Nettles Newton + Murphy Received on August 5, 2019 P.M.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	CIVIL ACTION NO: 2018-CP-40-06344
MB Hutson/MB Hudson, Plaintiff, vs. Penn America Insurance Company, Global Indemnity Group, Inc., Timothy J. Newton, Esq., J.R. Murphy, Esq., John Doe #1, John Doe #2, Defendants.	**ORDER GRANTING DEFENDANTS NEWTON AND MURPHY'S DISPOSITIVE MOTIONS**

This matter is before me upon motions to dismiss by Defendants J.R. Murphy and Timothy J. Newton. Newton, joined by Murphy, also moved for summary judgment pursuant to Rule 12(b) and 56(b) of the South Carolina Rules of Civil Procedure. Defendants Penn-America Insurance Company and Global Indemnity Group, Inc. (hereinafter collectively "PAIC") also filed a motion for summary judgment. This matter was heard on June 26, 2019. The Plaintiff and Defendants Murphy and Newton appeared *pro se*. Christian Stegmaier represented PAIC.

This matter presents the question of whether a putative insured has a cause of action against coverage counsel representing a liability insurer. Under the circumstances of this case, I find that Plaintiff has failed to state a cognizable claim.

Plaintiff argues that questions of fact exist that prevent disposition of his claims at this stage of the case. However, the nature of Plaintiff's claim raises several threshold legal questions that must be addressed before proceeding to the merits. As noted above, a question of law exists as to whether Plaintiff has standing to assert this claim. A second question of law is whether Hutson has pled a recognized cause of action against Murphy and Newton. Yet another legal question is presented as to the effect of the release. Hutson's claim fails as a matter of law.

PLAINTIFF'S ALLEGATIONS

Plaintiff M.B. Hutson filed this action on December 5, 2018 and amended his complaint on December 28, 2018. Hutson also filed a supplemental memorandum, an affidavit, and exhibits. Construed broadly, Hutson alleges Newton knew that a fraud upon the court was committed in a prior action and failed to report the fraud or to otherwise take action to vindicate Hutson's rights. Hutson's allegations concern a campground known as Big Water Resort in Clarendon County.

Specifically, Hutson alleges that he entered into a Lease Purchase Agreement with certain non-parties to this action, TLC Holdings, LLC and its principals (hereinafter collectively "TLC"), to lease and ultimately purchase certain property located at 5215 Dingle Pond Road in Summerton (hereinafter "the Property"). Hutson alleges that when this transaction was negotiated, he notified TLC that he intended to purchase and develop lakefront condominiums on the Property.

Hutson alleges that TLC told him during these negotiations that TLC owned the Property and that a campground business located on the Property was owned by a separate entity, Big Water Resort, LLC. As alleged, TLC told Hutson that in order to purchase the Property, he would have to purchase Big Water Resort, LLC as well.

Hutson further alleges that TLC failed to disclose key facts to him during these negotiations. Specifically, TLC allegedly represented that water and sewer capacity were available for a development when in fact they were not, and misrepresented the financial condition of Big Water Resort, LLC. TLC also allegedly failed to disclose certain debts owed by Big Water Resort, LLC, including a debt owed to Black River Electric.

Hutson's key allegation is that TLC failed to disclose to Hutson that Big Water Resort, LLC had entered into Retail Membership Agreements (hereinafter "Campground Memberships" that granted the members of the campground the right to use the campground facilities for up to

two lifetimes. Hutson alleges that when he performed a title search, he did not find the Campground Memberships because they were not recorded.

Hutson alleges that these hidden defects rendered title to the Property unmarketable. As a result, the Property was undevelopable and the Property and Big Water Resort, LLC were worthless.

Exhibits establish that Hutson entered into the Lease Purchase Agreement with TLC in December of 2010. Hutson also entered into a Membership Interest Purchase Agreement at the same time. Through this agreement, Hutson became the sole principal in Big Water Resort, LLC.

Hutson alleges that the Defendants in this action knew that TLC's attorneys had committed "Extrinsic Fraud on the Courts" in a Settlement Agreement and Consent Order. This fraud was allegedly "carried over" into a defamation action filed by TLC against Hutson.

In support of this allegation, Hutson quotes an e-mail from Defendant Newton. Hutson alleges that Newton gave him "legal advice" in the e-mail. Hutson does not allege that he acted upon the purported legal advice. Instead, Hutson alleges that the e-mail establishes Newton's knowledge of the fraud perpetrated on him by TLC. Hutson claims that Newton's failure to act on the knowledge of this alleged fraud damaged Hutson by causing Hutson to be unsuccessful in his litigation against TLC.

Broadly construed in favor of Hutson, the e-mail indicates that Newton was aware of evidence corroborating Hutson's claims that he was defrauded. These include evidence from prior cases that:

- TLC knew Hutson wanted to develop waterfront property;
- the Campground Memberships (as well as an alleged lease between TLC Holdings, LLC and Big Water Resort, LLC) were not recorded;

- the Lease Purchase Agreement, the Membership Interest Purchase Agreement, and the Campground Memberships do not specify which portions of the Property were part of the campground;
- one campground member testified she thought all of the Property was campground property;
- the campground members were not parties to the Settlement Agreement;
- the Settlement Agreement had provisions for an acreage release in conjunction with which Hutson agreed to submit a plat to TLC for its approval for a subdivision development on the Property; and
- exhibits to a separate bankruptcy action appeared to indicate that the subdivision TLC approved was on the campground site.

