

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Mark J. Hayes, II

Case No. 2015-CP-07-02047

Appellant Case No. 2019-000200

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SC Court of Appeals

James R. Brady.....Respondent.

v.

Hilton Head Homes at Allenwood, LLC,
Village Square Development Company, LLC,
Lancaster Redevelopment Corp. and
Gary GrossmanAppellants,

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE PLAINTIFF REGARDING THE COUNTERCLAIMS ASSERTED IN THE CASE WHERE THERE WERE GENUINE ISSUES OF MATERIAL FACT PRESENTED TO THE COURT IN THE FORM OF TESTIMONY REGARDING THE COUNTERCLAIMS ASSERTED BY THE DEFENDANTS

STATEMENT OF THE CASE

This matter is before this Court appealing the Order of the Honorable J. Mark Hayes, II, dated February 8, 2019. (Form 4 Order, Feb. 8, 2019). In that Order, Judge Hayes granted the Plaintiff summary judgment as to the Defendants' counterclaims. *Id.* Judge Hayes heard the motion on February 6, 2019, and ruled on the motion on February 8, 2019. (Transcript, 2/6/2019; Order, 2/6/2019). Judge Hayes filed his full formal Order on March 1, 2019 (Order, March 1, 2019). That Order is identical to the Form Order submitted on February 8, 2019. (*Id.*; Order 2/8, 2019).

This case commenced with the filing of a Summons and Complaint on August 25, 2015.¹ (Summons and Complaint). In his Complaint, the Plaintiff asserted causes of action for breach of contract, quantum meruit, and conversion arising out of his former employment to market and sell homes at developments on Hilton Head Island. *Id.* The Defendants Hilton Head Homes at Allenwood, LLC, and Village Square Development, LLC, are South Carolina limited liability companies. *Id.* The Defendant Lancaster Redevelopment Corporation is a Pennsylvania corporation. *Id.* Gary Grossman is an individual residing in Pennsylvania. *Id.* Lancaster Redevelopment Corporation is sole Member of Hilton Head Homes at Allenwood, LLC, and Village Square Development, LLC. (Operating Agreements). Mr. Grossman serves as the

¹ There was an earlier case between these parties which was dismissed pursuant to Rule 40(j). *See Brady v. Hilton Head Homes at Allenwood*, 2009-CP-07-2690 (Order Denying Motion to Refer to Special Referee, 6/16/2015). The current case started anew with the filing of the Summons and Complaint on August 25, 2015

President of Lancaster Redevelopment Corporation. *Id.* The Plaintiff never had any employment agreement with Mr. Grossman, but, rather, with these entities. (Letter, Feb. 4, 2004)

The Defendants filed their Answered and Counterclaim on September 14, 2015, setting forth affirmative defenses and causes of action against Mr. Brady. (Answer and Counterclaim). In the Answer and Counterclaim, the Defendants asserted that pursuant to an agreement with Lancaster Redevelopment Corporation, the Plaintiff was to have provided services to Hilton Head Homes at Allenwood, LLC, Village Square Development, LLC, and Lancaster Redevelopment Corporation in connection the construction, sales, and marketing of certain development in Beaufort County. *Id.* The Defendants alleged that loans and advances were given to the Plaintiff for work which was not performed and for which the Defendants would be repaid prior to any distributions to be made to the Plaintiff. *Id.* The Defendants further alleged that the Plaintiff failed to perform so that the Defendants had to hire third parties to complete the Plaintiff's job. *Id.* Hilton Head Homes at Allenwood, LLC, Village Square Development, LLC, and Lancaster Redevelopment Corporation made numerous payments to the Plaintiff in excess of Six Hundred Thousand and No/100 (\$600,000.00) Dollars, which constitutes a benefit the Plaintiff was not entitled to retain. *Id.* The Defendants asserted causes of action against the Plaintiff for breach of contract and unjust enrichment for actual damages in excess of Six Hundred Thousand and No/100 (\$600,000.00) Dollars in amounts to be determined at trial. *Id.*

On July 27, 2016, the Plaintiff submitted his Reply to Counterclaim [sic] setting forth some affirmative defenses. (Reply)

Discovery commenced, including the taking of an out of state deposition of Ms. Ginger Griffith, who has worked for Lancaster Redevelopment Corporation as treasurer until the company succumbed to the recession in 2010. (Ginger Griffith Deposition Transcript., 12/20/2018, p.7).

