

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Nov 23 2020

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Judge

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.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	
)	
Noel Owen,)	Case No.: 2018-CP-40-01561
)	
Plaintiff,)	
	)	ORDER GRANTING SUMMARY
vs.	)	JUDGMENT FOR DEFENDANTS
	)	CALDERA AND SOUTH MARKET
Mountain Air Heating & Cooling, South	)	REALTY
Market Real Estate, Demetra Caldera)	
And Ronald E. Gilmer)	
)	
Defendant.)	
_____)	

Hearing Date:	October 17, 2019
Judge:	The Honorable Thomas A. Russo
Plaintiff’s Counsel:	Andrew Radeker, Esquire
D. Caldera’s Counsel:	Kelley Reed Leddy, Esquire
South Market’s Counsel:	Margaret A. Collins, Esquire
Ronald Gilmer’s Counsel:	Stephen K. Surasky, Esquire
Mountain Air’s Counsel:	R. Trippett Boineau, III, Esquire
Court Reporter:	Bethanie K. Creppon

This matter came before me on Defendant Caldera’s *Notice of Motion and Motion for Summary Judgment* and Defendant South Market’s *Amended Notice of Motion and Motion to Dismiss 12(b)(6); in the Alternative, Motion for Summary Judgment* filed on February 26, 2019 and April 23, 2019 respectively. Proper service was effectuated on all parties pursuant to the *South Carolina Rules of Procedure*.

Present at the call of the case was Andrew Radeker, Esquire of Harrison & Radeker, PA, attorney for the Noel Owens, the Plaintiff; Kelley Reed Leedy, Esquire of Finkle Law Firm, LLC, attorney for Demetra Caldera, Defendant; Margaret A. Collins, Esquire of Palmetto State Law Group, LLC for South Market Real Estate, Defendant; Stephen K. Surasky, Esquire of Surasky Law Firm, LLC for Ronald Gilmer, Defendant; and R. Trippett Boineau, III, Esquire of McAngus

Goudelock & Courie, LLC for Mountain Air Heating and Cooling, Defendant. Defendant South Market submitted supporting Memorandum of Law on March 12, 2019, and Plaintiff submitted a Memorandum in Opposition October 16, 2019.

Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rules Civ. Proc., Rule 56(c). *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246 (S.C.,2012). After consideration of the submitted memoranda, arguments by counsel, pleadings, and applicable case law, I make the following findings of fact and conclusions of law:

1. Plaintiff engaged Defendant Caldera as a real estate agent in April 2015. At the time Plaintiff engaged Defendant Caldera, she was presented with a one (1) page document that contained a Disclaimer and Release of Liability as applied to Defendant South Market and its “licensees” including Demetra Caldera.
2. To paraphrase, the Disclaimer and Release of Liability placed Plaintiff on notice that Defendant South Market and its licensees did not provide any warranty as to the reliability or accuracy of any inspector hired to perform an inspection, consultation, or verify information pertaining to property purchased by the Plaintiff. The Disclaimer and Release of Liability also provided that plaintiff agreed to release, indemnify, and hold harmless South Market and its licensees for any actions or omissions by any inspectors, contractors, and service providers.
3. Plaintiff signed this one (1) page document on or about April 3, 2015. None of the above facts are disputed.
4. Pursuant to *Stanley Smith Sons v. D.M.R. Inc.*, 307 S.C. 413,417 (Ctr. App. 1992), a contracting party has a duty to read a contract prior to signing, and a signature serves as an

indication that the party read the contract. Failure to read is only excused “if the party is ignorant and unwary.” *Id.* At hearing, the Plaintiff provided no evidence that she was ignorant or unwary, or that she failed to read the Disclaimer and Release of Liability.

5. Further, at all times material to the sale, Defendant Caldera was an independent contractor or Defendant South Market’s “licensee.” As such, the Disclaimer also covered Defendant Caldera- meaning that Defendant Caldera was disclaimed and release from liability as to any representations, actions, or omissions of any inspectors, contractors, and service providers as well.
6. Plaintiff further argued that releases are generally not prospective in nature. To support this argument, Plaintiff relied on *Gardener v. City of Columbia Police Dept.*, 216 S.C. 219, 223 (1950). However, the case states, “The scope and effect of a release must be gathered from its terms, which may be interpreted in the light of the surrounding facts and circumstances.” *Id.* As applied to the case at bar, the terms of both the disclaimer and release of liability are clear. Defendant South Market and its licensee makes no warranties as to the reliability of any of the inspectors, contractors, or service providers. Further, Plaintiff by signing the document agreed to “release, indemnify, and hold harmless” Defendant South Market and its licensee from any claims or omissions by the inspector, contractors, or service providers.
7. Plaintiff’s claims against South Market Real Estate and Demetra Caldera stem from what she alleges was a negligent inspection performed by Defendant Mountain Heating and Air on the HVAC system of the home Plaintiff purchased.
8. Plaintiff’s claims in this case against Defendants South Market Real Estate and Demetra Caldera fall squarely within the purview of the Disclaimer and Release of Liability signed

by Plaintiff on or about April 3, 2015.

9. For the above reasons, the Court hereby grants both Defendant Caldera's and Defendant South Market's Motion for Summary Judgment.
10. Both South Market Real Estate and Demetra Caldera counterclaimed against the Plaintiff for indemnification based on the indemnity clause in the Disclaimer and Release of Liability.
11. As such, Plaintiff is to indemnify both Defendant Caldera and Defendant South Market for their defense of this action, including attorney's fees and costs, and Defendants South Market Real State and Demetra Caldera shall provide the amount of their indemnification claims to Plaintiff within fifteen (15) days of the signing of this Order. If the indemnification claims are accepted by Plaintiff, the parties are to effectuate a Consent Order of the amount of judgment against Plaintiff within forty-five (45) days from the date of this Order. If any dispute arises as to the amount of the indemnification, then the matter will be set for a damages hearing upon the filing of the appropriate Motion.

AND IT IS SO ORDERED

The Honorable Thomas A. Russo



Richland Common Pleas

Case Caption: Noel Owens vs Mountain Air Heating & Cooling , defendant, et al

Case Number: 2018CP4001561

Type: Order/Summary Judgment

So Ordered

s/Thomas A. Russo #2141

Electronically signed on 2019-11-01 12:20:10 page 5 of 5

Noel Owens
PLAINTIFF(S)

Ronald E Gilmer et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED** (*CHECK REASON*): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN** (*CHECK REASON*): Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's motion to reconsider is denied.

ORDER INFORMATION

This order ends does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 12/19/2019 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Richland Common Pleas

Case Caption: Noel Owens vs Mountain Air Heating & Cooling , defendant, et al

Case Number: 2018CP4001561

Type: Order/Electronic Form 4

So Ordered

s/Thomas A. Russo #2141

Electronically signed on 2019-12-19 11:14:26 page 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
CASE NO. 2018-CP-40-_____

Noel Owens,

Plaintiffs,

vs.

**Mountain Air Heating & Cooling, South
Market Real Estate, Demetra Caldera,
and Ronald E. Gilmer,**

Defendants.

**SUMMONS
(JURY TRIAL DEMANDED)**

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said Complaint upon the subscriber, at his office, P. O. Box 50143, Columbia, South Carolina 29250, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint in the time aforesaid, a judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,

/s/ Andrew S. Radeker
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Columbia, South Carolina
March 21, 2018

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CASE NO. 2018-CP-40-_____

Noel Owens,

Plaintiffs,

vs.

**Mountain Air Heating & Cooling, South
Market Real Estate, Demetra Caldera
and Ronald E. Gilmer,**

Defendants.

**COMPLAINT
(JURY TRIAL DEMANDED)**

The Plaintiffs, complaining of the Defendants herein, allege:

1. At times material to this action, the Plaintiff (hereinafter “Owens”) was a citizen and resides of the County of Richland, State of South Carolina.
2. Defendant Mountain Air Heating & Cooling (hereinafter “Mountain Air”) is a business entity with its principal place of business in Richland County, South Carolina.
3. Defendant South Market Real Estate (hereinafter “South Market”) is a business entity with its principal place of business in Richland County, South Carolina.
4. Defendant Demetra Caldera (hereinafter “Caldera”) is a citizen and resident of Richland County, South Carolina.
5. Defendant Ronald E. Gilmer (hereinafter “Gilmer”) upon information and belief is a resident of Aiken County, South Carolina.
6. Owens desired to purchase a home and engaged Caldera for that purpose. Caldera represented that she was capable and qualified to act as a real estate agent on behalf of Owens in purchasing a home.
7. Caldera showed Owens several properties.

8. Eventually Owens, herself, discovered the property at 8025 Nightingdale Drive, Columbia, SC and asked Caldera to arrange for Owens to see it and Caldera did so.

9. Owens liked the home and instructed Caldera to arrange a sale. Caldera said she would handle everything including the inspections and assisting in determining if Owens could obtain a loan to purchase the home.

10. Caldera represented the interests of Owens in the purchasing of the property and closing the transaction.

11. Caldera was at all times material hereto, a realtor working at South Market.

12. South Market had, at all times material hereto, the right to control Caldera.

13. Caldera was, at all times material hereto, an agent and servant of South Market

14. Gilmer was the owner of the 8025 Nightingale Drive who sold the same to Owens.

15. Caldera represented to Owens that the heating and air system looked good and that it was well taken care of.

16. There were in fact numerous problems with the heating and air system and it had to be replaced by Owens.

17. Caldera and Gilmer knew or should have known of the problems and condition of the heating and air system and should have disclosed the same to Owens.

