

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)
)
Rory M. Isaac and Kimberly J. Isaac,)
)
Plaintiffs,)
)
vs.)
)
Thomas C. Onions, Jacqueline Onions,)
Laura Kopchynski, and Lane's)
Professional Pest Elimination, Inc.,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2018-CP-22-00956

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT**

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SC Court of Appeals

This matter comes before the Court on Defendant Laura Kopchynski's Motion for Summary Judgment. The Court heard oral arguments from counsel for the Parties on July 26, 2019. After careful consideration of the Parties' submissions and the arguments of counsel, the Court grants the motion for the reasons stated below.

Background

This action arises out of the purchase and sale of real property located at 24 Avenue of Live Oaks in Pawley's Island, South Carolina (the "Property") by the Plaintiffs, Rory and Kim Isaac (the "Isaacs") from Defendants Thomas and Jacqueline Onions (the "Onions"). The movant, Laura Kopchynski acted as the Onions' realtor with respect to the transaction.

On or about April 23, 2018, the Onions, through Kopchynski, listed the Onions' house for sale. Shortly thereafter, the Property went under contract with prospective buyers Randy and Suzanne Cole (the "Coles"). The Coles engaged a home inspector who provided a report dated May 10, 2018, a summary of which was provided to the Onions and Kopchynski.

Amongst other issues identified by the inspector, the May 10, 2018 inspection report noted "dampness in the crawlspace," "missing vapor barrier," and "wet debris on top of vapor barrier,"

and “damp ground” in multiple spots. The Coles then requested that the issues identified on the inspection report summary be addressed.

Following the Coles’ request for repairs, the Onions requested that Stark Exterminators inspect the crawlspace to assess the dampness identified on the inspection report summary. On May 16, 2018, Stark Exterminators provided a graph of the crawlspace and a “crawl space moisture management system” proposal. The graph identified moisture levels in certain parts of the crawlspace between 22-25%. The “crawl space moisture management system” proposed to install a dehumidifier and cover the crawlspace vents for \$4,595 and \$200 to renew the service annually.

The Onions testified that they requested a second opinion from a contractor who had previously done work at their property, Emery Custer. The Onions then hired Custer who added vapor barrier where it was missing, installed a fan in the crawlspace to lower moisture levels, and performed other repairs identified on the Coles’ inspection report summary.

On or about June 18, 2018, the Coles hired Lanes Professional Pest Elimination, Inc. (“Lanes”) to perform a South Carolina Wood Infestation Report, commonly referred to as a CL-100. The same day, however, the contract between the Coles and the Onions was terminated based upon the appraisal contingency in the contract. According to the record, on June 20, 2018 the Onions paid for the June 18, 2018 CL-100 report in order to receive the report, although the contract with the Coles had terminated. The June 18, 2018 CL-100 identified moisture levels in the crawlspace ranging from 20-25%.

Following termination of the contract with the Coles, Kopchynski reached out to the Isaacs’ realtor, Ed Kimbrough, to identify that the the Property was available. Via email dated June 19, 2018, Kopchynski advised Kimbrough the “CL-100 was done yesterday and from what I understand it was good, but I can obtain the report if/when necessary as the seller’s paid for it.” In

addition, Kimbrough was provided an updated Property Condition Disclosure Statement which identified the repairs performed by Custer along with the Coles' inspection report summary.

In deposition testimony, when asked whether he wanted the June 18, 2018 CL-100 referenced by Kopchynski in her June 18, 2018 email, and, Mr. Kimbrough testified "No.". When asked why he did not want the June 18, 2018 CL-100, Kimbrough testified:

A. I mean, well, because it is our responsibility to do it. It was going to be on our terms, not on their terms or anybody else's terms. I thought when she said "good," I thought, perfect. We're not going to have an issue with that. We will order our own CL-100 and we'll verify the information that we need to see regarding repairs. So, no, I mean, and it was—it was not even relevant from a date period. CL-100 reports are only good for 30 days. We would have had to have another one done prior to closing anyway. So, my thought is let's do it ourselves, and we'll verify what we're looking for.

