to the breaching of the contract and not merely to its making, and such proof may or may not involve false representations. *Ball v. Canadian Am. Exp. Co .*, 314 S.C. 272, 276, 442 S.E.2d 620, 623 (Ct. App. 1994). "Fraudulent intent is normally a factual question proved by circumstances surrounding the breach." *Floyd v. Country Squire Mobile Homes. Inc.*, 287 S.C. 5 L 54, 336 S.E.2d 502, 503-04 (Ct. App. 1985). "The fraudulent act may be proved to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character." *D.R. Horton. Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 555-56, 730 S.E.2d 340, 354 (Ct. App. 2012), *aff'd in part as modified, vacated in part*, 410 S.C. 319, 764 S.E.2d 701(2014)(citing id. at 54, 336 S.E.2d at 504.))

> In all of the decided cases in this State on this subject [breach of contract accompanied by a fraudulent act] the underlying principle of law is that there must be proof of some fraudulent act, other than the mere receiving of the money, either in the inception of the contract or in its nonfulfillment and fraudulent breach. For example, in a case where, after the contract was entered into to work a crop on halves, and after the cropper had been induced to labor to make it he was run off the premises by the landlord, who gathered the crop, and refused to settle with the cropper, it is clear that the subsequent taking of the crop was a fraudulent act accompanying the breach with fraudulent intent to cheat and defraud. *Sullivan v. Calhoun*, 117 S.C._137,108_S.E._189; *Ford v. Ball.* 178 S.C. 111, 182 S.E. 319: *Moody v. Stem*, 51 S.E.2d 163 (S .C. 1948).

Furthermore, the comments to S.C. Code Ann § 33-44-303 provide, "[a] member or manager, as an agent of the company, is not liable for the debts, obligations, and liabilities of the company simply because of the agency. A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in a tort against the member

or manager if that person were acting in an individual capacity." S.C. Code Ann. § 33-44-303 cmt. South Carolina has interpreted this statute to create liability in LLC members, individually, if their individual conduct was the basis for the offending act or omission on the part of the company. *See generally, 16 Jade St., LLC v. R. Design Const. Co.*, 398 S.C. 338, 347, 728 S.E.2d 448, 453 (2012), opinion withdrawn and superseded on other grounds on reh'g sub nom. *16 Jade St., LLC v. R. Design Const. Co ., LLC*, 405 S.C. 384, 747 S.E.2d 770(2013).

This interpretation is also consistent with the law in South Carolina regarding piercing the corporate veil. "Generally, a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears; but when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons." *Hunting v. Elders* 359 S.C. 217, 597 S.E.2d 803 (S.C. App. 2004), rehearing denied, *certiorari* granted, *certiorari* dismissed.

ARGUMENT

The Court of Common Pleas under the Circuit Court Judge J.C. Nicholson, Jr. (Circuit Court Case No. 2017-CP-10-4112) ruled that: "The motion granted as to the individuals denied as to the LLC. The facts in Paragraphs 60 and 61, in this Court's opinion, did not amount to the facts giving rise that buyers acted outside the corporation, nor in compliance with anything in the LLC statute. However, I will give him [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 of 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."

I. Did the Trial Court improperly dismiss Appellant's well-pleaded claim of breach with the intent to wrongfully gain a financial advantage?

In Respondent's Motion for Partial Dismissal, they improperly claim that "Plaintiff has not alleged, and cannot point to or prove any specific fraudulent act". The Trial Court somewhat believes respondent as evidenced in the hearing transcript Page 13 and Line 2-7 as follows:

THE COURT: Well, it doesn't say extort.

MR. WILLS: Yes, Your Honor, it's 61, it does.

THE COURT: Where does it say extort?

MR. WILLS: In Paragraph 61. Columbus intentionally breached the agreements with plaintiff in order to wrongfully gain a financial advantage and extort money.

