THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Judge

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SC Court of Appeals

Appellate Case No.: 2020-000054

Noel Owens,...Appellant,

v.

Mountain Air Heating & Cooling, South Market Real Estate, Demetra Caldera, and Ronald Gilmer, Defendants,

Of whom South Market Real Estate and Demetra Caldera are the...............Respondents.

FINAL BRIEF OF RESPONDENT

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Statement of Issues on Appeal

1.) Did the Trial Court err in granting summary judgment to Respondent regarding the enforceability and applicability of Respondent's limited liability and disclaimer provisions?

2.) Did the Trial Court err in granting summary judgment to Respondent in determining that Respondent was an independent contractor protected by the release and disclaimer?

Statement of the Case

Noel Owens (hereinafter "Appellant") brought suit against Mountain Air Heating Cooling South Market Real Estate, its licensee Demetra Caldera (hereinafter "Respondent"), and Ronald E. Gilmer on March 21, 2018. The complaint alleged, *inter alia*, negligent misrepresentation, violations of S.C. Code Ann. § 27-50-65 and § 39-5-10, *et. seq.*, and more. The trial court granted Respondent's Motion for Summary Judgement on November 1, 2019. Thereafter on November 11, 2019 Appellant filed a Motion to Reconsider, which was denied. Plaintiff then filed a Notice of Appeal on January 8, 2020, and this appeal followed.

Statement of Facts

Appellant contracted with Respondent for use of her services as a real estate agent to purchase a home in 2015. Respondent was, at all times relevant to this action an independent contractor/licensee of South Market Real Estate. Respondent's relationship to Appellant was that of real estate agent – client. Appellant purchased a home in April 2015 located at 8025 Nightingale Drive Columbia, South Carolina (hereinafter "the Home"). As part of the purchase, Respondent supplied to Appellant a non-exhaustive list of inspectors who could conduct routine home inspections appurtenant to the putative purchase. Appellant selected Mountain Air to inspect and report on the condition of the home's HVAC system. The inspection was performed in early April 2015. Appellant was supplied with Mountain Air's inspection report on April 13, 2015.

As part of the home purchase, Appellant signed and agreed to both a Disclaimer and Release of Liability. The disclaimer reads in relevant part:

> [t]he *buyer acknowledges* that South Market Real Estate and its *licensees give no warranty of any kind*, express or implied as to: (1) the physical condition of the property or as to the condition of or existence of improvements, services or systems including but not limited to termite damage, roof, basement, appliances, *heating and air conditioning systems*, plumbing, sewage/septic, electrical systems or to structure; (2) the reliability or accuracy of any individual, company, entity, or governmental agency selected by, hired by, or consulted by the buyer to perform any inspection, provide consultation, or verify information pertaining to the property." (emphasis added). (ROA p. 029, South Market Realty Disclaimer and Release of Liability Form).

The Release of Liability states:

> [t]he *buyer releases*, indemnifies and holds harmless South Market Real Estate and its *licensees* from and of any and all actions, claims, or demands regarding: (1) the recommendation of and selection of inspectors, contractors, and service providers (including but not limited to mortgage lenders and closing attorneys); (2) the acts, claims, performance, and omissions of selected inspectors, contractors, and service providers (including but not limited to mortgage lenders and closing attorneys); (3) the verification of property information." (emphasis added). (ROA p. 029, South Market Realty Disclaimer and Release of Liability Form).

Following the purchase of the home, Appellant complained of various issues relating to the condition of the HVAC system forming the basis of this action.

Standard of Review

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Per Rule 56, "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*." (emphasis added). Ultimately, "[t]he manifest purpose of a summary judgment is to obviate delay where there is no real material issue of fact." *Hammond v. Scott*, 268 S.C. 137, 143, 232 S.E.2d 336, 339 (1977). Importantly for the purpose of this appeal, "summary judgment is proper and a trial unnecessary where the intention of the parties as to the legal effect of the

contract may be gathered from the four corners of the instrument itself." *First-Citizens Bank & Tr. Co. v. Conway Nat'l Bank*, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct. App. 1984).

Argument

I. The Trial Court's finding that the limitation of liability and disclaimer provisions in Respondent's South Market Realty Disclaimer and Release of Liability Form are enforceable and bar Appellant's claims against Respondent should be upheld.

South Carolina courts "[have] generally upheld limitations of liability and exculpatory clauses, finding they are commercially reasonable." *Maybank v. BB&T Corp.*, 416 S.C. 541, 573, 787 S.E.2d 498, 515 (2016); *see also Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013); *Huckaby v. Confederate Motor Speedway, Inc.*, 276 S.C. 629, 281 S.E.2d 223 (1981). This is founded on the maxim that "[w]hen a contract is entered into freely and voluntarily, contractual limitations are normally enforced." M*aybank* at 573, 787 S.E.2d at 515. Courts have only invalidated limitation of liability clauses when they 1) violate public policy or 2) are unconscionable. *Id.* at 574, 787 S.E.2d at 515; *see also Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013). Violation of public policy is viewed "by reference to legislative enactments wherever possible." *Gladden*, at 143, 739 S.E.2d at 883. Unconscionability is "defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id.* at 144, 739 S.E.2d at 884.

