

STATE OF SOUTH CAROLINA

COUNTY OF YORK

KAREN K. BABER,

Plaintiff,

vs.

SUMMIT FUNDING, INC., APPRAISAL
INNOVATIONS, LLC, BRIAN L. BLUE, THE
GILLEN LAW FIRM, P.A., MICHAEL F.
GILLEN, ALLEN TATE CO., INC., COLLEEN
COESENS, JONATHAN GARVEY, ROBERT
OUZTS, CONNIE DELANEY, and GLORIA
LONG-ROBINSON,

Defendants.

IN THE COURT OF COMMON PLEAS
2018-CP-46-01592

RECEIVED

AUG 28 2019

SC Court of Appeals

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT**

THIS MATTER comes before the Court upon the Motion for Summary Judgment (“Motion”) filed on March 5, 2019 by Defendants Allen Tate Co., Inc. (“Allen Tate”), Colleen Coesens (“Coesens”), Jonathan Garvey (“Garvey”), Robert Ouzts (“Ouzts”) and Connie Delaney (“Delaney”) (collectively, the “Tate Defendants”). The Court conducted a hearing in this matter on April 3, 2019 after proper notice to all parties. Present at the hearing were Plaintiff Karen Baber (“Baber”), counsel for the Tate Defendants, Thomas L. Ogburn III, counsel for Summit Funding, Inc., Susan Driscoll, and counsel for Appraisal Innovations, LLC and Brian L. Blue, Russell Racine.

In support of the Motion, the Tate Defendants presented the Motion, a supporting brief, the Plaintiff’s deposition transcript and selective exhibits, the Tate Defendants’ Requests for Admission and the Affidavit of Thomas L. Ogburn III. In opposition to the Motion, Baber presented an Affidavit of Plaintiff Karen K. Baber in Opposition to the Tate Defendants’ Motion for Summary Judgment and attached exhibits (“Baber Affidavit”).

As an initial point, Ms. Baber announced at the beginning of the hearing that Creighton Coleman was in the process of filing an appearance on her behalf in this matter. The undersigned contacted Mr. Coleman by telephone in open court. Mr. Coleman told the Court that he had agreed to meet with Ms. Baber on Friday, April 5, 2019, but had not yet agreed to represent her in this matter. Mr. Coleman confirmed that he was not representing Ms. Baber in defending the Tate Defendants' Motion. Based on this representation and Ms. Baber's presence in the courtroom, the Court exercised its discretion to proceed in hearing the Motion.

On April 8, 2019, after the hearing on the Motion, Mr. Coleman sent a letter to the Court announcing that he and Glenn Bowens were now representing Baber and requesting that the Court deny the Motion without prejudice because discovery was not complete. Mr. Coleman also requested that the Court set a supplemental hearing on the Motion at least 30 days later to allow he and Mr. Bowens ample time to review Baber's file, complete discovery and prepare a response to the Motion. The Tate Defendants opposed this request. Based on, among other things, Mr. Coleman's prior representation at the time of the hearing that he was not representing Baber, the fact that the Motion was based on Baber's own testimony and the prejudice that the Tate Defendants would suffer if the Court were to conduct another hearing on the Motion, Mr. Coleman's request is denied in the Court's discretion.

At the hearing, Counsel for the Tate Defendants objected to the Court's consideration of the Baber Affidavit in opposition to the Motion because, among other things: (1) the Baber Affidavit contains hearsay and does not comply with Rule 56(e), SCRCP; (2) Baber testified in her deposition that e-mails that she produced to all of the Defendants may have been the product of "cutting and pasting" multiple e-mails or combining multiple e-mails and the Tate Defendants

argued that most of the e-mails attached to the Baber Affidavit were not accurate representations of the actual e-mails; and (3) the Baber Affidavit may contain e-mails that were falsified, such as Exhibit 13 of the Baber Affidavit, which was not an accurate representation of Exhibit 14 from Baber's deposition. Additionally, the Tate Defendants objected to the Court's consideration of the Baber Affidavit to the extent that it contradicted her sworn deposition testimony. After reviewing and considering the Baber Affidavit the Court overrules the Tate Defendants' objection and has considered the Baber Affidavit in ruling on the Motion.

Based on the Court's review of the documents submitted by the parties, the pleadings in the Court's file and the arguments of counsel and Baber, the Court determines that there is no genuine issue as to any material fact in this matter and the Tate Defendants are entitled to judgment as a matter of law on all of Baber's claims against them. Therefore, the Court grants the Motion on the grounds set forth herein.