Q. Right.

A. And there was no mention as to who performed that CL-100.

Q. Okay.

A. It could have been any fly by night company. I have no idea.

Q. Okay. Just wasn't something that you were—you were not interested in getting it; you were doing your own CL-100.

A. That's correct.

On June 20, 2018, the Isaacs made an offer to purchase the Property. The Isaacs did not hire their own home inspector; however, they did hire Lanes to perform their own CL-100 inspection. Lanes performed a CL-100 inspection for the Isaacs on July 11, 2018. The July 11, 2018 CL-100 identified moisture levels ranging from 8 to 18%.

On July 23, 2018, the Isaacs closed on the purchase of the Property. Soon thereafter, the Isaacs allege that they experienced extensive standing water on the Property including water in the

crawlspace. The Isaacs allege that they have had to spend a significant amount of money to address flooding on the property and moisture issues in the crawlspace.

On November 16, 2018 the Isaacs commenced suit against the Onions, Kopchynski and Lanes. With respect to the motion at bar, the Isaacs asserted causes of action against Kopchynski for fraud, negligent misrepresentation, civil conspiracy, and violation of the South Carolina Residential Property Condition Disclosure Act.

The Isaacs allege that Ms. Kopchynski concealed material information concerning the property by failing to provide a copy of the Stark Exterminators' graph and the June 18, 2018 CL-100. The Isaacs allege that had they received the Stark Exterminators' graph and June 18, 2018 CL-100, they would have been made aware of elevated moisture levels in the crawlspace and may not have purchased the Property.

Kopchynski argues that the Isaacs had their own CL-100 performed prior to closing on which they relied and did not rely on any statements by her. Kopchynski avers that the statutes governing real estate licensees expressly state that a licensee cannot be liable for an alleged inaccurate CL-100, to the extent the Isaacs allege their July 11, 2018 CL-100 was inaccurate.

Furthermore, Kopchynski argues that contrary to the Isaacs' allegation that prior inspections of the crawlspace showing elevated moisture levels were concealed, she did disclose the June 18, 2018 CL-100 and offered a copy of the report to the Isaac's realtor if he wanted the report. The Isaacs' realtor testified that he did not want the report, as the Isaacs were having their own CL-100 completed. Kopchynski argues that these actions comply with the statutes governing real estate licensees, and as a matter of law she cannot be liable for alleged flooding at the property.

Legal Standard

“Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Rule 56, SCRCPP; *South Carolina Prop. & Cas. Guar. Ass'n. v. Yensen*, 345 S.C. 512, 528, 518, 548 S.E.2d 880, 883 (Ct.App.2001). “When ruling on a motion for summary judgment, the trial judge must consider all of the documents and evidence within the record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits.” *Anthony v. Padmar, Inc.*, 307 S.C. 503, 415 S.E.2d 828 (Ct. App. 1992); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986). “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.” *Bradley v. Doe*, 374 S.C. 622, 626, 649 S.E.2d 153 (Ct. App. 2007).

Analysis

The Isaacs' fraud, negligent misrepresentation, and violation of the Property Condition Disclosure Act claims each rely on the central allegation that a material fact about the property, i.e., the prior reporting of elevated moisture levels by Stark Exterminators and the June 18, 2018 CI-100 was concealed by Kopchynski and relied upon by the Isaacs.

To establish fraud, a plaintiff must prove the following elements 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; and (9) the hearer's consequent and proximate injury. *Moseley v. All Things Possible, Inc.*, 388 S.C. 31, 35-36, 694 S.E.2d 43, 45 (Ct. App. 2010).

Similarly, to establish negligent misrepresentation, “the plaintiff must allege and prove the following essential elements...: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.” *AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992)(emphasis added)

Finally, S.C. Code §§27-50-50(C), 27-50-70(B) and 27-50-80, discusses the responsibility and liability of a real estate licensee under the South Carolina Residential Property Disclosure Act. These sections reference and reaffirm the obligations of real estate licensees under the statute governing real estate licensees, S.C. Code §40-57-350. More particularly, these statutes provide that an agent cannot be liable for the statement of an owner, even allegedly false statements, if the licensee does not have actual or constructive knowledge of the alleged falsity of the statements.

