

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
MIGUEL OYUELA-MARTINEZ,)
Plaintiff,)
vs.)
KUHN & KUHN, LLC AND JOHN ROBERT)
KUHN,)
Defendants.)

IN THE COURT OF COMMON PLEAS
THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-10-00341

ORDER GRANTING SUMMARY
RECEIVED
JUN 22 2020
SC Court of Appeals

This matter came before me on the Defendant Kuhn & Kuhn, LLC's (the "Firm's") motion for summary judgement. For the following reasons, the Firm's motion is hereby GRANTED.

BACKGROUND FACTS AND PROCEDURAL POSTURE

This case arises out of an automobile/pedestrian accident on October 24, 2018. On or about January 10, 2019, Plaintiff signed a Covenant Not To Execute ("Covenant") as to Mr. Kuhn, and consideration for the Covenant was paid on behalf of Mr. Kuhn.¹ Twelve days later, on January 22, 2019, Plaintiff filed the instant lawsuit against Mr. Kuhn and the Firm. In addition to the general negligence claims alleged against Defendant Kuhn, Plaintiff alleged the Firm was vicariously liable for Mr. Kuhn's actions and negligently supervised him at the time of the accident.

On June 7, 2019, Defendants moved for summary judgment. In Judge Culbertson's July 15, 2019 Order, the Firm was granted partial summary judgment as to the claims against it for

¹ The Firm made the Court aware of a second, supplemental covenant releasing Mr. Kuhn executed on or about November 29, 2019. Plaintiff's counsel claimed this second covenant was not properly before this Court, but did not dispute its existence.

direct negligence (negligent supervision and hiring). Judge Culbertson declined to grant the remaining portion of the motion as to vicarious liability.

On January 22, 2020, the Firm filed a renewed motion for summary judgment on Plaintiff's vicarious liability claim. A hearing on the Firm's motion was held on May 5, 2020. At the hearing, the Firm argued the claims against it must be dismissed as the signed Covenant that releases Defendant Kuhn as an agent also releases the Firm as the principal. Plaintiff's counsel argued that it needed additional time to respond to this argument. The hearing was adjourned and Plaintiff was allowed additional time to prepare and file a brief in opposition to the Firm's motion. The hearing was reconvened on May 14, 2020. Plaintiff conceded that a covenant releasing the agent released the principal, but argued: (1) this Court is bound by Judge Culbertson's previous order denying summary judgment; and (2) the Covenant was induced by fraud.

I find that the previous order denying summary judgment does not bar this Court from ruling on the Firm's January 2020 motion for summary judgment. The Court agrees with the Plaintiffs that there potentially could be a scintilla of evidence to get past Summary Judgment as to the fraudulent misrepresentation. However, that should be brought in a separate action. As the Covenant is still currently in place and the consideration for the Covenant has been paid, I find that the executed Covenant, which releases Defendant Kuhn as the agent, also releases the Firm as the principal.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact for a jury's consideration and it is clear that the moving party is entitled to a judgment as a matter of law. S.C. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Sapp v. Ford Motor Co., 386 S.C. 143, 146, 687 S.E.2d 47, 48 (2009). In determining whether any triable

issues of fact exist, the evidence must be viewed in the light most favorable to the nonmoving party; however, summary judgment is appropriate when plain, palpable and indisputable facts exist on which reasonable minds cannot differ. Byerly v. Connor, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992).

ORDER

1. The Previous Order Denying Summary Judgement

As an initial matter, the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings. Ballenger v. Bowen, 313 S.C. 476, 477–78, 443 S.E.2d 379, 380 (1994); see also Weil v. Weil, 299 S.C. 84, 382 S.E.2d 471 (Ct.App.1989) (statement made while denying summary judgment is not the law of the case). It is for this reason that an order denying a motion for summary judgment is not appealable. Ballenger, 313 S.C. 146, 478. Accordingly, this Court is free to rule on the Firm’s January 22, 2020 motion for summary judgment.

2. The Covenant

In South Carolina, it is well-established that a release of an agent releases the principal as to all vicarious claims. Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), rev'd on other grounds, 356 S.C. 238, 588 S.E.2d 588 (2003). In Andrade v. Johnson, a consumer sued a heating contractor and SCE&G, alleging (amongst other claims) the contractor negligently installed HVAC systems in the consumer’s home while working as an agent of SCE&G. After the consumer executed a Covenant² (“Andrade Covenant”) with the contractor,

² In Andrade, a claimant signed a Covenant Not To Sue. “A Covenant Not to Sue and a Covenant Not to Execute are so closely akin that the only major distinguishing factor is that the latter is normally executed when a settlement occurs after the filing of a lawsuit while the former is entered into before a lawsuit is filed.” Poston by Poston v.

the Circuit Court Judge granted summary judgment to SCE&G on all vicarious liability claims even though the Covenant specifically attempted to reserve the consumer's right to sue SCE&G. Id. at 222 (The Covenant states plaintiff retained: "all rights of action, claims, and demands against any and all persons other than [agent], including, but not limited to [SCE&G]"). The consumer appealed the decision and the Court of Appeals of South Carolina held the trial court properly granted SCE&G's Motion. Id. at 219. The court held firm to South Carolina common law in finding the Andrade Covenant, which released the contractor, also released the utility company as principal from vicarious liability. Id. at 226. The Court specifically found:

"When [the consumer] issued a covenant not to sue in [agent]'s favor, any claims she had against him were terminated. **Thus, SCE&G's derivative liability based upon Johnson's conduct was extinguished.** Were we to find the covenant released [agent] but not SCE&G, it would necessarily follow that SCE&G could seek indemnification from [agent] and recover the entire amount of any verdict against it from him. **This would effectively strip the covenant not to sue of any real meaning** and result in what the court in Nelson v. Gillette described as a "corrosive circle of indemnity."

Id.

The Andrade Court noted other jurisdictions at the time were split on whether a Covenant in favor of an agent released a principal, but found South Carolina law to be clear: "[A] covenant not to sue, which ordinarily does not release another joint-tortfeasor from liability, does operate as a release of the master, liable only under respondeat superior, if given to the servant responsible." Id.; see also Seaboard Air Line R.R. v. Coastal Distrib., 273 F.Supp. 340, 343 (D.S.C.1967). In reaching its conclusion, it noted the key was "whether the liability arises *only* vicariously because of the negligence of another party, or whether the parties are true joint tortfeasors, both being independently negligent toward the third party." Id. at 669.

CONCLUSION

Barnes, 294 S.C. 261, 363 S.E.2d 888 (1987); see also Ackerman v. Travelers Indem. Co. 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995).

As such, according to longstanding South Carolina common law and the principles adhered to in Andrade and Seaboard Air Lines, the executed Covenant given to agent Kuhn, operates as a release of the Firm who is only derivatively liable. The Firm's motion for summary judgment is hereby **GRANTED**.

IT IS SO ORDERED.

The Honorable Bentley Price
Circuit Court Judge

On this ____ day of May, 2020
Charleston, SC



Charleston Common Pleas

Case Caption: Miguel Oyuela Martinez VS Kuhn & Kuhn LLC , defendant, et al

Case Number: 2019CP1000341

Type: Order/Summary Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766