

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Mark J. Hayes, II, Circuit Court Judge

Circuit Court Case No. 2015-CP-07-02047

Appellate Case No. 2019-000200

James R. Brady,

Respondent,

v.

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

Appellants.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL	1
1. Whether an otherwise plausible inference demonstrates a genuine question of material fact where no evidence corroborates that inference and where both opposing parties' testimony proves that the inference is not true?.....	1
STATEMENT OF THE CASE.....	1
FACTS.....	2
ARGUMENT.....	4
CONCLUSION	7

TABLE OF AUTHORITIES

CASES

Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 616 S.E.2d 722 (Ct. App. 2005) 5

STATUTES AND RULES

Rule 56, South Carolina Rules of Civil Procedure 4, 5, 6

STATEMENT OF ISSUE ON APPEAL

1. Whether an otherwise plausible inference demonstrates a genuine question of material fact where no evidence corroborates that inference and where both opposing parties' testimony proves that the inference is not true?

STATEMENT OF THE CASE

This litigation is a payment claim with a long procedural history. The Respondent is Plaintiff James Rod Brady (hereinafter "Brady"). Brady entered into a contract with Appellants in 2004. The contract was for the construction and development of two neighborhoods. The projects moved forward until the business arrangement terminated in 2007. Brady filed this lawsuit on June 5, 2009. (2009 Summons & Complaint). In this lawsuit, Brady alleges that Appellants owe him money for his work performed and for his shares of profits made during the 2004–2007 construction and development projects. *Id.*

Despite having admitted liability to Brady back in 2007, Appellants filed counterclaims against Brady, claiming that Brady owed them money instead. This case stalled for several years while Appellants were involved with several other federal lawsuits that impeded their ability to pay the claim. Pursuant to Rule 40(j), SCRCF, this case was dismissed and subsequently restored. (2015 Summons & Complaint). The 2015 Summons & Complaint is identical to the 2009 Summons and Complaint.

Subsequent to the restoration, Brady filed an identical version of this Motion for Summary Judgment as to Counterclaims on January 5, 2017. The parties then mediated this case later in January 2017, before this motion was ever heard. At mediation, the parties entered into a provisional settlement agreement. Unfortunately, however, the final settlement agreement was never signed.

After discovering that Appellants would never sign any reasonable iteration of the settlement agreement, Brady filed a Motion for Status Conference, on May 10,

2018. Brady's counsel then took the deposition of Appellants' employee and treasurer Ginger Griffith on December 19–20, 2018. All citations to the deposition of Ginger Griffith herein are citations to her December 20 *de bene esse* deposition to be used at trial. Soon afterward, on January 8, 2019, Brady filed the version of this Motion for Summary Judgment as to Appellants' counterclaims that is now before the Court. (2019 Motion for Summary Judgment).

The Honorable Mark J. Hayes, II heard this Motion for Summary Judgment as to Appellants' counterclaims on February 6, 2019, less than one week before trial was rostered to begin on February 11, 2019. He granted the motion by way of an informal email order summarily dismissing Appellants' counterclaims on February 8, 2019. The final order was entered on March 1, 2019.

FACTS

Brady was to provide construction, marketing, and real estate sales services in connection with the development of the Allenwood neighborhood on Hilton Head Island. (2004 Letter). In exchange, Appellants were to pay Brady for those services and to share the profits made after the residential units were sold to the public. *Id.* The project continued for approximately three years. Brady oversaw the construction and sale of 103 residential units. (2007 Letter; Aff. of Brady ¶4). As of September 2007, Defendants admitted to owing Plaintiff \$711,027 for profit sharing and for construction, marketing, and sales services. (2007 Letter; Dep. of Griffith, 29:24–30:1; 31:21–32:19; 33:1–17, 34:4–22; and 35:14–36:14; Aff. of Brady). After that, Defendants failed to pay Brady any of this amount owed. (Aff. of Brady ¶19; *see also* Dep. of Griffith, 29:9–23; 35:14–36:14). As a result, Brady stopped working on the project. (Aff. of Brady ¶19).

Brady filed this lawsuit back in 2009, seeking payment of this debt. (2009 Summons and Complaint). Despite having clearly admitted liability, Appellants filed

counterclaims against Brady, alleging that Brady owed them money. (Answer & Counterclaim ¶20–39).