18. Caldera knew that Owens was counting on her to insure the home was in a satisfactory condition failed to perform their duties as Owens' realtor adequately, including, but not necessarily limited to representing to her that the heating and air system looked good and was well taken care of. Mountain Air performed these repairs and the carpet cleaning in a negligent manner, which cost Owens money.

18. Caldera engaged Mountain Air to perform an inspection on the heating and cooling system (HVAC system).

19. Mountain Air stated the heating and air system looks good and was well taken care of.

20. In fact the air system had numerous problems, including but not limited to, the condenser and evaporator coil were extremely dirty, the unit top was missing insulation and the compressor had weak valves. The gas line was improperly installed and was in contact with the ground. Numerous sections of supply ducts were missing insulation. The main supply and trunk lines needed to be replaced and hung off the ground. In addition shipping holes in Gaspac base we not filled to prevent rodent infestation and flashing was not waterproof to keep duct insulation dry and intact. The gas line issues were not up to standard Code and the duct system was not properly installed. Due to the age and condition of the unit it had to be replaced.

21. Mountain Air failed to adequately inspect the heating and air conditioner.

22. Mountain Air did not inform Owens of the above conditions which an adequate inspection would have revealed.

23. Owens ultimately discovered these problems after she had closed on the purchase of the house, and spent money to correct these problems.

24. If Owens had known of the home's problems, she would not have purchased it.

FOR A FIRST CAUSE OF ACTION

25. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

26. Gilmer violated S.C. Code Ann. § 27-50-65 (hereinafter "the Residential Property Condition Disclosure Act") in that he did not disclose the condition of the air conditioner.

27. Owens has suffered damages as a proximate result of Gilmer's violation of the Residential Property Condition Disclosure Act.

28. Gilmer is liable to Owens for her damages, reasonable attorney's fees, and costs.

FOR A SECOND CAUSE OF ACTION

29. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

30. Actions of the Defendants including, but not necessarily limited to, those stated in this pleading, constituted unfair and deceptive acts in trade or commerce and were violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*

31. These Defendants knew or should have known that the said actions were violations of the Unfair Trade Practices Act and constituted unfair and deceptive acts in trade or commerce.

32. These actions are capable of repetition, including, but not necessarily limited to, as follows:

- a. Caldera is a realtor and will thus have the opportunity to engage in similar misconduct in the future;
- b. South Market is in the business of providing realtor services and will thus have the opportunity to engage in similar misconduct in the future; and
- c. Mountain Air is in the business of home inspection and will thus have the opportunity to engage in similar misconduct in the future.

33. Owens has suffered damages as a proximate result of these Defendants' actions.

34. Owens is entitled to recover from these Defendants actual damages, treble damages, reasonable attorney's fees, and costs.

FOR A THIRD CAUSE OF ACTION

35. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

36. The Defendants had a duty to inform Owwns of the problems with 8025 Nightingale Drive that are described hereinabove.

37. The failure of these Defendants to inform Owens of these problems was a representation to Owens that the house did not have those problems.

38. These Defendants' omissions to inform the Owens of these problems were calculated to convey to Owens the impression that the house was free of such problems.

39. These Defendants knew or should have known that the impression that these omissions were calculated to give was false.

40. In addition, Mountain Air and Caldera made affirmative representations that the house did not suffer from these problems.

41. Owens did not know of these problems until after she had moved into the house, and she would not reasonably have been able to discover them before the closing.

42. These Defendants' aforesaid representations were material to Owens purchase of the house subject of this action.

43. These Defendants had a monetary interest in making these misrepresentations.

44. Owens reasonably relied and had a right to rely on the representations made by these Defendants that the house did not have these problems.

45. As a proximate result of these Defendants' failure to disclose these conditions to Owens and these Defendants' misrepresentations, Owens has suffered damages.

46. Owens is entitled to recover actual and punitive damages from these Defendants.

FOR A FOURTH CAUSE OF ACTION

47. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

48. Even if Gilmer did not know of the falsity of his representations and the impression conveyed by his failure to disclose problems with the house, he should have known of such falsity.

49. Gilmer was familiar with the true condition of the house.

50. Alternatively, if Gilmer was not familiar with the true condition of the house, then he had had the opportunity to become familiar with its condition prior to the time that the house was marketed and sold to Owens.

FOR A FIFTH CAUSE OF ACTION

51. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

52. Defendants had a financial interest in misrepresenting the condition of the house at 8025 Nightingale Drive.

53. Defendants owed Owens a duty to exercise reasonable care in their representations to Owens regarding the condition of the house.

54. Defendants breached that duty to the Owens by concealing the true condition of the house and failing to disclose the problems with the house.

55. As a proximate result of these Defendants' failure to disclose these conditions to the Owens, Owens has suffered damages.

56. Owens is entitled to recover actual and punitive damages from the Defendants.

FOR A SIXTH CAUSE OF ACTION

57. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

58. Mountain Air Heating and Cooling owed Owens a duty of care with regard to the inspection of 8025 Nightingale Drive.

59. This Defendant breached that duty by its acts and omissions that were negligent, grossly negligent, reckless, and/or willful and wanton, including, but not limited to, their failure to adequately inspect the house at 8025 Nightingale Drive.

60. As a proximate result of this Defendants negligent, grossly negligent, reckless, and/or willful and wanton acts and omissions, Owens has suffered damages.

61. Owens is entitled to recover actual and punitive damages from this Defendant.

62. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

FOR A SEVENTH CAUSE OF ACTION

63. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

64. Caldera and South Market Real Estate, LLC are entities that undertook agency duties to the Owens in the purchase and sale transactions described above.

65. These Defendants breached their agency duties to the Owens, including, but not necessarily limited to, in the following particulars:

- a. In failing to disclose to the Owens all facts pertinent to the transactions, such facts including, but not being limited to, the problems with the 8025 Nightingale Drive house;
- b. In failing to act as agents with the loyalty to the Owens inherent in the agency relationship; and
- c. In failing to exercise reasonable care in the conduct of the Owens business in the transaction.

66. As a proximate result of these Defendants' breach of their agency duties, Owens has suffered damages.

67. Owens is entitled to recover actual and punitive damages from these Defendants.

FOR A TENTH CAUSE OF ACTION

68. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

69. Owens contracted with Caldera, and agent and employee of South Market as aforesaid, for Caldera to serve as Owens realtor.

70. Caldera breached that contract through Caldera's acts and omissions as described herein.

71. This breach of contract was done with fraudulent intent with regard to the breach and was accompanied by fraudulent act or acts with regard to the breach.

72. This breach of contract accompanied by fraudulent act proximately caused damages to Owens.

73. Owens is entitled to recover actual damages, punitive damages, and the costs of this action from these Defendants as a result of this breach of contract accompanied by fraudulent act.

WHEREFORE, the Plaintiffs pray:

- a) For judgment against the Defendants awarding the Plaintiff actual damages;
 - b) For judgment against the Defendants awarding the Plaintiff punitive damages;
 - c) For judgment against the Defendants awarding the Plaintiff treble damages;
 - d) For judgment against the Defendants awarding the Plaintiff reasonable attorney's fees;
 - e) For judgment against the Defendants awarding the Plaintiff the costs of this action;
- and
- f) For such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Andrew S. Radeker

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March 21, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Noel Owens,)
Plaintiff,)
v.)
Mountain Air Heating & Cooling,)
South Market Real Estate, Demetra)
Caldera, and Ronald E. Gilmer,)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
Case No.: 2018-CP-40-01561

ANSWER AND COUNTERCLAIM

TO: THE PLAINTIFF, NOEL OWENS, BY AND THROUGH ANDREW S. RADEKER, ESQUIRE:

NOW COMES THE DEFENDANT, Southern Market Real Estate, by and through its undersigned counsel, would respectfully answer the Complaint of the Plaintiff, and would respectfully show unto this Court as follows:

FOR A FIRST DEFENSE
(General Denial)

1. The Defendant denies each and every allegation not specifically admitted herein and demands strict proof thereof.

FOR A SECOND DEFENSE
(Responses to Enumerated Paragraphs)

- 2. The Defendant is without knowledge as to Paragraphs One (1) and Two (2).
- 3. The Defendant admits Paragraph Three (3).
- 4. Upon information and belief, The Defendant admits Paragraph Four (4).
- 5. Defendant is without sufficient information to admit or deny Paragraph Five (5).
- 6. Upon information and belief, the Defendant admits Paragraphs Six (6) and Seven (7).
- 7. Defendant is without sufficient information to admit or deny Paragraph Eight (8).

8. The Defendant admits so much of Paragraph Nine (9) as Defendant Caldera did arrange the sale of the property but, upon information and belief, denies the remaining allegations of Paragraph Nine (9). Specifically, the Defendant avers that the Defendants Agent and South Market Real Estate do not elect which, if any, inspections occur, which contractors are used for such inspections, or what broker and loan company the purchaser elects to use. Upon request of the purchaser, the Defendant Agent and Defendant South Market will provide a list of contractors and lenders. If the purchaser elects to have inspections, the agent will provide access to the home during such inspections as a matter of convenience to the purchaser.
9. The Defendant denies the allegations of Paragraph Ten (10). The Defendant would aver that the duties performed by Defendants Agent and South Market are specifically delineated and limited to those indicated in the Agency Agreement between the Defendants and Plaintiff.
10. The Defendant admits so much of Paragraph Eleven (11) that infers that Defendant Caldera was an independent contractor with Defendant South Market at all times relevant to this transaction. Defendant South Market, however, specifically denies that Defendant Caldera worked for Defendant South Market as an employee.
11. The Defendant denies Paragraphs Twelve (12) and Thirteen (13) and craves reference to Paragraph Ten (10) herein.
12. Upon information and belief, the Defendant admits Paragraph Fourteen (14).
13. The Defendant is without knowledge as to Paragraphs Fifteen (15), Sixteen (16), and Seventeen (17).

