

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Gary Victory,

Plaintiff,

v.

Wells Fargo Bank NA and Mortgage Contracting Services, LLC,

Defendants.

Mortgage Contracting Services, LLC,

Third Party Plaintiff,

v.

Ryan Davis d/b/a Davis Home Preservation,

Third Party Defendant.

) IN THE COURT OF COMMON PLEAS  
) FOURTEENTH JUDICIAL CIRCUIT  
) CASE NO.: 2018-CP-07-00409

Order Granting Summary Judgment to Mortgage Contracting Services, Inc.

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SC Court of Appeals

This case came before the Court on Defendant Mortgage Contracting Services, LLC's ("MCS") Motion for Summary Judgment. On October 16, 2019, the Court held a hearing where counsel presented oral arguments, case law, and exhibits in support of the motion. For the following reasons, the Court grants MCS' Motion for Summary Judgment.

Factual Background

The claims in this action arise from undisputed events. On July 30, 2017, Ryan Davis d/b/a/ Davis Home Preservation ("Davis") was hired by B4 & After, LLC d/b/a Premier Property Preservation ("PPP") to perform specific work at a home located at 5614 Frederick Drive, Burton, South Carolina. (Davis Answer to Third Party Complaint ¶ 7). The mortgage on Frederick Drive was being foreclosed by Wells Fargo Bank NA ("Wells Fargo"). (Wells Fargo

Answer ¶ 6). Wells Fargo contracted with MCS to perform the work (MCS Answer and Third-Party Complaint ¶ 30). MCS, in turn, contracted with PPP; PPP contracted with Davis. (Davis Answer to Third Party Complaint ¶ 7). The address and description of the work to be performed at 5614 Frederick Drive was provided in the Work Order Detail Report for Work Order M11309387. (Exhibit B to MCS' Motion). Page 1 of the Work Order Detail Report clearly identifies 5614 Frederick Drive as the location at which the work was to be performed. Pages 1 through 3 outline the work that was intended to be performed at 5614 Frederick Drive: initial grass cut; installing lock boxes on the front and back doors; and taking photos to document the condition of the property. The remainder of the Work Order Detail Report describes and photo-documents the condition of the property where Davis performed the work.

The genesis of Plaintiff's Complaint is that Davis did not perform the work at 5614 Frederick Drive, but instead performed the work at 5614 Freemont Court, a property owned by Plaintiff. MCS provided instructions to PPP relative to property located at 5614 Frederick Drive (Exhibit B), which was in turn relayed to Davis by PPP. (Davis Answer to Third Party Complaint ¶ 7). Instead Davis mistakenly performed the work at Plaintiff's property located at 5614 Freemont Court, approximately a block away from the correct address. (Exhibit A to MCS' Motion ¶ 1; Davis Answer to Third Party Complaint ¶ 8). PPP never instructed Davis to perform work at Plaintiff's property located at 5614 Freemont Court. (Davis Answer to Third Party Complaint ¶ 10). Davis completed the work at the wrong address on July 30, 2017. (Exhibit A to MCS' Motion ¶ 1). Plaintiff was not present at 5614 Freemont Court while Davis was there.

It is not known when Plaintiff discovered the lock boxes at the property. He made a telephone report of the incident to the Beaufort County Sheriff on July 31, 2017 at 5:57 p.m. (Exhibit C to MCS' Motion). On August 1, 2017, Davis was advised of his mistake. (Exhibit A

to MCS' Motion ¶ 2). Upon learning of his mistake he immediately called Deputy Parnell of the Beaufort County Sheriff's Department to provide the lock box codes necessary for Plaintiff to access his property. (Exhibit A to MCS' Motion ¶ 2). He was advised by Deputy Parnell that Deputy Parnell was at the property with Plaintiff and no further action was necessary on Davis' part once lock box codes were provided for Plaintiff's use. (Exhibit A to MCS' Motion ¶ 2). The matter was closed by the Sheriff's Department on August 1, 2017. (Exhibit C to MCS' Motion).

The instant action was filed on February 26, 2018. The Complaint states two causes of action against MCS: 1) conversion of Plaintiff's property; and 2) slander and libel. Plaintiff asserts that he was denied access to his real property, that personal property was taken during the process of securing the real property, and that Defendants represented to Plaintiff's neighbors that he was being foreclosed upon, thereby libeling and slandering him. (Complaint ¶¶ 6-8 and 10).