The Plaintiff filed a Motion for Summary Judgment as to the Defendants' Counterclaims on January 1, 2015. (Motion for Summary Judgment, 1/15/2017).

While the motion was pending, the parties participated in mediation which resulted in a provision settlement which ultimately fell apart. (Transcript, Feb. 6, 2019).

The hearing of the Plaintiff's motion for summary judgment was continued by consent due to scheduling conflicts, including mandatory evacuations order during one of the times the motion was scheduled to be heard. (Consent Order of Continuance, 9/19/18).

The parties filed a Consent Motion for an Order of Protection and for a Status Conference to Set a Trial Date Certain. (Consent Motion, Jan. 23, 2019)

The parties also filed their Memoranda in Support and in Opposition to the Plaintiff's Motion for Summary Judgment on February 4, 2019. (Memorandum in Support of Motion for Summary Judgment with Exhibits; Memorandum in Opposition of Motion for Summary Judgment with Exhibits; 2/4/2019).

The Motion was heard by the Honorable J. Mark Hayes, II, on February 6, 2019, in Beaufort. (Transcript, 2/6/2019).

At the hearing, Judge Hayes took the matter under advisement and advised he would be moving the motion to the front of those matters already under advisement. (Transcript, pp. 17-18). The case was subject for trial the following week. *Id.*

Two days later, Judge Hayes entered his Form 4 Order granting the Plaintiff Summary Judgment. (Order, 2/8/2019).

The case was then appealed to this Court by Notice of Appeal dated February 8, 2019. (Notice of Appeal).

Judge Hayes' Final Order was filed March 1, 2019, while this appeal was pending. (Order 3/1/2019)

STATEMENT OF FACTS

This matter comes before the Court upon the motion of the Plaintiff that there are no triable issue of facts in this matter regarding the Defendants Counterclaim as set forth in their motion. (Answer and Counterclaim).

The Defendants Hilton Head Homes at Allenwood, LLC, and Village Square Development Company, LLC, are limited liability companies organized and existing pursuant to the laws of the State of South Carolina, which formerly developed two neighborhoods on Hilton Head. (*Id.*)

The Defendant Lancaster Redevelopment Corporation is a corporation organized and existing pursuant to the laws of the State of Pennsylvania and authorized to conduct business in South Carolina, and the Defendant Gary L. Grossman is a citizen and resident of the State of Pennsylvania. (Summons and Complaint)(Answer and Counterclaim)

Lancaster Redevelopment Corporation is the Member of both Hilton Head Homes at Allenwood, LLC, and Village Square Development Company, LLC. (Letter, Feb. 4, 2004)

Pursuant to the terms and conditions of an agreement with Lancaster Redevelopment Corporation, the Plaintiff was to have provided services to Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation in connection with the construction, sales, and marketing of a certain development in Beaufort County, South Carolina. *Id.* The Plaintiff was given sums as loans and as advances for work that should have been performed by the Plaintiff, which work as not performed by the Plaintiff, prior to any distributions being made or prior to any commissions or payments being given to the Plaintiff. *Id.*

The Plaintiff often informed the Defendants Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation that he

could not cover the workload required of him in order to receive commissions and other compensation. *Id.*

While he was to have been furthering the business of Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation, the Plaintiff failed to perform work required of him and third parties had to be employed to complete the work the Plaintiff was going to allegedly complete. (Answer and Counterclaim) The Defendants Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation made numerous payments to the Plaintiff in spite of his inability to perform as promised and as relied upon by Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation. (Answer and Counterclaim)

Because of his failure to perform, the Defendants Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation seek to recover all payments made to the Plaintiff in excess of Six Hundred Thousand and No/100 (\$600,000.00) Dollars. *Id.*

In September, 2007, Ginger Griffith, who worked as the treasurer for Lancaster Redevelopment Corporation, wrote to Mr. Brady regarding an analysis of compensation to be paid to him as a result of his employment. (Letter, Sept. 13, 2007)

In her correspondence, Ms. Griffith advised that under the terms of the agreement with Lancaster Redevelopment Corporation, past due receivables were to be repaid first. (Letter, *id.*) She also advised that given carrying costs, there could be no additional monthly expenses funded. *Id.*

Ms. Griffith gave her deposition in this matter on December 20, 2018. (Griffith Depo., 12/20/18).