This e-mail is dated August 13, 2018. In the e-mail, Newton stated that "If you were ordered to develop property that was subject to lifetime use rights, that probably should have been brought to the court's attention." Newton told Hutson that Newton did not represent Hutson, and that if Hutson wanted to pursue litigation against TLC, he should hire an attorney.

Hutson asserted several purported causes of action in his Amended Complaint. However, the gist of Hutson's claim appears to be that Newton's admitted knowledge of the above facts, coupled with certain statements about the law regarding these facts that Hutson calls "legal advice," created a duty on the part of the Defendants to report fraud and/or to prosecute or pay for the prosecution of Hutson's claims against TLC. Hutson made no allegations specific to Murphy.

Newton's e-mail does not state that TLC committed fraud upon the court. However, in response to Newton's briefing, Hutson submitted an affidavit averring that Newton told him verbally on several occasions that Newton knew that Hutson had been defrauded.

NEWTON'S CONTENTIONS

Newton denied Hutson's allegations. In response, Newton pointed to a letter Hutson attached to his Amended Complaint. That letter recounts that the e-mail Hutson quoted in his Amended Complaint was part of ongoing settlement negotiations.

As set forth in the letter, Hutson had threatened to sue Defendant Penn-America Insurance Company for failure to procure a *supersedeas* bond while an appeal was pending from a judgment rendered against Hutson for $3,500,000. During the course of those negotiations, Hutson offered to refrain from filing suit if Penn-America would join Hutson in a lawsuit against TLC. The e-mail Hutson quoted was in response to several e-mails from Hutson under the subject heading, "Setting Aside the Judgment," in which Hutson represented to Newton that Hutson was not aware at the time he purchased the property that all of the Property he purchased was subject to the lifetime Campground Memberships.

Newton submitted the entire series of e-mails in support of his motion. Hutson did not object to these documents or dispute their authenticity at the hearing. In response, Hutson submitted additional materials, but those materials did not contradict Newton's account in either the letter attached to Hutson's Amended Complaint or the series of e-mails Newton submitted.

Newton submitted court records demonstrating that Defendants Newton was not involved in any of the above-referenced cases. Newton's sole involvement in litigation with Hutson was that he represented Penn-America for purposes of a declaratory judgment action filed in federal court in June of 2016. Penn-America was notified of claims against Hutson in February of 2016 and it began defending Hutson in two lawsuits under a liability policy Penn-America issued to one of Hutson's companies, BWR, Inc.

PRIOR RELATED LITIGATION

Hutson's Amended Complaint alleges fraud that occurred in prior litigation. Newton submitted several judicial orders that bear upon Hutson's claims in this action. Because Hutson's allegations concern events that occurred in prior cases, a summary of the prior litigation and the judicial orders is necessary in order to evaluate Hutson's claims in this action.

The Ejectment Action

In late 2011, TLC filed an action for ejectment and breach of lease in the Court of Common Pleas for Clarendon County. TLC Holdings, LLC v. M.B. Hudson a/k/a M.B. Hutson, Civil Action No. 2011-CP-14-00602 (the Ejectment Action"). The Settlement Agreement and Consent Order that Hutson attached to his pleading and alleged are fraudulent were filed in the Ejectment Action. Court records reflect that Newton was not involved in the Ejectment Action. Hutson was represented by separate counsel throughout the course of the Ejectment Action.

In the Ejectment Action, TLC alleged that Hutson breached the Lease Purchase Agreement and failed to make lease payments. Hutson answered and asserted counterclaims against TLC. Among the issues Hutson raised in his counterclaim were the alleged undisclosed sewer moratorium and outstanding debt owed to Black River Electric Cooperative.

The Settlement Agreement, which was filed on April 13, 2012, imposes certain duties on Hutson, including the duty to make lease payments. Hutson was permitted to stay on the Property and the Lease Purchase Agreement remained in force. One of the terms of the Settlement Agreement was that Hutson agreed to submit a Qualified Plat for TLC's approval for a subdivision project on the Property. Court records from the Ejectment Action appear to confirm that the agreed-upon location of the proposed subdivision would be on the campground property. The Settlement Agreement specifically provided that if Hutson breached the terms of the Agreement, the Lease Purchase Agreement would be automatically terminated upon the filing of TLC's affidavit of default. In that event Hutson would be required to immediately vacate the property. Additionally, Hutson would be deemed to have released TLC from any conduct involving Big Water Resort through the date of Hutson's breach. The Settlement Agreement was incorporated into a Consent Order that was also filed on April 13, 2012.

None of the Defendants in this action were involved in negotiating the Settlement Agreement and Consent Order. Hutson was represented in that transaction by Paul Weissenstein.