14. Defendant South Market denies so much of the allegations of Paragraph Eighteen (18) that avers Caldera knew Owens was counting on her to insure the home was in satisfactory condition, or that avers Caldera failed to perform her realtor duties adequately. Defendant does not possess sufficient knowledge to admit or deny the remaining allegations and, therefore, denies them and demands strict proof thereof.
15. As to the second Paragraph Eighteen (18), Defendant denies this, as only a purchaser may, under South Carolina law and pursuant to the written agreement between Plaintiff and Defendant, elect to have inspections and also has the exclusive obligation to select any inspector. Defendant merely provides a list of contractors for Plaintiff's convenience and also advised the Plaintiff they may select any contractor to perform such service. Therefore, Plaintiff was the party charged with selecting the contractor. As her agent, Defendant's independent contractor realtor would have merely scheduled the inspection and made the property available to such contractor. Defendant denies any realtor would have engaged a contractor without explicit instructions from the Plaintiff to do so.
16. Defendant denies the allegations of Paragraph Nineteen (19), as the HVAC report merely stated, "Performed Single System HVAC inspection. Found everything is working well at this time." Upon information and belief, no representation or warranty was provided, or could have been provided, as to the history of care of the unit.
17. Defendant is without sufficient information to admit or deny the allegations of Paragraph Twenty (20), Twenty-One, (21), Twenty-Two (22), Twenty-Three (23), and Twenty-Four (24) and, therefore, demands strict proof thereof.

18. Paragraph Twenty-Five (25) through Twenty-Nine do not relate to this Defendant and does not require a response from it. To the extent a response is required, such allegations are denied in their entirety.
19. The Defendant avers that Paragraph Thirty (30) is a legal conclusion and does not require a response. To the extent a response is required, the Defendant denies it.
20. Defendant denies the allegations of Thirty-One (31).
21. As to Paragraph Thirty-Two (32):
- a. The Defendant denies a, to the extent that it avers misconduct by Caldera. As to the remaining paragraph, the Defendant is informed and believed that Caldera is still a realtor and will continue to be one for the foreseeable future;
 - b. The Defendant denies b to the extent that it avers misconduct by Defendant South Market and admits that Defendant South Market is still a realty company and will continue for the foreseeable future;
 - c. The Defendant is without knowledge as to c and demands strict proof thereof.
22. Defendant denies Paragraph Thirty-Three (33) to the extent it applies to Defendant.
23. Defendant denies Paragraph Thirty-Four (34) to the extent it applies to Defendant.
24. Defendant denies Paragraphs Thirty-Six (36), Thirty-Seven (37), Thirty-Eight (38), and Thirty-Nine (39) to the extent they apply to Defendant. Defendant would also state that at no time did they omit or represent anything to the Plaintiff as this Defendant never dealt with the Plaintiff personally.
25. Based upon the HVAC report, the Defendant would deny the allegations of Paragraph Forty (40). To the extent that Plaintiff avers that some other verbal or written communication with representations occurred, this Defendant is without knowledge as to

- the representation and therefore, demands strict proof thereof for the allegations in Paragraph Forty (40).
26. The Defendant is without knowledge as to Paragraph Forty-One (41). However, the Defendant would aver that, if the allegations relating to the HVAC conditions proffered by Plaintiff are true, the Defendant would deny that the Plaintiff was not able to reasonably discovery such problems.
 27. Defendant denies Paragraph Forty-Two (42) as this Defendant, upon information and belief, denies such representations were made, or that any representation other than those contained in the report should have been relied upon by Plaintiff.
 28. The Defendant denies Paragraph Forty-Three (43) and would aver that the Defendant had no monetary interest in making a statement relating to the HVAC.
 29. As to Paragraph Forty-Four (44), and upon information and belief, the Defendant denies that the representation that “the house did not have these problems” was made. However, to the extent that such representation can be shown, Defendant denies Plaintiff had a right to rely on any representation outside the four corners of the HVAC report and the Seller’s disclosure, as it relates to the issues at hand.
 30. Defendant denies Paragraph Forty-Five (45) and would again state that Defendant had no direct dealing with the Plaintiff in which Defendant could disclose or misrepresent anything. Defendant is without sufficient information to admit or deny issues relating to Plaintiff’s damages and therefore, denies same and demands strict proof thereof.
 31. Defendant denies Paragraph Forty-Six (46) to the extend it applies to this Defendant.
 32. Defendant would aver that Paragraphs Forty-Eight (48), Forty-Nine (49), and Fifty (50) do not require a response from this Defendant. To the extent a response is required,

- Defendant is without knowledge as to Paragraphs Forty-Eight (48), Forty-Nine (49), and Fifty (50) and demands strict proof thereof.
33. Defendant denies Paragraphs Fifty-Two (52), Fifty-Three (53), Fifty-Four (54), Fifty-Five (55) and Fifty-Six (56).
34. Defendant would aver that Paragraphs Fifty-Eight (58), Fifty-Nine (59), Sixty (60), and Sixty-One (61) do not require a response from this Defendant. To the extent a response is required, Defendant is without knowledge as to Paragraphs Fifty-Eight (58), Fifty-Nine (59), Sixty (60), and Sixty-One (61) and demands strict proof thereof.
35. Defendant admits so much of Paragraph Sixty-Four (64) that avers Plaintiff and Defendants Caldera and South Market entered into an Agency Agreement. But, this Defendant would crave reference to such Agreement, as well as the applicable statutes and regulations, for the rights and obligations of each party thereto.
36. Defendant denies Paragraph Sixty-Five (65), as well as its subparts thereto.
37. Defendant denies Paragraphs Sixty-Six (66) and Sixty-Seven (67).
38. Defendant denies Paragraph Sixty-Nine (69) and would state that Defendant Caldera was not an employee, but an independent contractor.
39. Upon information and belief, Defendant denies the allegations of Paragraph Seventy (70), Seventy-One (71), and Seventy-Two (72).
40. Defendant denies Paragraph Seventy-Three (73).

FOR ADDITIONAL DEFENSES AND BY WAY OF COUNTERCLAIMS
(General Defenses/Indemnification/ Failure to State a Claim)

41. Defendant adopts and incorporates all prior paragraphs as if realleged herein.
42. As to the allegations against this Defendant, Plaintiff fails to state a cause of action for which relief can be granted.

43. Defendant would aver that the Plaintiff has misstated the legal relationship between Defendant South Market and Defendant Caldera, as Defendant Caldera was an independent contractor. As such, this Defendant would not have liability for the fashion which Defendant Caldera undertook her agency duties, to the extent that the allegations herein are concerned.
44. Defendant had no direct dealings with the Plaintiff at any time material to the issues contained in the Plaintiff's Complaint and therefore could not have made or omitted any representations to the Plaintiff.
45. Further, pursuant to an addendum to the Agency Agreement between Defendant Caldera and the Plaintiff, attached as **Exhibit A**, the Plaintiff was aware of the nature of the relationship between Defendant and Defendant Caldera. Additionally, Plaintiff knew of her right and duty to select her own contractors, and to rely upon written reports from such contractors.
46. The addendum referenced as **Exhibit A** provides that Plaintiff is precluded and estopped from seeking relief from this Defendant, as well as having waived any rights to sue Defendant South Market for the allegations contained herein.
47. Further, Plaintiff agreed to indemnify and hold Defendant South Market harmless from any and all claims or demands for:
- a. The recommendation and selection of inspectors, contractors and service providers;
 - b. The acts, claims, performance and omissions of selected inspectors, contractors, and service providers.

48. As a direct and proximate result of Plaintiff's agreement to indemnify and hold this Defendant harmless, Defendant South Marketing avers that it is entitled to recovery of all costs for having to defend this action, including all attorney's fees and costs.
49. Defendant again craves reference to the Agreement between the Plaintiff and Defendant Caldera as it contains this limitation on Defendant Caldera's duties.
50. Defendant requests that all allegations in the Plaintiff's Complaint, as applied to the Defendant are dropped for failure to state a cause of action for which relief can be granted.

FOR ADDITIONAL DEFENSES AND BY WAY OF COUNTERCLAIMS
(Unfair Trade Practices Act is Inapplicable)

51. Defendant adopts and incorporates all prior paragraphs as if realleged herein.
52. As applied to Defendant, the South Carolina Unfair Trade Practices Act is inapplicable under the law.
53. Pursuant to §39-5-40 of the South Carolina Unfair Trade Practices Act, the act itself is not applicable to any "actions or transactions permitted under law administered by any regulatory body."
54. The South Carolina Department of Labor, Licensing, and Regulation governs the licensing and actions of all Real Estate Agents, brokers, and Real Estate Businesses.
55. The South Carolina Department of Labor, Licensing, and Regulation is a regulatory body as contemplated by the statute.
56. As such, any complaints or claims should have been brought before the regulatory body.
57. Any alleged representations relating to the HVAC may or should be deemed as mere "puffing" and may not, or should not be relied upon by Plaintiff.
58. Plaintiff only had the right to rely upon the written inspection reports for the HVAC system.