FACTS

1. Baber is a former South Carolina licensed real estate broker who has also worked for attorneys in handling real estate closings. (Deposition of Karen Baber ("Baber Dep."), pp. 22-23).

2. In January, 2015, Baber was searching for a home to purchase in Rock Hill, South Carolina. At the time, she was working with Garvey, who served as her real estate agent pursuant to an Exclusive Right to Buy Buyer Agency Contract signed by both Baber and Garvey. (Baber Dep. p. 36 and Ex. 4).

3. Between January 9, 2015 and January 11, 2015, Baber and Garvey exchanged several e-mails about a property located at 255 Rolling Ridge Road, Rock Hill, South Carolina.

("Property") (Baber Dep., Ex. 5-7). As part of those e-mails, Baber questioned Garvey about certain issues with the Property that she identified when she walked through the Property, including the condition of the air conditioning, water heater, gas pack, deck, stove, siding, bedroom ceiling, windows, and roof shingles, among other things. (Id.) As part of this exchange, Garvey provided Baber with the Residential Property Condition Disclosure Statement ("Disclosure Statement") signed by Gloria Long-Robinson, the owner of the Property. (Baber Dep. pp. 59-60 and Ex. 7).¹

4. In the Disclosure Statement, Long-Robinson represented that *she had actual knowledge of problems with twelve of the fourteen systems described on page 2 of the Disclosure Statement*, including: the water supply, water quality, water pressure, sanitary sewer, roof system, gutter system, plumbing system, electrical system, appliances, built-in systems and fixtures, heating system and cooling system. (Baber Dep., Ex. 7, p.2). Long-Robinson also disclosed on page 3 of the Disclosure Statement that she was also aware of problems caused by water during her ownership. (Baber Dep., Ex. 7, p. 3). Many of these systems Long-Robinson identified in the Disclosure Statement as having problems were the same items that Baber had already observed and questioned in her e-mail exchange with Garvey between January 9 and January 11. (See, Baber Dep. Ex. 5-7).

5. Shortly thereafter, Baber submitted a proposed Agreement/Contract to Buy and Sell Real Estate to Long-Robinson in which she offered to purchase the Property for \$145,000.00. (Baber Dep. p. 75). The offer includes, among other things, a requirement that Long-Robinson

¹ Ms. Long-Robinson was represented in the sale of the property by Delaney and Ouzts, who are also defendants in this matter. (Baber Dep. p. 29).

pay for a home warranty for Baber. (Baber Dep. Ex., 9, § 14). Long-Robinson ultimately did not agree to purchase a home warranty on the property. (Baber Dep. p. 75). After Long-Robinson refused to purchase a home warranty, Baber testified that Garvey agreed to pay for a home warranty, but admitted that “well, if you don't, I will, because we need one.” (Baber Dep. p. 76).

6. On or about February 19, 2015, Baber and Long-Robinson entered into an Agreement/Contract to Buy and Sell Real Estate (“Purchase Contract”) pursuant to which Baber agreed to purchase the property for \$145,000.00. (Baber Dep. Ex. 11). The Purchase Contract clearly indicated that Baber was purchasing the property “As-Is, Where Is, With all Faults” and the sale was contingent on Long-Robinson’s lender approving a short sale of the Property. (Id. § 28 and Short Sale Addendum). The Purchase Contract did not require that a home warranty be purchased. (Id. § 14). The Purchase Contract gave Baber the right to inspect the condition of the Property and to have the property inspected for wood infestation. (Id. §§ 8 and 11).

7. Most of Baber’s claims against the Tate Defendants are based on alleged representations made by the Tate Defendants and others prior to closing that termite and home inspections had been performed and came back clear or that such inspections were a condition on her closing of the loan. Baber claims that had she known the true condition of the Property, she would not have purchased it. (See, e.g., Complaint ¶¶ 106, 135, 165).

8. Baber testified in her deposition that when she received the original appraisal of the Property on March 5, 2015 (Baber Dep. Ex. 16), she immediately questioned the accuracy of the appraisal because it did not identify the defects in Property she had spotted in January. (Baber Dep. pp. 110-113). More specifically, she was concerned that appraisal did not address:

a hole I thought I saw in the roof from the outside, two rusted holes in the air conditioner, the rotten and unsafe deck which I did not think met FHA standards, the rotten wood around the windows, window seals, overhangs, doors and signing, the gutters that were falling off and water spots in the ceiling.