Appellants submitted evidence that they paid money to Brady. All such payments are referenced in a September 2007 letter written by Appellants' staff treasurer Ginger Griffith to Brady. (2007 Letter). The purpose of the September 2007 letter was to provide an accounting of contract payments already paid and still owed to Brady. After deducting each and every payment Appellants made to Brady, Ms. Griffith accounts that Appellants still owed Brady \$711,027. (*Id.*; Dep. of Griffith, 33:1–17, 34:4–22; and 35:14–36:14). This net balance due was for work that Brady already performed. (*Id.*; see also Dep. of Griffith 31:21–32:19). Brady had completely constructed these houses. *Id.* The net balance due was also for the sharing of profits that Appellants had already retained. *Id.* The houses that Brady built had been sold and Appellants already collected a profit from those sales. *Id.* Brady was due a percentage of those profits under his agreement with Appellants. (2004 Letter; 2007 Letter).

Yet, Appellants allege in this lawsuit that the payments that Ms. Griffith accounted for might have been loans instead! In over ten years of litigation, Appellants have presented no evidence in support of the alleged inference that these payments could have been loans instead of payments already earned by Brady.

Under the 2004 agreement, Brady was entitled to retain third parties to assist him with constructing these houses, at Appellants' expense. (2004 Letter). Naturally, Appellants were entitled to deduct these expenses from the amount Appellants would ultimately owe Brady. *Id.* Due to the high demand for these houses, Brady retained third parties to help him with the volume of construction. In her 2007 letter, Ms. Griffith accounted for each and every payment Appellants made to these third-party contractors. (2007 Letter; Day 1 Dep. of Griffith (Dec. 19) 21:20–22:23, 23:9–16; Dep. of Griffith 34:9–35:3). Ms. Griffith deducted all of those payments from the amount

that Appellants owed Brady. *Id.* Again, after all of these deductions, Ms. Griffith accounted that Appellants still owed Brady \$711,027. (2007 Letter; Dep. of Griffith 35:14–36:14).

Appellants never paid Brady any of the \$711,027 owed to him. (Aff. of Brady ¶19; *see also* Dep. of Griffith, 29:9–23 and 36:6–16). Despite that fact, Appellants’ counterclaims allege that Brady needs to pay Appellants back for the amount they paid to the third-party contractors. A sensible person would find those allegations appalling. In over ten years of litigation, Appellants have presented no evidence of payments to third-party contractors that are not accounted for within Ms. Griffith’s 2007 letter.

ARGUMENT

The Statement of Issue on Appeal noted above presents such an obvious question that one might surmise that it cannot possibly accurately and completely represent what is before the Court on this appeal. Yet, that Statement of Issue does represent—without embellishment or argument—exactly what is before the Court on this appeal. The Court can decide this matter based primarily on a reading of the facts.

In several instances, Appellants mischaracterize what the record shows. For example, at page 4 of their brief, Appellants state that Brady “was given sums as loans and as advances for work that should have been performed.” Their citation to the record that follows does not support that statement. The truth of the matter is that the money paid to Brady was for work he had already completed. (2007 Letter; Dep. of Griffith, 29:24–30:1, 33:1–34:22, and 35:14–36:14; Aff. of Brady ¶4, 12–14). Then, for two paragraphs on page 5 of their brief, under the heading “Statement of Facts,” Appellants make bold allegations as to Brady, while citing only to their own counterclaim allegations. Allegations are not evidence.

The applicable Rule 56 itself states:

(Appellants) may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), SCRPC. “Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.” *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005). “Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” *Id.*

Appellants’ counterclaims are for breach of contract and unjust enrichment. Both causes of action rest upon two separate factual theories. The evidence in this case does not support either one of those theories.

Appellants’ first factual theory is that the money Appellants paid Brady were mere “loans” and “advances” rather than payments for services rendered and profit-sharing promises. Yes, Appellants did pay Brady money. Per Appellants’ own admission, however, this money was paid to Brady for work that was already performed and for profits that had already been realized. (2007 Letter; Dep. of Griffith, 29:24–30:1, 33:1–34:22; Aff. of Brady ¶4, 12–14). Appellants never paid any loans or advances to Brady. *Id.* More importantly, Appellants have not presented a single piece of evidence suggesting any of their payments to Brady was a loan or an advance.