TLC subsequently filed an Affidavit of Default in December of 2013. Hutson sought a temporary restraining order and moved to set aside the affidavit of default. On the date set for the hearing, Hutson filed bankruptcy. The bankruptcy court lifted the stay for a determination whether Hutson had an equitable interest in the Property.

In an Order filed March 21, 2014, Judge (now Justice) George C. James, Jr. ruled that Hutson breached the Settlement Agreement. He found that Hutson's breach was not caused by TLC's actions. Judge James ruled that by the terms of the Settlement Agreement, Hutson's breach terminated the Lease Purchase Agreement and required Hutson to immediately vacate the Property. Hutson was represented by counsel (E. Freeman Belser) at this hearing.

Hutson's postcard

Shortly after Hutson was notified of TLC's Affidavit of Default, Hutson sent a postcard (hereinafter "the Postcard") to all the campground members. In the Postcard, Hutson stated that both he and they were victims of a scam perpetrated by TLC. This led to two additional lawsuits.

The Class Action

The campground members filed a putative class action against TLC in federal court in April of 2014. Reed v. Big Water Resort, LLC, Civil Action No. 2:14-cv-1583-DCN-MGB (hereinafter "the Class Action"). The campground members settled their claims with TLC in February 2016. However, TLC asserted third-party claims against Hutson. Hutson also asserted counterclaims against TLC. TLC raised the automatic release provision in the 2012 Settlement Agreement as a defense to Hutson's counterclaims. Cross-motions for summary judgment were referred to Magistrate Judge Mary Gordon Baker for a hearing.

Magistrate Judge Baker's recitation of Hutson's counterclaims indicates that many of allegations Hutson raised in the Class Action are substantially the same allegations that Hutson raised in the Ejectment Action. In particular, Hutson alleged that TLC failed to disclose the financial location of Big Water Resort, LLC, the sewer moratorium, and the debt owed to Black River Electric when Hutson purchased the Property. Reed v. Big Water Resort, LLC, 2016 WL 7435620 at *4 (D.S.C. signed Apr. 5, 2016). Hutson also alleged that TLC failed to disclose the Campground Memberships with their lifetime use rights to Hutson when he purchased the property. Id.

Baker found that the release in the 2012 Settlement Agreement barred all of Hutson's counterclaims except for his defamation claim. Baker specifically found that the Settlement Agreement could not be set aside due to fraud. Id. at *12. After a thorough review of the evidence Hutson presented, Baker concluded that "All of Hutson's claims pertaining to fraud relate to the ***original*** transaction, ***not the Release***." Id. at *14 (emphasis in original).

Baker specifically found that Hutson was aware of the Campground Memberships when he purchased the Property. Id. at *13 n.5. She cited correspondence dated November 2012 between Hutson, his realtor, TLC's realtor, and an attorney, regarding the effect of the lifetime memberships on the marketability of the title to the property. Id. This took place before Hutson signed the Lease Purchase Agreement and the Membership Interest Purchase Agreement.

At the time Magistrate Judge Baker heard the motions, Hutson was *pro se* as to his counterclaims. Hutson had an attorney prior to March 26, 2015, but that attorney (Matthew D.Hamrick) had been relieved as counsel. Hutson was *pro se* as to his counterclaims through the remainder of the Class Action. Counsel retained by Defendant Penn-America to defend Hutson (Laura Paton) had only appeared in the case a month earlier, and Paton only represented Hutson with respect to his defense. Id. at *8.

On May 20, 2016, District Judge David C. Norton granted TLC's motion for summary judgment as to Hutson's counterclaims. Judge Norton ruled that Hutson's counterclaims were barred by *res judicata*. Reed v. Big Water Resort, LLC, 2016 WL 2935891, *5-*8 (D.S.C. signed May 20, 2016). Judge Norton adopted Magistrate Judge Baker's factual findings as to Hutson's claims of alleged fraud. Id. at *7. He also found that all of Hutson's allegations of fraud related to the original transaction and not the procurement of the release. Id. at *7-*8.

The Defamation Action

In 2015, TLC filed suit against Hutson for defamation. TLC alleged that the defamatory statements he made in the Postcard he mailed to the campground members instigated the Class Action against TLC. TLC Holdings, LLC v. M.B. Hutson a/k/a M.B. Hudson, Civil Action No. 2015-CP-14-00615. Hutson also asserted counterclaims against TLC in the Defamation Action.

On March 17, 2017, Judge R. Ferrell Cothran, Jr. granted TLC's motion for summary judgment as to TLC's counterclaims. After reviewing the three above-referenced orders, Judge Cothran concluded that Hutson's counterclaims were barred by *res judicata*. Judge Cothran ruled that Hutson "never alleges that [TLC] perpetrated any sort of fraud or otherwise committed wrongful conduct, in relation to the parties' execution of the Settlement Agreement. . . . . In other words, the fraud that Hutson here complains of is fraud related to the *original transaction*, not the *release*." Penn-America originally retained Laura Paton to defend Hutson in the Defamation. In February 2017, Frank J. Gordon was substituted as counsel for Hutson.