(Baber Dep. pp. 112-113 and Ex. 17).

9. Baber closed on her purchase of the Property on May 29, 2015. (Baber Dep. P. 122). Immediately prior to closing, Baber notified Linda Mattison, the paralegal for the closing attorney, Michael Gillen, by e-mail that she “didn’t have a termite inspection done” and “did have an inspection/appraisal” which had been paid for. (Baber Dep. Ex. 14). Baber admitted in her deposition that she never received any bill for any inspections or any invoices for repairs to the Property prior to closing. (Baber Dep. pp. 90, 94).

10. As part of the closing, Baber concedes that she executed a Walk-Through Acknowledgment (“Acknowledgement”) in which she represented that she “accepts the repairs and condition of the property.” (Baber Dep. pp. 123-124 and Ex. 19). She also executed a Professional Services Disclosure and Election (“Professional Services Disclosure”) in which she did not indicate that she had selected anyone to perform a home inspection or a wood infestation inspection. (Baber Dep. p. 129 and Ex. 20).

11. Baber testified that within the first few days of her purchase of the Property on March 29, 2015 she was aware of the majority of the problems with the Property of which she now complains. (Baber Dep. pp. 130-131). She demanded a meeting with Coesens, Garvey and others at Allen Tate to discuss the Property and the fact that she did not receive a home warranty on the Property. (Baber Dep. 133-134).

12. Baber testified that she met with Coesens, Garvey and Ouzts on June 29, 2015. (Baber Dep. pp. 136-137). During that meeting, Allen Tate offered to pay Baber \$409.00 towards

the cost of a home warranty and asked her to sign a release of claims against Allen Tate and its agents in exchange for that payment. (Baber Dep. pp. 137-138).

13. On June 30, 2015, Baber purchased a home warranty (Baber Dep. Ex. 23). She received the \$409.00 payment and signed a General Release (“Release”) in which she released “Allen Tate Co., Inc., its parent entities, predecessors, successors and assigns, officers, directors, brokers, agents, employees and related and affiliated companies” (which includes all of the Tate Defendants) from:

any and all manner of, disputes, actions claims, demands, and liabilities whatsoever in law or equity, including complaints to any professional association or commission, and all claims for contribution and indemnification, arising from and by reason of any and all known and unknown, foreseen and unforeseen, injuries and damages, and the consequences thereof, related to and associated with the Offer to Purchase and Contract dated February 15, 2015 and any and all transactions and circumstances regarding the property located at 255 Rolling Ridge Road, Rock Hill, South Carolina.

(Baber Dep. pp. 138 and Ex. 22). Baber admitted in her deposition that she signed the release, received the payment and gave up all rights and claims against the Tate Defendants. (Baber Dep. pp. 139-140). Baber further conceded in her deposition that she gave the Tate Defendants the Release in exchange for the Tate Defendants providing her with the funds to purchase a home warranty. (See, Baber Dep. pp. 139-140, 141).

14. Baber filed this action on May 29, 2018 and has alleged that the Tate Defendants and others failed to disclose material information concerning the condition of the house, that many people made false representations about what inspections were required, that inspections were

performed that showed no issues with the house and Baber was ultimately fraudulently induced to purchase the property through a conspiracy among the defendants.²

15. On August 8, 2018, the Tate Defendants served Requests for Admission on Baber pursuant to Rule 36, SCRCF. As demonstrated in the Affidavit of Thomas L. Ogburn, Baber failed to timely respond to the requests for admission and failed to timely either seek an extension of time to respond or seek relief from the effects of Rule 36.

LEGAL STANDARD

Summary judgment shall be granted “if the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” Rule 56(c), SCRCF. A party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 592, 545 S.E.2d 500, 505 (2001). “Once the moving party carries its initial burden, the opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as the material facts but must come forward with specific facts showing that there is a genuine issue for trial.” Id. “The party opposing summary judgment cannot simply rest on mere allegations and denials contained in the pleadings.” Id. at 593, 454 S.E.2d at 505, citing Rule 56(e), SCRCF.