The specific issue of whether limitation of liability clauses are enforceable for inspectors and related parties during the home purchasing process has already been addressed in South Carolina. In *Gladden*, the South Carolina Supreme Court found that a contract containing a limitation of liability clause entered into by a homebuyer and a home inspector was enforceable

against the homebuyer and barred future legal action against the inspector based on the inspector's performance. There, the homebuyer, Gladden, contracted with a home inspector for inspection services as is typical during the home-buying process. *Id.* at 142, 739 S.E.2d at 883. Gladden alleged that the inspector missed key deficiencies in the home that required extensive and expensive repairs. *Id.* Gladden brought suit against the home inspector and real estate company. *Id.* The Court upheld the limitation of liability clause found in their contract finding that it neither violated public policy because the legislature opted not to provide homebuyers with more protection against home inspectors and real estate agents nor was it unconscionable because the terms used were not hidden, oppressive, nor was it shown that the homebuyer was unable to understand the terms they assented to. *Id.* at 144-47, 739 S.E.2d at 884-85.

The facts of *Gladden* are highly akin to those presented in this appeal. Like the home buyer in *Gladden*, Appellant contracted with Respondent and agreed to a clear and specific limited liability provision, specifically the disclaimer and release agreement. This routine provision, like the one used by Respondent, limited Respondent's liability in the event of a suit. The key distinction between the home inspector in *Gladden* and Respondent is that, unlike the home inspector in *Gladden*, Appellant's claims are based on the claims, errors, and omissions of the third-party inspector (Mountain Air), not Respondent. Respondent's culpability is even further removed than that of the home inspector in *Gladden*. Respondent's release specifically provides for this type of situation: "*buyer releases, indemnifies and holds harmless* South Market Real Estate and its *licensees* from and of any and all actions, claims, or demands regarding . . . the *acts, claims, performance*, and omissions of *selected inspectors*, contractors, and service providers." (emphasis added). (ROA p. 029, South Market Realty Disclaimer and Release of Liability Form). Appellant's only further attempt of entangling Respondent is through an email between

Respondent and Appellant wherein Respondent provided Mountain Air's inspection report and indicated that Mountain Air's report confirmed the "heating and air looks good *the inspector said it is well taken care of*." (emphasis added). (ROA p. 055, Respondent's Email to Appellant). Overlooking Appellant's omission of the final clause of the sentence in her brief explaining the context of the email, the disclaimer provision Appellant agreed to clearly covers that communication: "[t]he buyer acknowledges that South Market Real Estate and its *licensees give no warranty of any kind*, express or implied as to . . . *heating and air conditioning* systems . . . *reliability or accuracy* of . . . *any inspection* . . . or verify information pertaining to the property." (emphasis added). (ROA p. 029, South Market Realty Disclaimer and Release of Liability Form).

Applying *Gladden's* two factor analysis for liability releases supports enforcement Respondent's provision. Respondent's provision is supported by public policy as indicated by S.C. Code Ann. § 40-57-350(G)(2), which states:

> [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 other similar reports.

(emphasis added). The statute itself bars Appellant's claims against Respondent. Nonetheless, Given the clear legislative intent garnered from the above section as it relates to a real estate licensee's lack of liability for claims based on claims or actions of third parties, like inspectors, Respondent's release and disclaimer mirror legislative enactments thus sufficing public policy. Appellant has made no claims to the contrary.

Regarding unconscionability, "only in rare circumstances has an appellate court invalidated a contract on the basis of unconscionability." *Maybank*, at 575, 787 S.E.2d at 516. Factors used in determining unconscionability include: "the nature of the injuries, any disparity in

the parties' bargaining power, the level of sophistication of the parties, whether there is an element of surprise in the challenged clause, and the conspicuousness of the clause." *Id.* The disclaimer and release clauses were found on a single sheet of paper immediately above the signature line. (ROA p. 029, South Market Realty Disclaimer and Release of Liability Form). At no time did Appellant indicate she didn't understand or was uncomfortable with the terms. The terms are routine in real estate agent representation agreements and the homebuying process in general and exist to simply protect real estate agents from acts of third parties that are beyond their control. Appellant has never claimed that the agreement was anything but the product of an arms-length engagement.

Oddly, Appellant doesn't argue that the limitation of liability clause she signed violated public policy or is unconscionable. Rather, she argues in opposition that a test used for one-time settlement agreement releases should govern, specifically that the court's analysis should focus on 1) what claims existed at the time of signing the release and 2) what the parties contemplated when signing. *Gardner v. Columbia Police Dep't*, 216 S.C. 219, 57 S.E.2d 308 (1950). In *Gardner*, a police officer was struck by a concrete truck causing multiple injuries. *Id.* at 221, 57 S.E.2d at 309. The concrete company offered the officer a settlement agreement in exchange for releasing the company from related claims. *Id.* at 222, 57 S.E.2d at 309. The officer accepted and the court found that such a release was valid and precluded any claim against the concrete company for those injuries caused by the accident. *Id.* at 225, 57 S.E.2d at 310. Appellant conflates the nature of the current release which is clearly intended to preclude unknown future claims against Respondent from that of *Gardner* which was intended to settle a preexisting, one-off claim.