The Sanctions Order

In 2017, Hutson, acting *pro se*, filed a motion for reconsideration of the order granting summary judgment to TLC as to his counterclaims in the federal Class Action. Judge Norton denied Hutson's motion and also granted TLC's motion for sanctions. Judge Norton found that "Hutson appears to have continued his pattern of frivolous filings and conduct designed to harass

or burden [TLC], and there is no indication that he intends to cease." Judge Norton noted that Hutson "again makes reference to the alleged fraud by [TLC] in obtaining the settlement agreement and the order signed by Judge James in the prior state court litigation. Hutson has made these allegations throughout the course of this litigation. He has never, however, specified what the fraud is or submitted evidence of it." Judge Norton concluded that:

> Hutson has established a pattern of making misrepresentations to the court, of making unsupported allegations of unethical and criminal conduct by [TLC], and of using the judicial process as a mechanism of harassment. His meritless filings have wasted untold hours of the court's time. He lacks any evidence to support his counterclaims and other allegations against [TLC]. Indeed, Hutson routinely fails to provide factual or legal support for anything he files with the court. Accordingly, the court finds that sanctions are appropriate . . . .

Reed v. Big Water Resort, LLC, 2017 WL 4480195 at *2-*3 (D.S.C. filed Oct. 6, 2017).

Court records reflect that Penn-America settled TLC's claims against Hutson in early 2018. As part of that settlement, TLC released its claim for sanctions against Hutson.

The trial and appeal in the Defamation Action

In early 2018, TLC's case against Hutson in the Defamation Action proceeded to trial. The jury returned a verdict against Hutson in the amount of $3,500,000. Counsel defending Hutson (Frank Gordon) filed an appeal from that judgment.

The e-mail Hutson attached to his pleading was sent during the pendency of this appeal. The record reflects that the Defamation Action settled for $1,875,000. The judgment was marked satisfied on December 20, 2018. After receiving notice of the settlement, Hutson filed this lawsuit.

The Coverage Action

One other prior lawsuit is pertinent to this case. Penn-America filed a declaratory judgment action in federal court on June 14, 2016. Penn-America Ins. Co. v. BWR, Inc., *et al.*, Civil Action No. 2:16-01943-DCN (D.S.C.). Hutson was named as a defendant in the Declaratory Judgment Action. Defendants Murphy and Newton signed the Complaint. In the Declaratory Judgment

Action, Penn-America contested its coverage for Hutson as to TLC's claims against him in the Class Action and the Defamation Action. Among other things, Penn-America contended that Hutson was not an insured for purposes of his actions forming the basis for TLC's claims against him. Penn-America also contended that the claims were excluded because Hutson knowingly violated TLC's rights and/or knowingly published false information.

Hutson alleged that the Defamation Action was filed secretly. However, court records reflect that Hutson was personally served with the pleadings in the Defamation Action. Hutson was dismissed as a party from the Coverage Action after stipulating to be bound by the results.

The Release

In conjunction with Hutson's dismissal from the Coverage Action, Hutson entered into a settlement agreement with Penn-America. Another first-party claim on the policy by Hutson was also included in this settlement. As part of the settlement agreement, Hutson agreed to release Penn-America and its agents from any further claims related to the Coverage Action. Hutson alleged that Murphy and Newton acted as agents for Penn-America in his Amended Complaint.

STANDARD

Generally, a motion to dismiss pursuant to Rule 12(b)(6), SCRCP is based solely upon the allegations in the Complaint. Exhibits attached to a pleading are incorporated into the pleading as a part thereof for all purposes. Rule 10(c), SCRCP. This Court may dismiss a suit when the defendant demonstrates that the plaintiff has failed to state facts sufficient to constitute a cause of action. Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006). However, the Rules provide that a motion to dismiss may be converted into a motion for summary judgment when matters outside the pleadings are presented to the Court. Rule 12(c); SCRCP; Brown v. Leverette, 291 S.C. 364, 366-67, 353 S.E.2d 697, 698-99 (1987).

In this case, I find it appropriate to consider matters outside the pleadings. The Amended Complaint bases its claims in part on matters that occurred in prior proceedings. The documents filed in those proceedings are public record. Some excerpts from depositions and trial testimony have been provided. These documents were offered merely for the purpose of establishing Hutson's knowledge of certain events and determinations in prior litigation. The defendants have submitted a settlement agreement between Hutson and Penn-America that pertains to this litigation. Finally, Newton submitted correspondence between Hutson and Newton providing context to the e-mail Hutson quoted in his Amended Complaint. These were e-mails Hutson had in his possession when he filed this action. Hutson had the opportunity to produce documentation to refute Newton's account, and indeed he produced other e-mails in response. Accordingly, these documents will be considered and the appropriate standard is that found in Rule 56, SCRCP.

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 323-24, 566 S.E.2d 536, 540 (2002). "In determining whether a genuine question of fact exists, the court must view the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party." Id.