LAW/ANALYSIS

The Tate Defendants are entitled to summary judgment on all of Baber’s claims against them because there are no genuine issues of material fact and the Tate Defendants are entitled to

² All of Baber’s claims against Allen Tate Co., Inc. are based on the alleged acts of Coesens, Ouzts, Delaney and Garvey. (Complaint, ¶ 7-11). Baber does not allege any independent acts by Allen Tate Co., Inc.

judgment as a matter of law. Baber knowingly and voluntarily released all claims against the Tate Defendants when she executed the Release in exchange for the money to purchase a home warranty. As an additional ground for dismissal, the Tate Defendants are entitled to summary judgment on certain of Baber's claims against them because of admissions arising from Baber's failure to respond to Requests for Admission and on the remaining claim Baber admitted that she had no evidence to support it.

Release

The Release signed by Baber bars her claims in this action. All of Baber's claims against the Tate Defendants arise from her purchase of the Property on May 29, 2015, or from her execution of the Release shortly after closing. Baber testified that she was aware of the vast majority of alleged defects in the Property of which she now complains within a few days of closing and before she signed the Release. Baber further admitted in her deposition that she signed the Release in exchange for a payment of \$409.00 for a home warranty, that she received the funds and purchased the home warranty.

The clear, unambiguous language of the Release confirms Baber's deposition testimony and her understanding that she released all claims against the Tate Defendants based on a payment of \$409.00 for a home warranty, not based on any representations that Baber would be provided with copies of non-existent inspection reports. Therefore, the Tate Defendants' Motion should be granted and Baber's claims against the Tate Defendants should be dismissed, with prejudice.

Admissions by Plaintiff

The Tate Defendants are also entitled to summary judgment on Baber's second, third, fourth, eighth, and eleventh causes of action due to Baber's admissions arising from her failure to

respond to Requests for Admission and on Baber's first cause of action because Baber admitted that she had no evidence to support it.

Since Baber failed to timely respond to the Requests for Admission, it is deemed admitted for the purposes of this action that: (1) Baber was aware before she purchased the Property on May 29, 2015, that no termite inspection or home inspection had been performed on the Property; (2) she knew prior to purchasing the property that no CL-100 existed relating to the Property; and (3) she told one or more of the Tate Defendants that she did not want to pay for a home inspection or termite inspection. See, *Hinson-Barr, Inc. v. Pinckard*, 292 S.C. 267, 269-70, 356 S.E.2d 115, 116 (1987) ("Under Rule 36(a), SCRPC, all matters contained in a Request for Admission are admitted unless the party serves answers or objects within a certain time.").

Plaintiff's claims against the Tate Defendants in her Second, Third, Fourth, Eighth, and Eleventh causes of action are each based on alleged misrepresentations concerning whether a termite inspection or home inspection had been performed and the results of those inspections. (See, Complaint ¶¶ 112, 126, 132, 164, 180). Based on Baber's admissions, she was fully aware those inspections had not been performed and had told the Tate Defendants that she was not willing to pay for those inspections. Therefore, the Tate Defendants are entitled to summary judgment on those claims.

Finally, the Tate Defendants are entitled to summary judgment on Baber's first cause of action because Baber has conceded in her deposition that she has no evidence to support it. Baber's first Cause of Action alleges that Long-Robinson, Delaney, Ouzts and Allen Tate knew that the Disclosure Statement omitted material information concerning the condition of the Property.

(Complaint, ¶¶ 100-110).³ Baber admitted in her deposition that she had no evidence to support her First Cause of Action that Delaney and Ouzts knew that material information had been omitted from the Disclosure Statement. (Baber Dep. pp. 70-71). Therefore, the Tate Defendants are entitled to summary judgment on that claim as well. See, Chastain v. Hiltabidle, 381 S.C. 508, 520-21, 673 S.E.2d 826, 832-33 (Ct. App. 2009).

BASED ON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Mr. Coleman's request to deny the Motion and set a supplemental hearing is denied;
2. The Tate Defendants' objection to the Court's consideration of the Baber Affidavit is overruled; and
3. The Tate Defendants' Motion for Summary Judgment is granted and all of Plaintiff's claims against the Tate Defendants are dismissed with prejudice.

IT IS SO ORDERED.

[Signature contained on following page]

³ The Court previously dismissed the claims against Long-Robinson.



York Common Pleas

Case Caption: Karen K Baber VS Summit Funding Inc , defendant, et al

Case Number: 2018CP4601592

Type: Order/Summary Judgment

So Ordered

s/Daniel D. Hall 2753