Appellants’ second factual theory is that Appellants had to pay third parties for services Brady had contracted to perform. The parties here did contemplate that Brady would need to hire third party contractors to help complete the large volume of work. Brady did do that. And Appellants did pay those third parties. But Appellants already took a full accounting of all money paid to third-party contractors,

and still determined that they owed Brady \$711,027 after deducting the money paid to third parties. (2007 Letter; Day 1 Dep. of Griffith (Dec. 19) 21:20–22:23; 23:9–16; Dep. of Griffith 34:9–35:3; Aff. of Brady ¶15–18).

Appellants' brief notes reasons why Appellants did not pay Brady. At page 6 of their brief, Appellants blame their financial struggles resulting from other projects and the economy at large. Brady had nothing to do with the other projects that Appellants reference—Forest Homes from Allenwood, Cypress Harbor, and LRC's new plant. (Dep. of Griffith, 29:24–31:20). Appellants' reasons for nonpayment do not provide a legal excuse of their obligation to pay money owed to Brady. Moreover, the reasons for nonpayment do not substantiate a counterclaim allegation that somehow Brady actually owes Appellants money.

To recap, Appellants show evidence that they *paid* money to Brady and to third party contractors. But Appellants show no evidence whatsoever that Brady *owes* Appellants anything in connection with these payments. To the contrary, Appellants submitted evidence of their own admission that *they* owe Brady money. *Id.*

Appellants' factual theories of recovery consist of mere allegations. Mere allegations alone cannot defeat a motion for summary judgment. Appellants must support those allegations with some kind of testimony or affidavit. *See* Rule 56, SCRCP (quoted more fully above). Proving that Brady would actually owe Appellants for the amounts that Appellants paid is a necessary element of Appellants' counterclaims. In over ten years of litigation, Appellants have not produced a single piece of evidence supporting their contention that Brady owes them money for the amounts Appellants paid. Instead, Appellants produced evidence that they admitted liability to Brady. (2007 Letter; Dep. of Griffith, 35:14–36:14; Aff. of Brady). These counterclaims allegations are an insult to the integrity of this Court.

Finally, Judge Hayes granted this Motion for Summary Judgment as to Appellants' counterclaims one business day before a jury trial was rostered to

proceed. Appellants were out of time to compile additional evidence. The damning deposition testimony of Appellants' treasurer Ginger Griffith was in *de bene esse* format, exactly as it was going to be played to the jury. These factors suggest that the Court should perhaps give more weight to Judge Hayes' findings than it would give to, say, an order granting summary judgment entered earlier in a case. Appellants had 10 years to find evidence supporting their counterclaim allegations. The Court can be confident in knowing that such evidence does not exist.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court dismissing Appellants' counterclaims pursuant to Rule 56, SCRPC.

Respectfully submitted,

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October 17, 2019
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October 17, 2019

Via FedEx Overnight

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: **Brady v. Hilton Head Homes at Allenwood, LLC, et al.**
Appellate Case No. 2019-000200

Dear Ms. Kitchings:


Enclosed for filing in the above case are as follows:

- 1) Original and one copy of Initial Brief of Respondent;
- 2) Original and one copy of Respondent's Designation of Matter to be Included in the Record on Appeal; and
- 3) Original and one copy of Proof of Service of the above.

Please file all three originals and return clocked copies of each to me in the self-addressed, stamped return envelope also enclosed. Thank you for your attention to this matter.

Sincerely yours,

Capell Thomson, LLC



Charles W. Thomson

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Enclosures

CWT/cgb

cc: G. Hamlin O'Kelley, Counsel for Appellants

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Redevelopment Corp.; and Gary L. Grossman,

Appellants.

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Respondent and Respondent's Designation of Matter to Be Included in the Record on Appeal** on the above-named Appellants by depositing a copy of it in the United States Mail, postage prepaid, on August 27, 2019, addressed to their attorney of record, G. Hamlin O'Kelley, III, 652 Coleman Blvd., Suite 200, Mt. Pleasant, SC 29464.

October 17, 2019



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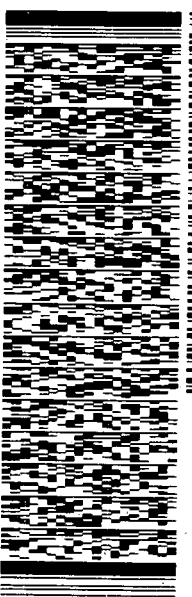
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