The Isaacs argue that due to the May 10, 2018 Stark Exterminators’ report identifying elevated moisture levels, Kopchynski had knowledge of a material adverse fact about the Property that she concealed from the Isaacs. The Isaacs allege this constitutes an issue of fact for the jury as to whether a violation of the South Carolina Residential Property Disclosure Act occurred.

Likewise, the Isaacs argue this creates an issue of fact as to their claims of fraud and negligent misrepresentation as the Isaacs allege that they relied on the alleged statements contained in the Property Condition Disclosure Statement, which allegedly were inaccurate in light of the Stark Exterminators report. The Court disagrees.

As an initial matter, it is undisputed that Kopchynski disclosed the June 18, 2018 CL-100 report to the Isaacs' realtor, and offered to obtain the report for the Isaacs. At oral arguments, the Court asked Plaintiffs' counsel if it was undisputed that the Isaacs' realtor testified under oath that the June 18, 2018 CL-100 report was of no interest to them as the Isaacs were having their own CL-100 performed. Plaintiffs' counsel candidly affirmed that this fact is undisputed.

Therefore, according to the Isaacs' realtor's testimony, the Isaacs ordered their own CL-100 inspection on which they relied. This inspection was completed on July 11, 2018, and the report showed that there were no excessive moisture levels in the crawlspace. In reliance on this report, the Isaacs closed on the Property. Accordingly, the Isaacs cannot satisfy the elements of Fraud or Negligent Misrepresentation as they relied upon their own CL-100.

Furthermore, S.C. Code §40-57-350(G) states that “[n]o cause of action may be brought against a real estate brokerage firm or licensee by a party for information contained in reports or opinions prepared by an engineer, land surveyor, geologist, wood destroying organism control expert, termite inspector, mortgage broker, home inspector, or other home inspection expert, or similar reports.”

To the extent that the Isaacs allege the July 11, 2018 CL-100 showing acceptable moisture readings was inaccurate, a plain reading of the statute bars a cause of action against Kopchynski for the information contained in the allegedly inaccurate July 11, 2018 CL-100 report. *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) (“The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.”); *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009) (“where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.”).

Based upon these facts and the statutory authority applicable to real estate licensees, the Court finds that there are no disputed issues of material fact as to the Issacs' claims against Kopchynski for Fraud, Negligent Misrepresentation and violation of the South Carolina Residential Property Disclosure Act, and summary judgment should be entered for Kopchynski on these claims.

In addition to the above claims regarding alleged concealment of a material adverse fact, the Isaacs also allege a civil conspiracy between all of the Defendants to cover-up alleged moisture issues. "A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006).

Kopchynski argues that there is no evidence in the record supporting the elements of civil conspiracy. Kopchynski also cites deposition testimony from Lanes' inspector stating that he does not know Kopchynski and has not talked to her.

In response, Plaintiffs do not identify any evidence showing collaboration between the Defendants to conceal an alleged adverse property condition. Likewise, Plaintiffs identify no evidence showing coordination amongst the Defendants to allegedly provide inaccurate moisture readings in the July 11, 2018 CL-100 report.

Therefore, the Court finds summary judgment should be entered for Kopchynski on Plaintiffs' civil conspiracy cause of action. *Bradley*, 374 S.C. at 626, 649 S.E.2d 153 ("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.").

For the reasons identified herein, the Court finds that Defendant Kopchynski is entitled to summary judgment as a matter of law. Accordingly, Defendant Kopchynski's motion for summary judgment is hereby GRANTED.

[ELECTRONIC SIGNATURE OF JUDGE TO FOLLOW]



Georgetown Common Pleas

Case Caption: Rory M Isaac , plaintiff, et al VS Thomas C Onions , defendant, et al

Case Number: 2018CP2200956

Type: Order/Summary Judgment

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

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