#### Summary Judgment Standard

Rule 56(b), S.C.R.C.P., provides: "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), S.C.R.C.P. Summary judgment is mandated by Rule 56 "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex Corporation v. Catrett, 477 U.S. 321, 325 106 S.Ct. 2548, 2554 (1986). In considering a

summary judgment motion, the court must “construe the evidence, and all reasonable inferences that may be drawn from such evidence, in the light most favorable to the nonmoving party.” Dash v. Mayweather, 731 F.3d 303, 310 (4th Cir. 2013). However, “the nonmoving party must rely on more than conclusory allegations, mere speculation, the building of one inference upon another, or the mere existence of a scintilla of evidence” in order to survive the motion. Id. at 311.

### Applicable Law and Discussion

#### **A. Conversion.**

The tort of conversion is the “unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights.” Powell v. A.K. Brown Motor Co., 200 S.C. 75, 78, 20 S.E. (2d) 636, 637 (1942). “To prevail in a conversion action, the plaintiff must prove either title to or a right to possession of the personal property at the time of the conversion.” Causey v. Blanton, 281 S.C. 163, 165, 314 S.E.2d 346, 348 (Ct. App. 1984).

Plaintiff's Complaint alleges that MCS acted through its “agents, servants and employees” (Complaint ¶¶ 5, 6, 8 and 9) to take action that deprived Plaintiff of his property. In fact, MCS hired PPP, which in turn hired Davis, to secure the property that was foreclosed by Wells Fargo. Davis was not employed by MCS and was not asked to perform the work at 5614 Frederick Drive by MCS. Davis admittedly received no direction from anyone to perform work at Plaintiff's property. As an independent contractor Davis' acts in securing the wrong property cannot be the basis for MCS, an entity which did not even hire him, to be held vicariously liable for those acts. Duane v. Presley Constr. Co., 270 S.C. 682, 244 S.E.2d 509 (1978); Cherry v. Myers Timber Co., 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013). There is no basis for any

finding that MCS converted property belonging to Plaintiff. Hawkins v. City of Greenville, 358 S.C. 280, 297 594 S.E.2d 557, 566 (Ct. App. 2004) (court did not err in granting motion for summary judgment on claim for conversion where there was no evidence that the City “seized, disposed, denied use, or wrongfully took control of” plaintiff’s property).

The facts concerning retention of Davis to perform work at 5614 Frederick Drive are not in dispute. Davis was not an employee of MCS, nor was he hired by MCS to perform the mistaken work; he was an independent contractor of PPP. MCS cannot be held vicariously liable for his mistaken acts. Further, Plaintiff has not alleged in his Complaint, or adduced evidence to establish, that MCS directly deprived Plaintiff of the use of any property. Plaintiff’s claim for conversion against MCS fails as a matter of law and summary judgment as to this claim is granted to MCS.

#### **B. Slander and Libel.**

Plaintiff’s Complaint contains only two allegations relevant to his cause of action for libel and slander: 1) he asserts that Defendants “placed signs around the Plaintiff’s residence that the same was in foreclosure and being taken over by” Defendants (Complaint ¶ 6); and 2) he claims as the last allegation of the Complaint “[t]hat in addition thereto the Defendants caused the Plaintiff to be slandered and liable [sic] by representing to his neighbors that he was being foreclosed which was not true and in fact, it was a false misrepresentation.” (Complaint ¶ 10). Plaintiff does not allege that he incurred damages of any kind as a result of the alleged slander and libel.

Libel and slander are the two forms of defamatory communication. Libel is the publication of defamatory material by written or printed word. Slander is the communication of defamatory material by spoken word, gesture or other method not encompassed by libel. Parrish

v. Allison, 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007). To recover for defamation, Plaintiff is required to prove: “(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of special harm or the publication of the statement caused special harm. The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002) (citations omitted). When a statement is actionable irrespective of special harm, a plaintiff may recover general damages: “injury to reputation, mental suffering, hurt feelings, and other similar types of injuries which are not capable of a definite monetary valuation. Goodwin v. Kennedy, 347 S.C. 30, 45, 552 S.E.2d 319, 327 (Ct. App. 2001) (citation omitted). In contrast, special damages “are tangible losses or injury to the plaintiff’s property, business, occupation or profession, which are capable of being assessed monetarily and which result from injury to the plaintiff’s reputation.” Id., 347 S.C. at 46, 552 S.E.2d at 327 (citation omitted).