59. Plaintiff had a duty to mitigate damages and failed to do so.
60. The Defendant would aver that Plaintiff contributed to the negligence, or was comparatively negligent, by her selection of the HVAC inspector, as well as failing to ensure that the Seller's Disclosures were accurate. Specifically, Plaintiff had a duty to undertake her own due diligence to ensure the condition of the home prior to purchase that was not and cannot be delegated to a real estate agent. As such, Plaintiff lacked a duty of due care in her due diligence of the subject property.
61. Defendants Agent and South Market have no duty and did not undertake any duty to warrant the condition of the home or HVAC. In fact, Defendants Agent and South Market limited any warranties of any kind, including the heating and air conditioning system, as well as any individual, company or entity selected by, hired by, or consulted by the buyer to perform any inspection pertaining to the property.
62. Plaintiff assumed the risk of the condition of the home and HVAC, as such a transaction is subject to the doctrine of caveat emptor.
63. By signing the
64. To the extent that Plaintiff alleges Defendant South Marketing is vicariously liable for the acts and deeds of Defendant Agent, the following defenses are alleged:
- a. The Defendant agent was an independent contractor and was not working under the direction and control of Defendant South Market;
 - b. If the allegations of the Plaintiff are true, Defendant Agent was not acting within the scope of her duties as agent, as well as would be violating certain laws and regulations relative to real estate agents. As such, her actions, if as alleged by Plaintiff, would not be foreseeable to Defendant South Marketing;

- c. If Plaintiff's allegations are true, the actions of the Defendant Agent would not have been in furtherance of a legitimate business interest of the Defendant South Market.

WHEREFORE, based on the foregoing reasons, Defendant requests an Order of this Court:

- A. Dismissing all claims in Plaintiff's Complaint with prejudice;
- B. Awarding Defendant attorney's fees and costs for having to defend in this action;
- C. Requiring Plaintiff to fully indemnify and hold this Defendant harmless from all liability resulting from the filing of this action;
- D. Awarding Defendant any other relief this Court deems just and appropriate.

PALMETTO STATE LAW

//s// Margaret A. Collins
Margaret A. Collins, Bar No. 13290
2241 Bush River Rd.
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Attorney for Defendant

July 13, 2018
Columbia, South Carolina



Due Diligence Period: A designated period of time during which the buyer is free to investigate a property for which they're under contract to purchase. Performing this type of investigation contributes significantly to informed decision making by enhancing the amount and quality of information available about the property to the buyer. Investigating the property can include, but is not limited to conducting inspections of the property and its components and systems, verification of pertinent information disclosed by the seller, and verification of information deemed important to the buyer regarding the property and its purchase.

Disclaimer

In the state of South Carolina, it is always the buyer's decision which inspections the buyer elects to conduct on the property and which companies, individuals, or entities they hire to conduct inspections and perform these services. South Market Real Estate and its licensees advise the buyer that all inspection results and verification of information deemed important to the buyer be received and documented in writing from the providing source.

The buyer acknowledges that South Market Real Estate and its licensees give no warranty of any kind, expressed 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.

Release of Liability

The buyer hereby 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.

Seller or Buyer *Nail Owen* Date *4/18/15*

Seller or Buyer _____ Date _____

Licensee *Michael [Signature]* Date *4/13/18*

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	
	)	Civil Action No.: 2018–CP–40-01561
Noel Owens,)	
)	
Plaintiff,)	
)	
vs.)	
	)	ANSWER AND COUNTERCLAIM OF
Mountain Air Heating & Cooling, South	)	DEFENDANT DEMETRA CALDERA
Market Real Estate, Demetra Caldera, and	)	(Jury Trial Demanded)
Ronald E. Gilmer,)	
)	
Defendants.)	

Defendant Demetra Caldera, by and through her undersigned attorneys, answering the Plaintiff's Complaint, would respectfully show unto the Court the following:

FOR A FIRST DEFENSE
(General Denial)

1. Each and every allegation of the Plaintiff's Complaint is denied unless specifically admitted herein.
2. Defendant is without information sufficient to form a belief about the truth of the allegations contained in Paragraph 1; thus, Defendant denies all allegations contained in Paragraph 1.
3. Defendant is without information sufficient to form a belief about the truth of the allegations contained in Paragraph 2; thus, Defendant denies all allegations contained in Paragraph 2.
4. Defendant is without information sufficient to form a belief about the truth of the allegations contained in Paragraph 3; thus, Defendant denies all allegations contained in Paragraph 3.
5. Defendant admits the allegations contained in Paragraph 4.

6. Defendant is without information sufficient to form a belief about the truth of the allegations contained in Paragraph 5; thus, Defendant denies all allegations contained in Paragraph 5.

7. Defendant does not have sufficient recollection of her first interactions with Plaintiff to form a belief about the truth of the allegations contained in Paragraphs 6 through 8; thus, Defendant denies all allegations contained in Paragraphs 6 through 8.

8. Defendant denies all allegations contained in Paragraph 9.

9. Defendant admits the allegations contained in Paragraph 10 insofar as she was Plaintiff's real estate agent in the purchasing of the property located at 8025 Nightingale Drive, Columbia, SC. Defendant denies all allegations remaining in Paragraph 10.

10. Defendant denies all allegations contained in Paragraph 11.

11. Defendant admits the allegations contained in paragraphs 12 and 13 to the extent the Defendant was a real estate agent employed by South Market Real Estate. Defendant denies all remaining allegations in paragraphs 12 and 13.

12. Defendant is without information sufficient to form a belief about the truth of the allegations contained in Paragraph 14; thus, Defendant denies all allegations contained in Paragraph 14.

13. Defendant denies all allegations contained in Paragraphs 15 through 18.

14. Defendant is without information sufficient to form a belief about the truth of the allegations contained in Paragraphs 19 through 24; thus, Defendant denies all allegations contained in Paragraphs 19 through 24.

PLAINTIFF'S FIRST CAUSE OF ACTION

15. Paragraph 25 contains no allegations and does not require a response. To the extent that a response is required, Defendant denies all allegations contained therein.

16. Defendant denies all allegations contained in Paragraphs 26 through 28.

PLAINTIFF'S SECOND CAUSE OF ACTION

17. Paragraph 29 contains no allegations and does not require a response. To the extent that a response is required, Defendant denies all allegations contained therein.

18. Defendant denies all allegations contained in Paragraphs 30 through 34 and any subparagraphs contained therein.

PLAINTIFF'S THIRD CAUSE OF ACTION

19. Paragraph 35 contains no allegations and does not require a response. To the extent that a response is required, Defendant denies all allegations contained therein.

20. Defendant denies all allegations contained in Paragraphs 36 through 46.

PLAINTIFF'S FOURTH CAUSE OF ACTION

21. Paragraph 47 contains no allegations and does not require a response. To the extent that a response is required, Defendant denies all allegations contained therein.

22. Defendant denies all allegations contained in Paragraphs 48 through 50.

PLAINTIFF'S FIFTH CAUSE OF ACTION

23. Paragraph 51 contains no allegations and does not require a response. To the extent that a response is required, Defendant denies all allegations contained therein.

24. Defendant denies all allegations contained in Paragraphs 52 through 56.

PLAINTIFF'S SIXTH CAUSE OF ACTION

25. Paragraph 57 contains no allegations and does not require a response. To the extent that a response is required, Defendant denies all allegations contained therein.

26. Defendant denies all allegations contained in Paragraphs 58 through 62.

PLAINTIFF'S SEVENTH CAUSE OF ACTION

27. Paragraph 63 contains no allegations and does not require a response. To the extent that a response is required, Defendant denies all allegations contained therein.

28. Defendant denies all allegations contained in Paragraphs 64 through 67, and all subparts contained therein.

PLAINTIFF'S TENTH CAUSE OF ACTION

29. Paragraph 68 contains no allegations and does not require a response. To the extent that a response is required, Defendant denies all allegations contained therein.

30. Defendant denies all allegations contained in Paragraphs 69 through 73.

31. The remainder of Plaintiff's Complaint contains a prayer for relief. To the extent necessary, Defendant denies that Plaintiff is entitled to any relief.

FOR A FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

32. Plaintiff's Complaint fails to state a claim upon which relief can be granted. As such, Defendant Caldera is entitled to relief dismissing Plaintiff's claims.

FOR A SECOND AFFIRMATIVE DEFENSE
(Injury by Third Party)

33. Defendant denies Plaintiff's allegations; however, if the Plaintiff's allegations are true, Defendant asserts that such injury (if any) suffered by the Plaintiff was caused by a third-party and not by Defendant Caldera.

FOR A THIRD AFFIRMATIVE DEFENSE
(Comparative Negligence)

34. The damages suffered by Plaintiff were the direct and proximate result of her own negligence and Plaintiff's recovery should be barred and/or reduced in proportion to the amount of her own negligence.

FOR A FOURTH AFFIRMATIVE DEFENSE

(Estoppel, Laches, and Waiver)

35. Plaintiff's claims are barred by the doctrines of estoppel, laches, and waiver.

FOR A FIFTH AFFIRMATIVE DEFENSE
(Setoff)

36. Defendant is entitled to a setoff of any recovery by the Plaintiff in that Plaintiff's recovery must be reduced to the extent that any other parties' actions or omissions caused or contributed to Plaintiff's damages.