A party opposing summary judgment may not rest upon the mere allegations or denials of his pleadings. SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990). Rule 56(e) requires a party opposing summary judgment "to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial." Doe v. Batson, 345 S.C. 316, 320-21, 548 S.E.2d 854, 856 (2001). Although only a scintilla of evidence is required, a party must present some evidence to avoid summary judgment. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 694 S.E.2d 1 (2010). Moreover, a party may not avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. Id. at 549, 694 S.E.2d at 6.

CONCLUSIONS OF LAW

Hutson's allegations, broadly construed in his favor, assert that Newton represented him. However, court records conclusively demonstrate that Newton did not appear as counsel for any party in the Ejectment Action, the Class Action, and the Defamation Action. Murphy and Newton appeared as coverage counsel for Penn-America in the Coverage Action only. I find it appropriate to take judicial notice of these facts because they are contained in the public record.

Therefore, despite Hutson's allegations to the contrary, Hutson's claim against Newton and Murphy relates to Newton's actions as counsel for Penn-America, an adverse party in the Coverage Action,. The first question is whether Hutson has standing to sue counsel for an adverse party. The second issue is whether Newton's e-mail created a cause of action.

I. Standing

In South Carolina, attorneys are generally immune from liability to third parties arising from their actions as counsel for their clients. Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 528, 339 S.E.2d 857, 889 (Ct. App. 1986). Attorneys are generally not liable to a party opponent for conduct in the course of litigation. Ronald E. Mallen & James A. Roberts, The Liability of a Litigation Attorney to a Party Opponent, 14 Willamette L. J. 387 (1978). Statements made in the course of litigation are absolutely privileged. Oesterle v. Wallace, 272 Mich. App. 260, 264, 725 N.W.3d 470, 474 (Mich. Ct. App. 2006). Every state that has considered the issue has held that the absolute judicial privilege from suit applies to statements made by attorneys during settlement negotiations. Id. at 266, 725 N.W.2d at 475-76.

The only exception to the rule that attorneys are immune from liability to third parties while representing party opponents is when misrepresentation or fraud is committed by the attorney. 7A C.J.S. Attorney & Client § 228 (June 2019 Update). There is no South Carolina case on point. 1 S.C. Jur. Attorney and Client § 22 (May 2019 Update). However, fraud generally requires proof

of nine distinct elements. Id. (citing M.B. Kahn Constr. Co. v. S.C. Nat'l Bank, 275 S.C. 381, 271 S.E.2d 414 (1980)).

Hutson does not allege that Newton or Murphy defrauded him. In fact, Hutson does not allege any conduct at all on the part of Murphy. Hutson's allegation is that Newton knew that TLC defrauded him and failed to take action. Moreover, as discussed below, it appears that Hutson cannot prove Newton or Murphy knew he was defrauded.

Hutson alleged that the purpose of Newton's e-mail was to provide leverage in settlement negotiations with TLC. A letter from Penn-America that Hutson attached to his pleading further explains that the e-mail served the dual purpose of providing leverage against TLC and also attempting to resolve Hutson's threatened lawsuit against Penn-America for failing to provide a *supersedeas* bond during the pendency of the appeal of the judgment in the Defamation Action.

I find that Newton's e-mail was part of ongoing settlement negotiations. The communication was made by Newton, acting as counsel for Hutson's opponent in the Coverage Action, Penn-America. Therefore, Hutson lacks standing to sue Newton or Murphy because they were acting as counsel for a party opponent in ongoing settlement negotiations.

II. Duty created by gratuitous undertaking

Hutson also alleges that Newton's e-mail constituted legal advice. Generally, an adverse party cannot demonstrate justifiable reliance in support of the creation of an implied duty of care. 1 S.C. Jur. Attorney and Client § 21 (May 2019 Update). Hutson, as an adverse party who was actively threatening litigation against Newton's client, cannot demonstrate he justifiably relied on any purported legal advice from Newton. Moreover, the e-mail upon which Hutson relies expressly states that the information therein was not provided based upon an attorney-client relationship, but rather upon a common interest.

As Hutson acknowledged at the hearing, Newton's e-mail states that Newton's comments to Hutson were based upon common interest. Hutson expressly alleges that had the alleged fraud been opposed, the $3,500,000 judgment in the Defamation Action could have been set aside.

Liability insurers have an interest in the results of lawsuits they are defending because they are contractually obligated to indemnify the insured for covered damages. For this reason, the Supreme Court has recently held that liability insurers may sue attorneys they retain to defend their insureds for malpractice. Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 826 S.E.2d 270 (2019). (allowing claim by insurer based upon defense counsel's failure to timely respond to requests for admission). Hutson alleges he was Penn-America's insured. This allegation demonstrates that Hutson had a common interest with Murphy and Newton's client, Penn-America. The common interest, as reflected in Hutson's allegations and supporting exhibits, was in reducing the value of the judgment against Hutson by potentially setting aside the judgment or using the threat of such litigation as leverage against TLC.

E-mails Newton provided demonstrate that Hutson was threatening lawsuits against both TLC and Penn-America at the time Newton's e-mail was sent. Hutson requested that Penn-America join him in litigation to set aside TLC's judgment against Hutson.

Hutson alleges that by providing information to him about a potential claim for fraud, Newton provided legal advice. However, Hutson fails to consider the nature of his claim against Penn-America.