Ms. Griffith testified that as of September of 2007, the housing market was falling apart and there was standing inventory that could not be sold (Depo. p. 37). There were foreclosures against the Defendants around this time. (Depo. p. 38). There could be no payments to Mr. Brady accordingly. (*Id.*; Letter of 9/13/2007).

Ms. Griffith testified that Mr. Brady was advanced sums during his employment by Hilton Head Homes and by Village Square against fees earned. *Id.* These advances were never repaid to the Defendants. Any incentive management fees were to be paid after the initial debts from Lancaster Redevelopment or Mr. Grossman were repaid. (Depo., p. 37)

The Plaintiff's conclusory statements that the amounts claimed by the Defendants are not loans are advances are just that: his opinion. This is the ultimate issue of fact. Were these payments loans, as the Defendants contend, or were these payments due? This is the issue Judge Hayes determined by his Order, when there are issues of fact.

The Defendants have acknowledged that due to the larger economic problems, there could be no payments made to Mr. Brady.

In correspondence to Mr. Brady of September 13, 2007, Ms. Griffith wrote

Given the carrying costs of the inventory, and past due receivables to Forest Homes from Allenwood, the monthly carrying costs at Cypress Harbor and our massive increase in overhead associated with the new plant, LRC [Lancaster Redevelopment Corporation] simply cannot fund any additional monthly expenses.

(Letter of 9/13/2007)

There were numerous advances made include "monthly expenses" as set forth in the letter which the Defendants contend are indeed loans and advances made, for which Mr. Brady is now responsible for reimbursing the Defendants Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation. A

difference of opinion as to what those matters are called does not warrant the granting of judgment as a matter of law as to these Defendant's counterclaims.

STANDARD OF REVIEW

Under Rule 56(c) of the South Carolina Rules of Civil Procedure, summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005); *South Carolina Electric and Gas Co. v. Town of Awendaw*, 359 S.C. 29, 596 S.E.2d 482 (2004). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. *See Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *Lt. Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002). In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). The Court in South Carolina has long recognized that summary judgment is a "...drastic remedy" that must be carefully invoked as to not improperly deprive any person of a trial of the disputed facts in a case. *Baughman v. American Telephone and Telegraph Co., et al.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE PLAINTIFF REGARDING THE COUNTERCLAIMS ASSERTED IN THE CASE WHERE THERE WERE GENUINE ISSUES OF MATERIAL FACT PRESENTED TO THE COURT IN THE FORM OF TESTIMONY REGARDING THE COUNTERCLAIMS ASSERTED BY THE DEFENDANTS

There are genuine issues of material facts in this matter that preclude the granting of summary judgment, which Judge Hayes failed to take into consideration or ignored. More than a mere scintilla of evidence was presented to Judge Hayes to preclude his granting summary judgment. (Transcript, Feb., 6, 2019). In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E. 2d 801, 803 (2009). At the hearing, the Plaintiff acknowledged that there had been upwards of Five Hundred Thousand (\$500,000.00) Dollars paid to him. (Transcript, 2/6/19; p. 5). Citing the letter from Ms. Griffith from September, 2007, the Plaintiff then claimed to be owed an additional Seven Hundred Eleven Thousand Dollars (\$711,000.00) Dollars. *Id.* Regardless of Mr. Brady's attorney stating that the Defendants have a "disgusting counterclaim", there was evidence presented that the counterclaim should be allowed to go forward based upon Ms. Griffith's testimony alone. (*Id.* at 7; *id.* at pp. 37-39).