FOR A SIXTH AFFIRMATIVE DEFENSE
(Economic Loss Doctrine)

37. Plaintiff claims are barred by the economic loss doctrine.

FOR A SEVENTH AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

38. Any injury and/or damage Plaintiff has allegedly suffered were due to Plaintiff's failure to mitigate her damages, which is a complete bar to her recovery.

FOR AN EIGHTH AFFIRMATIVE DEFENSE
(Punitive Damages)

39. Plaintiff's claim for punitive damages violates the rights of Defendant to procedural due process under the Fourteenth Amendment of the U.S. Constitution and the Constitution of the State of South Carolina.

FOR A NINTH AFFIRMATIVE DEFENSE
(Unclean Hands)

30. Plaintiff's claims are barred by the doctrine of unclean hands.

FOR A TENTH AFFIRMATIVE DEFENSE
(Release)

31. On April 3, 2015, Plaintiff and Defendant entered into an agreement in which Plaintiff released Defendant from any and all actions and/or claims regarding:

- a. the recommendation of and selection of inspectors, contractors, and services providers (including but not limited to mortgage lenders and closing attorneys);
- b. the acts, claims, performance, and omissions of selected inspectors, contractors, and service providers (including but not limited to mortgage lenders and closing attorneys); and
- c. the verification of property information.

32. As such, any and all claims by Plaintiff have been released against the Defendant and the Defendant is entitled to a dismissal of Plaintiff's claims.

FOR A FIRST COUNTERCLAIM AGAINST PLAINTIFF
(Breach of Contract)

40. Plaintiff and Defendant entered into an agreement dated April 3, 2015, (hereinafter the "Contract").

41. The Contract states that Plaintiff, the buyer, releases, indemnifies and holds harmless Defendant from any and all actions, claims, or demands regarding:

- a. the recommendation of and selection of inspectors, contractors, and services providers (including but not limited to mortgage lenders and closing attorneys);
- b. the acts, claims, performance, and omissions of selected inspectors, contractors, and service providers (including but not limited to mortgage lenders and closing attorneys); and
- c. the verification of property information.

42. Plaintiff filed this lawsuit on March 21, 2018, against Defendant alleging Defendant is liable for acts or omissions of the inspector/service Provider Mountain Air Heating & Cooling as inspectors of her home.

43. Plaintiff breached her contractual obligation to Defendant by filing this claim against Defendant.

44. As a direct and proximate result of Plaintiff's breach of the Contract, Plaintiff has suffered monetary damages in an amount to be determined at trial.

FOR A SECOND COUNTERCLAIM AGAINST PLAINTIFF
(Indemnification)

45. Defendant incorporates the preceding paragraphs 40-44 as if repeated herein verbatim.

46. The Contract terms included that Plaintiff would indemnify Defendant for any and all actions, claims, or demands regarding:

- a. the recommendation of and selection of inspectors, contractors, and services providers (including but not limited to mortgage lenders and closing attorneys);
- b. the acts, claims, performance, and omissions of selected inspectors, contractors, and service providers (including but not limited to mortgage lenders and closing attorneys); and
- c. the verification of property information.

47. Defendant contends that she is not liable to the Plaintiff for the conduct alleged in Plaintiff's Complaint. However, if a fact finder finds that Defendant is liable to Plaintiff, Defendant contends that Plaintiff is required to indemnify Defendant for any amounts she is found to be liable to the Plaintiff for, including the attorney's fees and costs incurred to defend against this action.

WHEREFORE, having fully answered the Plaintiff's Complaint and having asserted various defense and counterclaims, Defendant prays for the following relief to be granted:

- a. For dismissal of Plaintiff's claims with prejudice;
- b. For judgment in Defendant's favor on each of her counterclaims; and
- c. For other such relief as the Court deems just and proper.

<Signature on Next Page>

Respectfully submitted,

s/ Kelley R. Leddy

William R. Padget (SC Bar # 72579)

Kelley R. Leddy (SC Bar # 103257)

FINKEL LAW FIRM, LLC

1201 Main Street, Suite 1800

Columbia, SC 29201

O: 803-765-2935

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Attorneys for the Defendant Demetra Caldera

July 3, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
CASE NO. 2018-CP-40-01561

Noel Owens,

Plaintiffs,

vs.

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

Defendants.

REPLY
(JURY TRIAL DEMANDED)

The Plaintiff, in reply to Defendant South Market Real Estate (hereinafter “the Defendant”)’s counterclaim, replies and alleges as follows:

FOR A FIRST REPLY AND DEFENSE

1. Any allegation of the answer and counterclaim not herein admitted, qualified, or explained is denied. Any allegations of the answer and counterclaim subject of qualified admissions made herein are denied insofar as the allegations are not qualifiedly admitted, and any allegations of the answer and counterclaim subject of any other qualifications or explanations herein are denied insofar as they are not otherwise qualified or explained.

2. The affirmative assertions and allegations that purport to state legal conclusions are admitted only to the extent that they accurately state the law; otherwise, they are denied.

3. The affirmative assertions and allegations of the answer and counterclaim are otherwise denied.

4. No answer to the prayer in the answer and counterclaim is required; however, the Plaintiff denies that the Defendant is entitled to what is sought in that prayer.

FOR A SECOND REPLY AND DEFENSE
(Dismissal – Rule 12(b)(6))

5. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

6. The answer and counterclaim fails to state facts sufficient to constitute a cause of action.

7. The claims purported to be asserted in the answer and counterclaim should be dismissed.

FOR A THIRD REPLY AND DEFENSE
(Purported Release/Hold Harmless Ineffective)

8. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

9. The purported release or hold harmless agreement pled by the Defendant is not applicable to the reasons why the Defendant is liable to the Plaintiff in this case.

10. The purported release or hold harmless agreement pled by the Defendant was induced by fraud and is unenforceable in any event.

11. Prior breach of the parties' contract by the Defendant renders the Defendant unable to enforce the same.

FOR A FOURTH REPLY AND DEFENSE
(Unclean Hands)

12. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

13. As a result of the facts pled in the complaint, the Defendant has unclean hands in this matter.

Respectfully submitted,

/s/ Andrew S. Radeker

Andrew S. Radeker

S.C. Bar No. 73743

HARRISON, RADEKER & SMITH, P.A.

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(803) 779-6700 (facsimile)

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ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
August 13, 2018

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
CASE NO. 2018-CP-40-01561

Noel Owens,

Plaintiffs,

vs.

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

Defendants.

REPLY
(JURY TRIAL DEMANDED)

The Plaintiff, in reply to Defendant Demetra Caldera (hereinafter “the Defendant”)’s counterclaim, replies and alleges as follows:

FOR A FIRST REPLY AND DEFENSE

1. Any allegation of the answer and counterclaim not herein admitted, qualified, or explained is denied. Any allegations of the answer and counterclaim subject of qualified admissions made herein are denied insofar as the allegations are not qualifiedly admitted, and any allegations of the answer and counterclaim subject of any other qualifications or explanations herein are denied insofar as they are not otherwise qualified or explained.

2. The affirmative assertions and allegations that purport to state legal conclusions are admitted only to the extent that they accurately state the law; otherwise, they are denied.

3. The affirmative assertions and allegations of the answer and counterclaim are otherwise denied.

4. No answer to the prayer in the answer and counterclaim is required; however, the Plaintiff denies that the Defendant is entitled to what is sought in that prayer.

FOR A SECOND REPLY AND DEFENSE
(Dismissal – Rule 12(b)(6))

5. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

6. The answer and counterclaim fails to state facts sufficient to constitute a cause of action.

7. The claims purported to be asserted in the answer and counterclaim should be dismissed.

FOR A THIRD REPLY AND DEFENSE
(Purported Release/Hold Harmless Ineffective)

8. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

9. The purported release or hold harmless agreement pled by the Defendant is not applicable to the reasons why the Defendant is liable to the Plaintiff in this case.

10. The purported release or hold harmless agreement pled by the Defendant was induced by fraud and is unenforceable in any event.

11. Prior breach of the parties' contract by the Defendant renders the Defendant unable to enforce the same.

FOR A FOURTH REPLY AND DEFENSE
(Unclean Hands)

12. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

13. As a result of the facts pled in the complaint, the Defendant has unclean hands in this matter.

Respectfully submitted,

/s/ Andrew S. Radeker

Andrew S. Radeker

S.C. Bar No. 73743

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ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
August 13, 2018

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	OF THE FIRST JUDICIAL CIRCUIT
)	
Noel Owens,	)	Civil Action No.: 2018-CP-40-01561
)	
)	
Plaintiff,	)	DEFENDANT, DEMETRA CALDERA'S
	)	NOTICE OF MOTION AND MOTION
vs.	)	FOR SUMMARY JUDGMENT
)	
Mountain Air Heating & Cooling, South)	
Market Real Estate, Demetra Caldera, and)	
Ronald E. Gilmer.)	
)	
Defendants.)	