Hutson alleged that his counterclaims against TLC were intertwined with Penn-America's defense of TLC's claims against Hutson. In order to investigate Hutson's assertion that the $3,500,000 judgment could be set aside due to fraud, Penn-America necessarily had to investigate the merits of Hutson's claim against TLC. This investigation could not be conducted by the attorneys Penn-America retained to defend Hutson for several reasons. First, Hutson was *pro se*

as to his counterclaims against TLC. Second, Hutson was threatening litigation against Penn-America. Third, Hutson's claim concerned Penn-America's duty to defend and indemnify Hutson, not strategy for Hutson's defense.

Once Penn-America completed its investigation and declined Hutson's request to join in an action against TLC, Penn-America had no further interest in the information. The party with an interest in the information was Hutson because it was material to Hutson's allegations against TLC. By providing this information to Hutson, Penn-America satisfied any special duty owed to Hutson, as putative insured, to protect his counterclaims. Penn-America also furthered its common interest with Hutson in possibly reducing the value of TLC's judgment against Hutson.

For the above reasons, Hutson fails to establish that Newton gratuitously undertook Hutson's representation. Newton's e-mail expressly states that Newton did not represent Hutson. Hutson does not allege that Newton or Murphy defrauded Hutson. Moreover, the contents of Newton's e-mail do not demonstrate an undertaking to represent Hutson, but rather actions to further Penn-America's common interest in reducing the value of TLC's judgment against Hutson.

III. Professional malpractice liability

In order to bring a claim for professional malpractice, Hutson must establish an attorney-client relationship. Fabian v. Lindsay, 410 S.C. 475, 483, 765 S.E.2d 132, 136 (2014). Contractual privity is necessary to establish standing. Id. at 482, 765 S.E.2d at 136. The remaining elements of a legal malpractice action are a breach of duty by the attorney and proximately caused damages. Fabian, 410 S.C. at 483, 765 S.E.2d at 136. Hutson's claim fails for several reasons.

A. Duty

Hutson does not allege the existence of a contract creating an attorney-client relationship between himself and Newton. In fact, in the e-mail Hutson relies upon, Newton expressly stated several times that he does not represent Hutson and that Newton represented Hutson's opponent,

Penn-America. Hutson cannot demonstrate the existence of an attorney-client relationship to support a claim for professional malpractice against Newton.

Additionally, even if an attorney-client relationship could be proven, Hutson has failed to support his claim with the affidavit of an expert. Section 15-36-100(B) of the South Carolina Code requires a party bringing a professional malpractice action to "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." This statute applies to claims against attorneys. S.C. Code Ann. § 15-36-100(G)(2). Hutson did not attach an expert affidavit to his Complaint in this action. Therefore, Hutson has failed to state a claim for professional malpractice.

B. Breach of duty

Even if Hutson's allegations demonstrate the existence of a legal duty, Hutson fails to show a breach of that duty under the circumstances of this case.

Hutson does not allege that Newton or Murphy defrauded Hutson, but rather that they failed to take action to counteract known fraud perpetrated by TLC. Hutson does not appear to allege that Newton or Murphy ever represented TLC, and court records confirm that they only represented Penn-America in the Coverage action.

Hutson argues that the Rules of Professional Responsibility require an opposing attorney to report fraud. None of the rules Hutson cited stand for this proposition.

Rule 1.7 of the South Carolina Rules of Professional Responsibility governs attorney-client relationships. Specifically, it prohibits lawyers from representing clients when there is a conflict of interest. Because Murphy and Newton did not represent Hutson, this Rule does not apply.

Rule 1.2 prohibits a lawyer from engaging or assisting a client in committing a crime or a fraud. Hutson does not allege that Murphy or Newton represented TLC, who allegedly defrauded

Hutson. Therefore, this rule does not apply to them in this case. Importantly, this Rule does not impose any duties upon an attorney based upon mere knowledge of a fraud perpetrated upon an opposing litigant. The rule applies to fraud perpetrated by an attorney's client (*i.e.*, Penn-America). Hutson does not allege that Penn-America committed any fraud.

Rule 3.3 prohibits a lawyer from knowingly offering evidence the lawyer knows is false. Again, Hutson's allegation is not that Newton offered false evidence, but rather that TLC defrauded the court. Neither Murphy nor Newton ever represented TLC. Therefore, this Rule does not apply to them in this case.

Rule 4.1 prohibits a lawyer from knowingly making a false statement to others. It also requires lawyers to disclose material facts when disclosure is necessary to prevent a client from committing a fraud. Murphy and Newton did not represent TLC, who allegedly defrauded Hutson. They represented Penn-America, an adverse party to both TLC and Hutson. Nothing in this Rule imposes a duty on a lawyer who represents an adverse party to file an action to set aside the result of a prior action, regardless of whether there are allegations of fraud.

Rule 8.4(e) prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice. Newton did not represent either TLC or Hutson. This Rule does not require a lawyer representing a third party to intervene in a dispute merely because one of the adverse parties claims they are being defrauded.