Ms. Griffith's testimony alone demonstrates the issues of fact at hand in the matter. In her deposition, Ms. Griffith related the history of the Allenwood and Village Square Developments on Hilton Head Island. (*Id.* at 12-13). Mr. Brady was to have marketed and sold the inventory in these developments for certain fees. (*Id.* at 14) Mr. Brady was to be paid after debts from Lancaster Redevelopment Corporation or from Gary Grossman were repaid. (*Id.* at

37). This was all at a time when the housing market was taking a “nose dive” in 2007. (*Id.*) Lancaster Redevelopment Corporation was not immune from the economic downturn and was suffering at the time. (*Id.*) Foreclosures accumulated against both Village Square Allenwood. (*Id.* at 38) Mr. Brady had nothing to lose in these foreclosures as he was not a party to the loans. (*Id.*) Ms. Griffith acknowledged he was advanced sums against fees eared. (*Id.*) Yet, even with this testimony in the record and presented, Judge Hayes ruled that the Defendants had no counterclaims against Mr. Brady for the repayment of sums advanced him for claiming he did not properly perform his duties under any agreement with Lancaster Redevelopment Corporation. The monthly expenses advanced are set forth in detail in Ms. Griffiths’ correspondence to Mr. Brady of September 13, 2007. It those advances and monthly expenses that the Defendants seek to recover from Mr. Brady due to his non-performance and breach of his duties. The Defendants contend those advances were indeed loans made and should be repaid, with interest, as a jury would ultimately determine the facts surrounding those loans and advances. By ruling effectively dismissing the counterclaims, Judge Hayes has invoked that “...drastic remedy” that must be carefully invoked as to not improperly deprive any person of a trial of the disputed facts in a case. *Baughman v. American Telephone and Telegraph Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Such a drastic remedy is not available where there are further factual determinations about the very nature of those advances, whether or not they should have been or should be repaid, if they were loans or not, if the letter from September 13, 2007, governs over any understanding from the February 4, 2004 letter setting for the scope of the work which Mr. Brady was to have undertaken.


CONCLUSION

The Circuit Court improperly granted summary judgment where there was more than a mere scintilla of evidence in dispute.

For these reasons, the decision of the Circuit Court should be REVERSED.

Respectfully submitted:

Mt. Pleasant, South Carolina
Sept 13, 2019


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THE STATE OF SOUTH CAROLINA
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APPEAL FROM BEAUFORT COUNTY
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The Honorable Mark J. Hayes, II

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Appellant Case No. 2019-000200

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v.

James R. Brady.....Respondent.

PROOF OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matters to be Included in the Record on Appeal by depositing a copy of same via overnight delivery, postage prepaid, addressed to Charles W. Thomson, Esquire, and Glynn L. Capell, Esquire, 321 East Bay Street, Charleston, SC 29401.

Mt. Pleasant, South Carolina

Sept. 18, 2019



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September 18, 2019

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VIA OVERNIGHT DELIVERY

The Honorable Jenny Abbott Kitchings
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Re: *James R. Brady v. Hilton Head Homes at Allenwood, LLC, et al.*
Case No. 2015-CP-07-2047
Appellant Case No.: 2019-000200
File No.: 1115.0001

Dear Ms. Kitchings:

Enclosed for filing please find an original and one (1) copy of the following in the above-referenced matter:

1. Appellants' Initial Brief;
2. Appellants' Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service.

Please file the originals and return file-stamped copies to me in the enclosed envelope. By copy of this letter, I am serving same upon all counsel. Should you have any questions, please feel free to contact me. With kindest regards, I remain

Yours very truly,


G. Hamlin O'Kelley, III

GHOIII/act

cc: (w/ Encl.)
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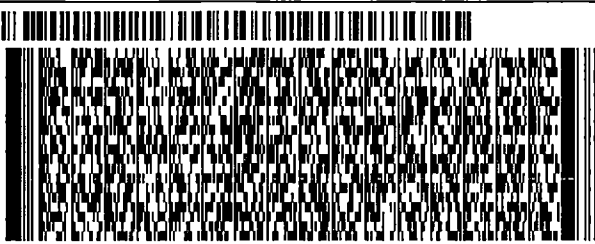
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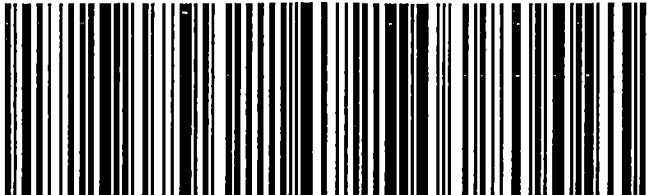


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