TO: PLAINTIFF AND HER ATTORNEY ANDREW S. RADEKER, ESQUIRE

PLEASE TAKE NOTICE that Defendant, Demetra Caldera, hereby moves this Court, through her undersigned attorney pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. For the reasons explained below, there exists no issue of fact and Defendant is entitled to an Order granting judgment in favor of Defendant as to all of Plaintiff’s claims and granting judgment in favor of Defendant as to Defendant’s counterclaim against Plaintiff for indemnity.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and Defendant Demetra Caldera (hereinafter “Defendant”) had a real estate agent – client relationship. Defendant Caldera has worked for South Market Real Estate. In April of 2015, Plaintiff, with Defendant as her real estate agent, purchased a home located at 8025 Nightingale Drive, Columbia, SC (hereinafter the “property” or the “home”). Prior to the purchase of the home, Defendant provided Plaintiff with a list entitle Home Inspectors/Letters from which Plaintiff could choose who she would like to perform the inspections on the property. Plaintiff choose Mountain Air to perform an inspection of the heating and air system

located at the property. In April of 2015, Mountain Air went to the property and performed an inspection of the heating and air system. Subsequently, Mountain Air Heating and Cooling sent their report to Defendant Caldera, who then provided that report to Plaintiff in an email on April 13, 2015.

Plaintiff executed a Release of Liability. (See **Exhibit A**, Defendant Caldera's Requests to Admit to Plaintiff and Plaintiff's Responses to Defendant's Requests to Admit.) The Disclaimer and Release of Liability states "[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." The Release of Liability also 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."

Plaintiff then purchased the home. After the home purchase, Plaintiff alleges that she discovered numerous problems with the heating and air system inside the home. Plaintiff filed

this Complaint on March 21, 2018, alleging, inter alia¹, a violation of the South Carolina Unfair and Deceptive Trade Practices Act, Negligence, and breach of contract against Defendant Caldera.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no issue of material fact, and the moving party is entitled to judgment in its favor as a matter of law. Rule 56 S.C.R. Civ. P. The moving party has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Rule 56(c), SCRPC. Once the moving party carries its initial burden, the non-moving party must “do more than simply show that there is some metaphysical doubt as to the material facts” but “must come forward with ‘specific facts showing that there is a genuine issue for trial.’ *Baughman v. American Telephone and Telegraph Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (emphasis in original) (citation omitted). The non-moving party must set forth facts, as “would be admissible in evidence,” to show that a true jury issue exists. Rule 56(e), SCRPC.

ARGUMENT

As previously stated, Plaintiff admits that she signed the Release of Liability. (Exhibit B). Under South Carolina law, limitation of liability provisions and contracts are generally accepted. *See Maybank v. BB&T Corporation*, 416 S.C. 541 (2016); *Gladden v. Boykin*, 402 S.C. 140 (2013). Limitation of liability and exculpation clauses are routinely entered into. *Gladden*, at

¹ Plaintiff’s causes of actions are not specifically stated. There are multiple causes of action against other named Defendants, none of which are labeled. Cause of action number one is a violation of the Residential Condition Disclosure Act against Defendant Gilmer. Cause of action number two is a violation of the SCUPTA against all Defendants (including Caldera). Cause of action number three is a fraud/misrepresentation case against all Defendants (including Caldera). Cause of action number four is a fraud/misrepresentation case against Defendant Gilmer. Cause of action number five is a negligence claim against all Defendants (including Caldera). Cause of action number six is a negligence claim against Defendant Mountain Air Heating and Cooling. Cause of action seven is a negligence claim against Defendants Caldera and South Market Real Estate, LLC. Cause of action eight (written as ten) is a breach of contract claim/ breach of contract accompanied by a fraudulent act against Caldera.

144. Courts have only held that these clauses are unconscionable when the provisions are so oppressive as no reasonable person would make them and no fair and honest person would accept them. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007).

The Release in this case specifically states “ [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.” The Release of Liability also 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.”

In the Gladden v. Boykin case, the homeowner, Gladden, entered into a contract a home inspector for their home inspection. Gladden, at 142. The contract contained a limit of liability clause. Subsequently, the Gladdens brought an action against the seller, real estate agents, and real estate companies involved in the transaction, as well as the inspector. Id. The inspector filed a Motion for Summary Judgment on the issue of the release of liability clause and summary

judgment was granted in favor of the inspector. Id. The Court held that the limits of liability was enforceable and not unconscionable and upheld the enforceability of the clause as to the inspector. Id.

This case is almost identical to the Gladden case. This Release (**Exhibit B**) is a complete bar to recovery in this action. Plaintiff's Complaint alleges causes of actions all tied to the inspection performed by Mountain Air Heating and Cooling, LLC. As Exhibit B states, Plaintiff expressly released Defendant Caldera as the licensee of South Market Real Estate from any and all actions, claims or demands regarding inspectors, like Mountain Air Heating and Cooling, LLC and from the acts, claims, performance, and omissions of inspectors, like Mountain Air Heating and Cooling, LLC. As in the Gladden v. Boykin case, this Release does not fall into the category of being unconscionable as a reasonable person seeking to purchase a home and receive suggestions of inspectors from their agent would enter into it and accept it. The Release simply protects real estate agents from claims exactly like this, where the homeowner chose an inspector and it prevents the homeowner from holding the real estate agent liable for anything missed by the home inspector. As such, the Release (**Exhibit B**) bars Plaintiff from any recovery in this action and Plaintiff's claims must be dismissed based on Defendant Caldera's affirmative defense of Release of Liability for these claims.

Defendant Caldera has asserted a counterclaim against Plaintiff for breach of contract and indemnification. To date, Defendant Caldera has incurred \$1,982.48 in attorney's fees for the time and expenses associated with defending this action and the preparation and filing of this Motion. (**Exhibit C**, Affidavit of attorney's fees). The Release (**Exhibit B**) states that Plaintiff will indemnify and hold harmless Defendant Caldera as a licensee of South Market Real Estate for all actions, claims, or demands regarding the selection of inspectors, like Mountain Air

Heating and Cooling, LLC, and from the acts, claims, performance, and omissions of inspectors, Mountain Air Heating and Cooling, LLC. As such, Plaintiff is entitled to summary judgment on her breach of contract and indemnification claims.

WHEREFORE, the Defendant, Demetra Caldera moves this Court for an Order:

- a. Dismissing the Plaintiff's claims against Defendant Caldera;
- b. Granting Judgment in favor of Defendant Caldera on her counterclaims; and
- c. Granting other and further relief as the Court may deem just and proper.

Respectfully submitted,

s/ Kelley R. Leddy
Kelley R. Leddy (SC Bar No.: 103257)
FINKEL LAW FIRM LLC
1201 Main Street, Suite 1800
Columbia, SC 29201
O: 803-765-2935
F: 803-252-0786

February 26, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Noel Owens,)
)
Plaintiff,)
)
vs.)
Mountain Air Heating & Cooling, South)
Market Real Estate, Demetra Caldera, and)
Ronald E. Gilmer,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2018-CP-40-01561

**DEFENDANT DEMETRA CALDERA'S
FIRST SET OF REQUESTS FOR
ADMISSION TO PLAINTIFF**

TO: THE PLAINTIFF AND HER ATTORNEY ANDREW S. RADEKER, ESQUIRE

Pursuant to Rules 36 and 37(c) of the South Carolina Rules of Civil Procedure, the Defendant hereby submits the following Requests for Admission to the above-named Plaintiff. The following Requests for Admission are served upon you pursuant to the South Carolina Rules of Civil Procedure. They are to be answered by you, in writing, under oath, and within the time provided by the South Carolina Rules of Civil Procedure, unless by agreement or Court order such time is extended.

INSTRUCTIONS AND DEFINITIONS

1. Pursuant to Rule 36(a), SCRPC, if an objection is made, the reasons therefor shall be stated.
2. Pursuant to Rule 36(a), SCRPC, if you can neither admit nor deny any of the requests for admission, your answer shall set forth, in detail, the reasons why you cannot truthfully admit or deny the matter.
3. Pursuant to Rule 36(a), any denial shall fairly meet the substance of the requested admission, and when good faith requires that you qualify your answer or deny only a part of the matter of which an admission is requested, you shall specify so much of it as is true and qualify or deny the remainder.
4. Pursuant to Rule 36(a), SCRPC, you may not give lack of information or knowledge as a reason for failure to admit or deny, unless you state that you have made reasonable inquiry and that the information known or readily obtainable by you is insufficient to enable you to admit or deny.

REQUESTS FOR ADMISSION



1. Admit that on April 3, 2015, Plaintiff voluntarily executed the Contract attached hereto as Exhibit A.

2. Admit that Plaintiff was the buyer in the transaction which Plaintiff refers to her in Complaint for the transfer of 8025 Nightingale Dr., Columbia, SC.

3. Admit that Plaintiff is the buyer referred to in Exhibit A.

4. Admit that Plaintiff signed Exhibit A on the line listed as “buyer or seller.”

5. Admit that Exhibit A states “ [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.”

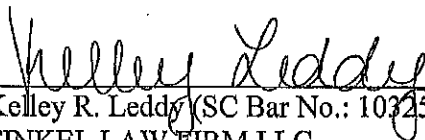
6. Admit that Exhibit A states “[t]he buyer releases, indemnifies and holds harmless South Market Real Estate and its licensees from and of any and all actions, claims, or demands regarding: (1) the recommendation of and selection of inspectors, contractors, and service providers (including but not limited 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.

7. Admit that Plaintiff freely and voluntarily executed Exhibit A on April 3, 2015.

8. Admit that Exhibit A is a binding contract between Demetra Caldera and Plaintiff.

9. Admit that Demetra Caldera provided Plaintiff Exhibit B.
10. Admit that Exhibit B is the list from which Plaintiff chose Mountain Air Heating & Cooling to inspect the HVAC system prior to her purchase of 8025 Nightingale Dr., Columbia, SC.
11. Admit that Exhibit B lists other companies besides Mountain Air Heating & Cooling under "HVAC Letter."
12. Admit that Exhibit B states "This is just a list to help you. You may use anyone you like."
13. Admit that Plaintiff chose to utilize Mountain Air Heating & Cooling to inspect the HVAC system prior to her purchase of 8025 Nightingale Dr., Columbia, SC.
14. Admit that Exhibit C is an email correspondence from Demetra Caldera to Noel Owens on April 13, 2015.
15. Admit that in Exhibit C Demetra Caldera states "[t]he heating and air looks good the inspector said it was well taken care of."