Hutson provides no other basis for a breach of duty. Liability insurance policies do not require insurers to prosecute claims their insureds may have against third parties. Moreover, it appears that information material to Hutson's potential claims against TLC was disclosed to him.

C. Proximate cause

Even if a duty was breached, Hutson fails to allege any basis for proximate cause in this case. A review of Hutson's damages claims indicates that Hutson essentially claims that the results

of the Ejectment Action, the Class Action, and the Defamation Action would have been different had the Defendants in this suit acted on Hutson's behalf to counteract the fraud. Court records reflect that Newton and Murphy were not involved in those actions. By the time Newton's e-mail was sent, the Ejectment action was concluded, the Class Action had been settled, and a judgment had been entered against Hutson in the Defamation Action. Hutson provides no authority for the proposition that a lawyer representing an adverse party must attempt to re-open judgments in prior actions merely because of an awareness that those judgments may have been tainted by fraud.

Furthermore, the evidence does not support Hutson's allegation that Newton or Murphy knew Hutson was defrauded. Before any of the defendants in this action were involved in the Big Water Resort litigation, Judge James found that Hutson breached the Settlement Agreement and the Consent Order in the Ejectment Action. The subsequent rulings adverse to Hutson were all based upon *res judicata*. Therefore, Hutson could not prevail in any claim against TLC unless the ruling in the Ejectment Action could be set aside on some basis.

Before any of the Defendants in this action became involved, Hutson raised the issue of setting aside the Settlement Agreement and Consent Order based upon fraud. Hutson presented his arguments to Magistrate Judge Baker in the Class Action. Baker expressly found that Hutson failed to demonstrate fraud inducing him to enter into the Settlement Agreement. Reed v. Big Water Resort, LLC, 2016 WL 7435620 at *14. Judge Norton adopted this finding. Reed v. Big Water Resort, LLC, 2016 WL 2935891 at *7-*8. Judge Cothran's Order in the Defamation Action was in accord with Magistrate Judge Baker's findings. Moreover, Judge Norton sanctioned Hutson for continuing to assert the same argument after it had been ruled upon.

The only theory upon which Hutson had any hope of prevailing was to demonstrate evidence that TLC fraudulently induced Hutson to enter into the Settlement Agreement. Correspondence filed with the briefing indicates that Hutson asked Penn-America to join him in

litigation to set aside the Order in the Ejectment Action based upon newly discovered evidence that TLC failed to disclose to Hutson that all of the Property was subject to the lifetime Campground Memberships. Because there was no record delineating which property could be developed and which could not, Hutson could potentially argue he was fraudulently induced to enter into the Settlement Agreement. Newton's e-mail discussed this possibility.

However, the evidence cited in Newton's e-mail falls well short of establishing a claim for fraud. The Supreme Court has summarized what is necessary for proving fraud as follows:

> In order to recover in an action for fraud and deceit, based upon misrepresentation, the following elements must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury. Failure to prove any one of the foregoing elements is fatal to recovery.

M.B. Kahn Constr. Co., Inc., 275 S.C. at 384, 271 S.E.2d at 415.

Fraud upon the court is an equitable doctrine. Chewning v. Ford Motor Co., 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003); Bryan v. Bryan, 220 S.C. 164, 167, 66 S.E.2d 609, 610 (1951) ("There is no doubt that a court of equity has inherent power to grant relief from a judgment on the ground of fraud."). Equitable relief is not available to a party who has unclean hands. Straight v. Goss, 383 S.C. 180, 206-07, 678 S.E.2d 443, 457–58 (Ct. App. 2009).

In order to prevail in an action to set aside a prior judgment based upon fraud, one of the elements Hutson would have to prove is that he was not aware at the time he entered into the Settlement Agreement that all of the Property was subject to the Campground Memberships. This element, which involves Hutson's subjective knowledge as to facts pertaining to prior transactions and legal actions, cannot be satisfied by any information in the possession of Newton or any of the Defendants in this case.

Although the issue was not specifically addressed in the judicial orders, court filings from the Class Action (a case in which Hutson was a party but in which Newton and Murphy were not involved) indicate that TLC argued in support of its motion for summary judgment against Hutson's counterclaims that all of the Property was not subject to the Campground Memberships. TLC's motion was granted. Therefore, Hutson appears to be collaterally estopped to argue that all of the Property was subject to the Campground Memberships. Moreover, a deposition transcript from the Class Action indicates that Hutson had the opportunity to personally cross-examine the realtor who represented TLC when Hutson purchased the Property, and she testified that some of the Property could have been developed.

Furthermore, Hutson has demonstrated a pattern of misrepresenting facts to the court regarding the alleged fraud. Hutson alleged in this action, as he did in the Ejectment Action, the Class Action, and the Defamation Action, that he was not aware of the Campground Memberships before he purchased the Property. Magistrate Judge Baker specifically found that Hutson was aware of the Campground Memberships before he purchased the Property. Reed v. Big Water Resort, LLC, 2016 WL 7435620 at *13 n.5. This finding was based upon communications between Hutson, the realtors, and an attorney in November 2010. Thus, Hutson's allegation in this action that he was not aware of the Campground Memberships before he purchased the Property is materially false. At a minimum, Hutson fails to show how any knowledge or actions on the part of Newton or any of the Defendants in this action could change the results of the prior litigation in light of this fact.