Specifically, the Appellant makes a proper well-pleaded claim in the Amended Complaint ¶¶60-61 as follows:

60. Knowing of Plaintiffs financial urgency in obtaining the release of the escrow funds, Willey and Poulin, on behalf of Columbus Street, intentionally breached the Agreements with Plaintiff to force Plaintiff into the position of having to choose whether to pay Columbus Street $10,000, or lose $15,000 as a penalty for defaulting on Plaintiffs other obligation.

61. Columbus Street's and Willey and Poulin' s intentional breach of the Agreements with Plaintiff in order to wrongfully gain financial advantage and extort money from Plaintiff constitutes dishonesty in fact and unfair dealing.

The Appellant made a proper claim in the Amended Complaint in Plaintiff's Complaint alleges just those aspects or Willie and Poulin's conduct on behalf of Columbus Street in intentionally creating a breach of the contract for the purpose of then extorting additional money from Plaintiff. The allegations of Plaintiff's Complaint, taken in the light most favorable to Plaintiff and for the purpose of surviving a 12(b)(6) motion to dismiss are not only sufficient with regard to his cause of action against all defendants for breach of contract accompanied by a fraudulent act

but also state facts sufficient to make out a cause of action for piercing the corporate veil. See *Pilkington v. McBain*, 274 S.C. 312, 315, 262 S.E.2d 916, 918 (1980)(the complaint must be liberally construed in favor of the pleader and left standing if the allegations, however uncertain, fairly constitute a cause of action for damages). According to the standard of review all of Appellant's claims should be heard and the Trial Court should NOT have dismissed the parties.

II. Did the Trial Court improperly dismiss the individuals of the LLC as parties to the case?

Because Plaintiff's Complaint alleges facts sufficient to support a cause of action for breach of contract accompanied by a fraudulent act and alleges facts sufficient to implicate Willie and Poulin's individual tortious conduct and actions as agents of their LLC, partial dismissal of Plaintiff's claims against them individually is not appropriate.

III. Did the Trial Court deprive Appellant of a right to a jury trial for the issue claiming breach with intent to wrongfully gain a financial advantage?

Appellant brings to the honorable court's attention that he is not a trained or educated attorney and has a limited understanding of the law. He also brings to the court's attention that he has five children in which two are in college with tuition payments. Respondents have wrongfully withheld the release of Appellant's money and severely damaged Appellant leaving him in a position not to be able to afford an attorney. The first counsel resigned because Appellant couldn't afford to pay him. The second council hired by Appellant is doing the same. From a layman's point of view, the hearing held on November 17th, 2017, dismissed the Defendants and claims before merits were heard and a trial was held. However, the judge said, if you can prove in discovery that there is sufficient evidence then you can bring back a claim. In essence, under this decision, a Plaintiff would NOT be allowed to file a civil matter unless they can first prove that their evidence is sufficient and thereby forfeit the right for a jury to hear their

issues. Effectively, the Trial Court granted itself jurisdiction over the issue of breach with fraudulent intent to be heard by the bench before it could be heard by a jury. *Beacon Theaters, Inc. v. Westover*, 359 US 500 (1959); *Dairy Queen, Inc. v. Hon. Harold K. Wood, Judge, et al.*, 369 U.S. 469 (1962); *Fitzgerald v. United States Lines Co.*, 374 U.S.16 (1963). In all three cases, the United States Supreme Court holds that in most situations, under the Seventh Amendment to the United States Constitution, a Trial Court cannot take away a litigant's right to Jury Trial, by the Trial Court deciding issues having res judicata or collateral estoppel effect on the Jury's decision-making authority.

CONCLUSION

Please reverse the Trial Court's decision and allow the claims to be heard by a jury in a fair trial. Appellant has substantial evidence and witnesses to prove that Respondent's acted in bad faith only to be unjustly enriched. Because of the Trial Court's decision, the Respondents have refused to provide discovery claiming it is now irrelevant to a simple Breach of Contract matter.

Respectfully Submitted and Dated at Burlington, Vermont on July 22nd, 2019,

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