Respectfully submitted,



Kelley R. Leddy (SC Bar No.: 103257)
FINKEL LAW FIRM LLC
1201 Main Street, Suite 1800
Columbia, SC 29201
803-765-0935 (office)
803-252-0786 (facsimile)
Attorney for the Defendant Demetra Caldera

August 29, 2018
Columbia, South Carolina



Due Diligence Period: A designated period of time during which the buyer is free to investigate a property for which they're under contract to purchase. Performing this type of investigation contributes significantly to informed decision making by enhancing the amount and quality of information available about the property to the buyer. Investigating the property can include, but is not limited to conducting inspections of the property and its components and systems, verification of pertinent information disclosed by the seller, and verification of information deemed important to the buyer regarding the property and its purchase.

Disclaimer

In the state of South Carolina, it is always the buyer's decision which inspections the buyer elects to conduct on the property and which companies, individuals, or entities they hire to conduct inspections and perform these services. South Market Real Estate and its licensees advise the buyer that all inspection results and verification of information deemed important to the buyer be received and documented in writing from the providing source.

The buyer acknowledges that South Market Real Estate and its licensees give no warranty of any kind, expressed 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.

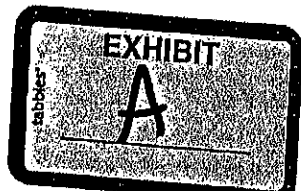
Release of Liability

The buyer hereby 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.

Seller or Buyer Hail Adams Date 4/8/15

Seller or Buyer _____ Date _____

Licensee [Signature] Date 4/3/15



HOME INSPECTORS / LETTERS

HOME INSPECTORS

HOME INSPECTION ONE
803-730-7954

PREFERRED HOME INSPECTIONS
803-407-3233

CL-100 LETTER

HARWELL PEST CONTROL
803-960-1980

COPELANDS
803-359-7926

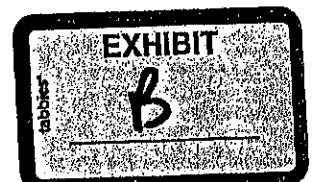
HVAC LETTER

MOUNTAIN AIR
803-767-2694

METRO HEATING AND AIR
803-600-1628

**THIS IS A JUST A LIST TO HELP YOU. YOU MAY USE ANYONE YOU
LIKE.**

Demetra Caldera
South Market Real Estate LLC.
803-920-5720 Cell
www.demetracaldera.com



Subject: HEATING AND AIR INSPECTION AND INVOICE

From: Demetra Caldera (demetracal@yahoo.com)

To: noel@brbdumpster.com;

Date: Monday, April 13, 2015 11:25 AM

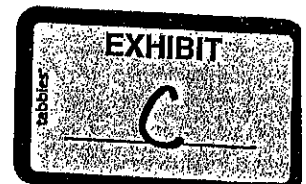
The heating and air looks good the inspector said it is well taken care of. But you do have a home warranty so if anything happens they will repair or replace if needed ;) I will have the other inspections soon and will send to you.

Demetra Caldera
South Market Real Estate, LLC
803-920-5720 Cell
<http://www.demetracaldera.com>

Attachments

- HVAC-8025 NIGHTINGALE04132015.pdf (793.50KB)

ELECTRONICALLY FILED - 2019 Feb 26 4:53 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4001561



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CASE NO. 2018-CP-40-01561

Noel Owens,

Plaintiffs,

vs.

**Mountain Air Heating & Cooling, South
Market Real Estate, Demetra Caldera,
and Ronald E. Gilmer,**

Defendants.

**PLAINTIFF'S RESPONSES TO
DEFENDANT CALDERA'S
DISCOVERY REQUESTS**

The Plaintiff hereby answers Defendant Demetra Caldera's standard interrogatories as follows:

(These answers are numbered to correspond with the numbering of the interrogatories to which they respond.)

1. Witnesses:

**Noel Owens
8025 Nightingale Dr.
Columbia, SC 29206**

No known statements other than in documents produced

Ms. Owens knows and has observed facts relating to the claims and defenses in this case, including, but not necessarily limited to, communications with defendants and persons acting on behalf of defendants, the condition of her property, how she discovered the defects in the property, and the damages she has sustained.

**Josepha Owens Elzarad
Robbie Owens
Sarah Ramos**

No statements

These people are former roommates of the Noel Owens and lived at the house involved in this case, and they likely know and have observed facts relating to the claims and defenses in this case that arise out of that experience.

Theresa and Kenny Wardlaw, as well as other Cool Care employees

No statements other than in documents produced

These people know and have observed facts relating to the claims and defenses in this case, including, but not necessarily limited to, as shown on the document stamped Owens prod 000007.

(Possibly) "Musa" (?), technician with LCB Contracting Solutions
See document stamped Owens prod 000008.

Employees or other agents of 211 Home Warranty
Contact information unknown

likely know and have observed facts relating to the claims and defenses in this case, including, but not necessarily limited to, such facts as they observed during an inspection of the property.

Kim Metz

No known statement

Ms. Metz sold Noel Owens a window air conditioning unit so that the house could have some cool air, and she likely knows and has observed facts relating to the claims and defenses in this case that arise out of that experience..

Josh _____ (last name unknown)

Dennis O'Toole

No known statements

These people performed electrical repair and replacement work at the property involved in this case, and they likely know and have observed facts relating to the claims and defenses in this case that arise out of that experience.

Tonya D. Graves

See statements in documents provided

The Defendants

2. See the documents produced by the Plaintiff and served by the parties in this case.
3. N/A.
4. N/A.
5. The Plaintiff's damages include, but are not necessarily limited to, the difference between the value of the house as it was sold to her and the value as it would have been had the air conditioning system been as represented by the Defendants and the costs of the window unit (\$100.00) and the cost of purchasing a replacement unit and duct replacement (approximately \$8,400.00). The Plaintiff is entitled to recover any other damages that are shown by the record at trial. The Plaintiff is entitled to punitive damages. The jury is permitted to render a judgment for damages that is greater than any specific amount claimed by the Plaintiff. Per the interrogatory, this response does not cover any damages for pain and suffering.

6. **The Plaintiff has not named an expert witness, other than that the Cool Care witnesses could possibly be determined to be expert witnesses.**
7. **See answer to Interrogatory 1.**
N/A

The Plaintiff hereby answers Defendant Demetra Caldera's additional interrogatories as follows:

(These answers are numbered to correspond with the numbering of the interrogatories to which they respond.)

1. **Noel Owens' memory and the documents produced by Plaintiff, including Defendant Caldera's express written representation.**
2. **Defendant Caldera undertook to make representation about the condition of the heating and air system and, accordingly, took on the responsibility to use an appropriate level of care in determining whether what she was saying was true.**
3. **Defendant Caldera engaged Defendant Mountain Air to perform the inspection. Defendant Caldera told Noel Owens that Defendant Caldera would take care of engaging Defendant Mountain Air to perform this inspection and did so. See document stamped Owens prod 000002, which states that Defendant Caldera was the realtor who requested the inspection.**
4. **Defendant Caldera undertook to be Noel Owens' realtor, thus becoming Noel Owens' agent. Defendant Caldera put her own interests (getting a commission check) before Noel's. This included, but is not limited to, in falsely representing to Noel that the heating and cooling system for this house was in good shape. Defendant Caldera either knew this statement was false or did not ascertain whether or not it was false, but she made it anyway. Throughout Noel's home-buying experience, Defendant Caldera represented to Noel that Defendant Caldera would take care of virtually everything about that for Noel. Defendant Caldera invited Noel's trust, and Noel trusted her.**
5. **See answer to interrogatory 4.**
6. **See answer to interrogatory 4.**

The Plaintiff hereby answers Defendant Demetra Caldera's Requests for Production as follows:

The Plaintiff objects to these requests to the extent that they seek the production of materials that are covered by attorney-client privilege, work product privilege, and any other applicable privilege and to the extent that they seek information otherwise protected from discovery. The Plaintiff's objections include, but are not necessarily limited to, the production of any documents of communication between herself and counsel, any notes

prepared for or in anticipation of litigation, and any documents concerning consultation with a potential expert witness. Subject to these objections, see the documents produced herewith and served by the parties in this case.

The Plaintiff, in answer to Defendant Demetra Caldera's First Requests for Admission, answers as follows:

(These answers are numbered to correspond with the numbering of the requests to which they respond.)

- 1. Noel admits that she signed this document because Demetra Caldera told her to do so. Noel was not presented with an opportunity to examine the document. Noel does not know whether she signed the document on April 3, 2015, or some other date.**
- 2. Admitted.**
- 3. Admitted.**
- 4. Admitted.**
- 5. Noel admits that the document says what it says.**
- 6. Noel admits that the document says what it says.**
- 7. Noel admits that she signed this document because Demetra Caldera told her to do so. Noel was not presented with an opportunity to examine the document. Noel does not know whether she signed the document on April 3, 2015, or some other date.**
- 8. Plaintiff objects to Request 8, which seeks the admission of a legal conclusion, not a matter of fact.**
- 9. Noel admits that this is possible; however, she does not remember this and, accordingly, after diligent inquiry, cannot admit or deny this request.**
- 10. Denied.**
- 11. Admitted.**
- 12. Admitted.**
- 13. Denied.**
- 14. Admitted.**
- 15. Admitted.**

I am providing these responses, including the documents produced, to counsel of record in this action on the date given below.