As discussed above, the genesis of this lawsuit—Hutson's representation to Newton that the entire Property (which included several parcels) was undevelopable and that TLC withheld this information from Hutson when he entered into the Settlement Agreement—appears to have been made without any good faith belief in its accuracy. Hutson made this same representation to this

Court in this action and to courts in other actions he has filed. (See Hutson Supp. Mem. filed June 19, 2019 at ¶ 9.C. on p. 11.) Newton argued at the hearing that his comments in the e-mail were conditional: "If you were ordered to develop property that was subject to lifetime use rights, that probably should have been brought to the court's attention." Newton's letter dated November 8, 2018, which was attached to Hutson's pleadings, and the e-mails Newton submitted were consistent with this understanding. Hutson was on notice, prior to the time he made any of these representations, through the court rulings against him on his counterclaims and Stroman's deposition testimony in the Class Action, that his assertion that none of the Property could be developed was baseless. Hutson was in a position to know which property could be developed, whereas Newton and Murphy were not. Yet Hutson herein seeks to invoke the authority of this Court against them based upon Newton's reaction to this false information Hutson knowingly provided to Newton.

Hutson's own court filings demonstrate that he had duties to the campground members in his capacity as principal in Big Water Resort, LLC, the entity that sold and held the Campground Memberships. Hutson thus had a duty to investigate which property could be developed and which could not at the time he entered into the Settlement Agreement because he was principal in Big Water Resort, LLC.

Hutson's allegations in this action are inconsistent with an affidavit he filed in the Ejectment Action. In that affidavit, Hutson referred to his duty to the campground members in his capacity as principal in Big Water Resort, LLC as a "major obstacle." Hutson testified that the Campground Memberships impaired his ability to develop and sell the property. Hutson testified he dealt with this by attempting to force the campground members to give up their lifetime memberships by (a) firing all the staff at Big Water Resort, and (b) raising costs to the campground members. These actions "outraged the members." Thus, Hutson's own testimony establishes that

he attempted to force the campground members out so he could build on the property, causing them to become outraged.

It is doubtful that Hutson could prevail on a claim of fraud upon the court because he appears to have unclean hands due to Hutson's breach of his duties to the campground members. Straight, 383 S.C. at 206-07, 678 S.E.2d at 457–58. At a minimum, this is sufficient to demonstrate that Newton and Murphy were not aware of provable fraud against Hutson.

This evidence, much of which is derived from court filings in prior related cases, and all of which was known to Hutson when he filed this action, demonstrates that Hutson cannot prove Newton knew he was defrauded by TLC. As a result, any breach of duty by Newton or Murphy could not have proximately caused the damages Hutson claims in this action. Moreover, this evidence reflects that Hutson's allegations in this action are consistent with his pattern of making materially false representations to courts, both in this case and throughout the course of his litigation involving Big Water Resort.

IV. Release

Finally, even if all of the above could be established, Hutson's claims are subject to dismissal because they are barred by a release. Hutson's settlement agreement with Penn-America releases his claims against not only Penn-America, but also Penn-America's agents.

A release is a contract by which a plaintiff relinquishes rights or claims against persons against whom those rights could have been enforced. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 492, 649 S.E.2d 494, 198 (Ct. App. 2007). "A release is a contract and contract principles of law should be used to determine what the parties intended." Id. at 497, 649 S.E.2d at 501. "The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." Id. at 500, 649 S.E.2d at 503.

Hutson made no attempt either in briefing or at the hearing to contest the authenticity or enforceability of the release. Hutson failed to provide any reason why it should not apply to his claims in this case. The release bars any further claims against Penn-America relating to its coverage and claim handling with respect to the Class Action and the Defamation Action. This was the subject matter of the Coverage Action, the only case in which Murphy and Newton was involved. Because Hutson alleged Murphy and Newton acted as Penn-America's agents, Hutson's claims against them in this action are barred by the release.

CONCLUSION

For the reasons set forth above, I find that Newton's Amended Motion to Dismiss, or in the Alternative for Summary Judgment and Murphy's Motion to Dismiss should be granted pursuant to Rules 12(b)(6) and 56 of the South Carolina Rules of Civil Procedure.

It is hereby

ORDERED, ADJUDGED and DECREED that judgment be entered for Defendants Murphy and Newton, that Hutson's claims against them in this action should be dismissed, and that Murphy and Newton and should be dismissed as a parties from this action.

IT IS SO ORDERED.

_____
The Honorable Michael G. Nettles
Presiding Judge of the Fifth Circuit Court

Columbia, South Carolina
Date:_____

Richland Common Pleas

Case Caption: MB Hutson , plaintiff, et al vs Penn America Insurance Company , defendant, et al

Case Number: 2018CP4006344

Type: Order/Summary Judgment

So Ordered

s/ The Honorable Michael G. Nettles #2140