A libelous statement is “actionable irrespective of special harm” when it constitutes libel per se. Libel per se concerns “imputations of conduct or characteristics incompatible with a person’s office, trade or profession.” Capps v. Watts, 271 S.C. 276, 286, 246 S.E.2d 606, 613 (1978). Plaintiff does not allege that any statement by MCS or Davis concerned “imputations of conduct or characteristics incompatible with [his] office, trade or profession.” In the absence of libel per se, when an allegedly defamatory statement may constitute libel per se quod, a plaintiff must plead and prove special damage to maintain an action. “‘Special damage’ is actual damage and must be pled and proved.” Id., 271 S.C. at 282, 246 S.E.2d at 609.

A slanderous statement is actionable per se when it concerns "one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession. In a defamation action that is actionable per se, general damages are presumed and need not be proven by the plaintiff." Goodwin, 347 S.C. 30, 36-7, 552 S.E.2d 319, 322-23 (citations omitted). In the absence of slander per se, when an allegedly defamatory statement may constitute slander per quod, a plaintiff must allege and prove special damages. Buffkin v. Pridgen, 154 S.C. 53, 151 S.E. 105 (1930).

In the absence of libel per se or slander per se, in addition to proving special damages, a plaintiff must also prove common law malice. Erickson v. Jones St. Publr., LLC, 368 S.C. 444, 629 S.E.2d 653 (2006). "Common law malice means the defendant acted with ill will toward the plaintiff, or acted recklessly or wantonly, i.e., with conscious indifference of the plaintiff's rights." Erickson, 368 S.C. at 466, 629 S.E.2d at 665.

Plaintiff's allegation that an agent, servant or employee of MCS "placed signs around the Plaintiff's residence that the same was in foreclosure and being taken over by" Defendants (Complaint ¶ 6) does not meet the definition of libel per quod. Likewise if an agent, servant or employee of MCS made a statement to a neighbor of Plaintiff concerning foreclosure of the property, a statement concerning foreclosure does not meet the definition of slander per se. Plaintiff's inability to establish libel per se or slander per se requires proof of special damage and proof of common law malice. Plaintiff has not pled special damage. Moreover, the mistake by Davis in securing the wrong address does not establish any ill will towards Plaintiff or a conscious indifference to his rights as required to establish common law malice. It was no more and no less than a mistake.

Assuming, arguendo, that Davis' mistake may satisfy the definition of common law malice and Plaintiff can prove special damages arising from the mistake, MCS cannot be held vicariously liable for libel or slander resulting from that mistake. As discussed above in regards to its potential liability under the conversion cause of action, Davis was not employed by MCS or otherwise contracted by MCS to perform work at 5614 Frederick Drive. MCS contracted with PPP, which in turn contracted with its independent contractor Davis, who mistakenly performed work at the wrong address. There can be no imposition of vicarious liability against MCS for any claimed libel or slander by Davis, who is, at best, a remote independent contractor to MCS. Duane v. Presley Constr. Co., 270 S.C. 682, 244 S.E.2d 509 (1978); Cherry v. Myers Timber Co., 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013). Summary judgment is appropriate as to Plaintiff's claims of slander and libel against MCS.

#### Conclusion

For the foregoing reasons, there are no genuine issues of material fact, and all of Plaintiff's causes of action against MCS fail as a matter of law. Accordingly, the Court **GRANTS** MCS' Motion for Summary Judgment.

**IT IS SO ORDERED.**

\_\_\_\_\_, 2019  
Beaufort, South Carolina

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The Honorable Brooks P. Goldsmith  
South Carolina Circuit Court Judge



Beaufort Common Pleas

**Case Caption:** Gary Victory VS Wells Fargo Bank Na , defendant, et al  
**Case Number:** 2018CP0700409  
**Type:** Order/Summary Judgment

It is so Ordered

Brooks P. Goldsmith, Circuit Court Judge