Even assuming the application of, Appellant still cannot prevail. First, releases by their nature are not always interpreted to cover only what has occurred between the parties up until the

signing and not what may occur thereafter. Instead, releases have also been interpreted (and purposefully constructed) to preemptively protect one's interests from prospective claims that are foreseeable. *See e.g. Huckaby v. Confederate Motor Speedway, Inc.*, 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) (upholding a release that race car drivers had to sign before they could use defendant's racetrack); *McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 247, 612 S.E.2d 462, 464 (Ct. App. 2005) (upholding a release that patrons had to sign before they could play paintball). Respondent's limited liability clause is of this latter variety and should be similarly be evaluated under *Gladden's* framework of public policy and unconscionability as explained earlier. Second, Appellant's claim that the release's effect was not contemplated by the parties is unsupported by any evidence. Appellant has never contended that she was unable to read or understand the release nor that she disputed or wished to negotiate any of its terms. Without more, "the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself." *First-Citizens Bank & Tr. Co. v. Conway Nat'l Bank*, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct. App. 1984).

Given the clear and unambiguous nature of the disclaimer and release, the only reasonable construction of the agreement is to disclaim and release Respondent from all agreed to claims. Where precedent that bears highly similar facts and provides clear guidance on the applicable law, tests from inapposite case law should rejected. Therefore, Trial Court's finding that Respondent was entitled to summary judgment should be upheld.

II. The Trial Court's conclusion that Respondent was an independent contractor of South Market protected by the disclaimer and release should be upheld.

Under South Carolina law, an independent contractor is assessed in light of "whether the alleged master has the right and authority to control and direct the manner or means of

accomplishing the work." *Bowen v. U.S. Capital Corp.*, 295 S.C. 201, 204, 367 S.E.2d 474, 476 (Ct. App. 1988). Persuasive factors aiding in determining whether someone is an independent contractor include: "(1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire." *Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009).

Respondent's relationship to South Market was the typical "independent contractor licensed sales agent" customary in real estate brokerages. (ROA pp. 110-112, Tonya Graves Affidavit). To the first factor of control, South Market had "very little do with the marketing, sale and closing of houses, other than as required under . . . South Carolina Regulations." (*Id.*). To the second factor, Respondent was responsible for supplying her own marketing materials, including her own business cards. (*Id.*). To the third factor, Respondent was not paid as a typical employee; she was provided a 1099 tax indicating she was an independent contractor form instead of a W-2 which is typical of an employee-employer relationship. (*Id.*). To the fourth factor, Respondent was subject to firing if she violated South Carolina real estate regulations that South Market was required to follow. (*Id.*). Respondent sought out her own clients, guided them entirely through the process herself apart from South Market, and handled all matters pertaining to closing. (*Id.*). In all the relevant documents signed by Appellant, all clearly labeled Respondent as "licensee." (ROA p. 029, South Market Realty Disclaimer and Release of Liability Form). Appellant sought out Respondent because she knew Respondent personally, not because she contacted South Market looking for a realtor. (ROA pp. 118-120, Noel Owens Affidavit). South Market's only involvement was ensuring Appellant was eligible for home loan. (*Id.*) Otherwise, Appellant's entire home-buying process was personally through Respondent in her capacity as an independent contractor real estate licensee. The trial court correctly found that Respondent was an independent

contractor/licensee of Southern Market, and thus protected by the limitation of liability and disclaimer.

Conclusion

WHEREFORE, for the reasons explained above, the Court should affirm the trial court's order finding that Respondent is entitled to summary judgment as to all claims against her because 1) Appellant's claims are clearly precluded by the disclaimer and release of liability and 2) Respondent is and was at all times relevant to this action an independent contractor protected by the disclaimer and release agreement.

Respectfully Submitted,

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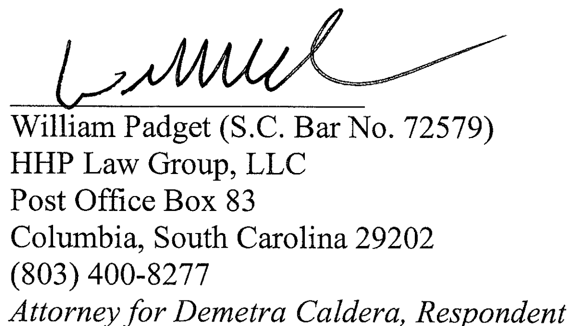
CERTIFICATE OF COUNSEL

The undersigned, counsel for Respondent, does hereby certify that the Final Brief of Respondent is in compliance with Rule 211(b), SCACR.

November 20, 2020



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