Respectfully submitted,



Andrew S. Radeker
S.C. Bar No. 73743
HARRISON, RADEKER & SMITH, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
January 11, 2019



Due Diligence Period: A designated period of time during which the buyer is free to investigate a property for which they're under contract to purchase. Performing this type of investigation contributes significantly to informed decision making by enhancing the amount and quality of information available about the property to the buyer. Investigating the property can include, but is not limited to conducting inspections of the property and its components and systems, verification of pertinent information disclosed by the seller, and verification of information deemed important to the buyer regarding the property and its purchase.

Disclaimer

In the state of South Carolina, it is always the buyer's decision which inspections the buyer elects to conduct on the property and which companies, individuals, or entities they hire to conduct inspections and perform these services. South Market Real Estate and its licensees advise the buyer that all inspection results and verification of information deemed important to the buyer be received and documented in writing from the providing source.

The buyer acknowledges that South Market Real Estate and its licensees give no warranty of any kind, expressed 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.

Release of Liability

The buyer hereby 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.

Seller or Buyer *Nail Owen* Date *4/8/15*

Seller or Buyer _____ Date _____

Licensee *Smith* Date *4/13/15*



STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL CIRCUIT

Noel Owens,)

Civil Action No.: 2018-CP-40-01561

Plaintiff,)

**AFFIDAVIT OF ATTORNEY'S FEES BY
KELLEY R. LEDDY, ESQUIRE**

vs.)

Mountain Air Heating & Cooling, South)
Market Real Estate, Demetra Caldera, and)
Ronald E. Gilmer.)

Defendants.

PERSONALLY APPEARED BEFORE ME, Kelley Reed Leddy, Attorney at Law, who being first duly sworn, and joined herein by her client, does state as follows:

1. She is the attorney for Defendant Demetra Caldera above named.
2. She was admitted to the South Carolina Bar in 2017 and since that time has been engaged in private practice; she presently practices as an associate with Finkel Law Firm LLC, in Columbia, South Carolina, and is currently engaged in the practice of law.
3. She represents the Defendant Demetra Caldera in proceedings which are pending before the Court. This Affidavit is filed in support of a Motion on behalf of her client for summary judgment against the Plaintiff to include attorney's fees, suit money and costs.
4. She incorporates herein Rule 32, Rules of the South Carolina Supreme Court, which contains the Canons of Ethics concerning the setting of attorney's fees. She further calls the attention of the Court to the plethora of case law decisions by the Supreme Court of South Carolina concerning the factors and criteria which should be considered in the setting of attorney's fees. She relies upon the discretion of this Court in the determination of the amount of fees based, among other things, upon the Court's file herein and the Court's knowledge of the litigation between these parties, which reflects the difficulty of the services rendered, the time necessarily expended, the result accomplished, and the other factors which are set forth in the Canons of Ethics and the case law decisions of this State.
6. She is informed and believes that the time spent in these matters as set forth more fully hereinafter was necessary to the protection of her client's interests and in order to make a concise and clear presentation to the Court of the issues as possible.

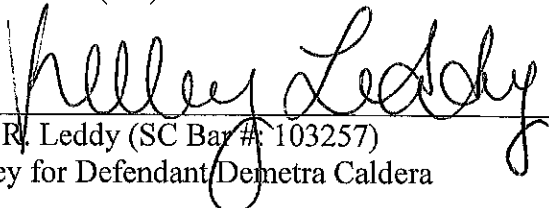


7. The undersigned, in accordance with her time and expense records (attached), states to the Court that the attached time was necessarily expended by her in the preparation for the issues currently before the Court (**Exhibit 1**). To date, Defendant Caldera has incurred \$1,982.48 in attorney's fees after preparation of her Motion for Summary Judgment.

8. Based not only upon the time necessarily devoted to this case, but also upon the criteria which have been held to be relevant in setting of attorney's fees, costs and suit money, the undersigned, on behalf of his client, requests that this Court review the file herein, together with this Affidavit, and grant judgment in favor of the undersigned's client against the Plaintiff in the sum of \$1,982.48 plus the additional costs of a hearing on Defendant Demetra Caldera's Motion for Summary Judgment for attorney's fees, costs and suit money, associated with this action.

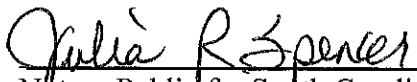
Respectfully submitted,

FINKEL LAW FIRM, LLC
1201 Main St., Suite 1800
PO Box 1799
Columbia, South Carolina 29202
803-765-2935 (telephone)
803-252-0786 (fax)

By: 
Kelley R. Leddy (SC Bar # 103257)
Attorney for Defendant Demetra Caldera

Columbia, SC
February 25, 2019

Sworn to and subscribed before me
this 25th day of February __, 2019


Notary Public for South Carolina
My Commission Expires: 2/18/2026

Finkel Law Firm LLC Time And Expense Details

Report ID: OT2025 - 65992
Monday, February 25, 2019

Printed By KJOH
Page 1

Client: Caldera, Demetra
Matter: 53427
Matter Reporting Name: Caldera, Demetra - Owens, Noel
Billing Timekeeper: Leddy, Kelley R

Date	Timekeeper	Hours Worked	Hours On Bill	Rate	Amount	Task	Activity	Narrative
6/25/2018	KRP	0.10	0.10	215.00	\$21.50			Review of XL Insurance Policy for South Carolina Real Estate Professionals, LLC.
7/13/2018	KRP	0.40	0.40	215.00	\$86.00			Preparation of Defendant Caldera's Counterclaims against Plaintiff
7/13/2018	KRP	1.40	1.40	215.00	\$301.00			Preparation of Defendant Demetra Caldera's Answer to Plaintiff's Complaint
7/16/2018	VLB	0.20	0.20	125.00	\$25.00			Prepare in final and file Answer and Counterclaim against Plaintiff with Richland County Court of Common Pleas
7/16/2018	VLB	0.10	0.10	125.00	\$12.50			File Notice of Appearance of Kelley Leddy as counsel for Defendant Demetra Caldera
7/16/2018	KRP	0.10	0.10	215.00	\$21.50			Email correspondence to Demetra Caldera regarding Answer to Plaintiff's Complaint
7/16/2018	KRP	0.20	0.20	215.00	\$43.00			Phone conference with Demetra Caldera regarding filed Answer of South State and preparation of her Answer and Counterclaims. Revision of Answer and Counterclaims.
7/16/2018	WRP	0.30	0.30	300.00	\$90.00			Review and revise answer and counterclaim.
8/20/2018	WRP	0.20	0.20	300.00	\$60.00			Review file status.
8/29/2018	KRP	1.80	1.80	215.00	\$387.00			Preparation of Requests for Admission, Requests for Production, and Interrogatories to Plaintiff.
8/29/2018	KRP	0.10	0.10	215.00	\$0.00			Profiling documents
8/30/2018	VLB	0.20	0.20	125.00	\$25.00			Prepare correspondence to Attorney Radeker serving Defendant's First Set of Continuing Interrogatories; First Request for Production and First Request for Admissions to Plaintiff and docket response deadlines.
8/30/2018	VLB	0.30	0.30	125.00	\$37.50			Prepare in final for service Defendant Caldera's First Set Continuing Interrogatories to Plaintiff; Defendant Caldera's First Set Request for Production to Plaintiff and Defendant Caldera's First Request for Production To Plaintiff.
8/30/2018	VLB	1.20	1.20	0.00	\$0.00			Access and review all pleadings filed to date with Richland County to determine deadline requirements and response needs and update records.
10/19/2018	KRP	0.10	0.10	215.00	\$0.00			Updating discovery in file.
11/5/2018	KRP	0.20	0.20	215.00	\$0.00			Meeting with Kathy Thorne regarding Rule 11 letter
11/5/2018	KRP	0.20	0.20	215.00	\$43.00			Review of Rule 11 letter to Andrew Radeker.
11/5/2018	KRP	0.10	0.10	215.00	\$0.00			Conference with Kathy Thorne regarding Rule 11 letter to opposing counsel.
11/5/2018	KJT	0.10	0.10	0.00	\$0.00			Draft Rule 11 ltr.
11/9/2018	KRP	0.30	0.30	215.00	\$64.50			Preparation of Motion to Compel discovery responses.
11/15/2018	KRP	0.20	0.20	215.00	\$43.00			Preparation of Motion to Compel Discovery Responses.
11/30/2018	WRP	0.20	0.20	300.00	\$60.00			Review file status with Attorney K. Leddy.
12/12/2018	KRP	0.20	0.20	215.00	\$43.00			Email correspondence regarding January 8th discovery deadline and consent order for continuance of Motion to Compel.
12/31/2018	KRP	0.20	0.20	215.00	\$0.00			Case status update.
1/17/2019	WRP	0.20	0.20	300.00	\$60.00			Review file status.



Finkel Law Firm LLC Time And Expense Details

Report ID: OT2025 - 65992
Monday, February 25, 2019

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Page 2

Beginning To End

Billed Time												
Date	Timekeeper	Hours Worked	Hours On Bill	Rate	Amount Task	Activity	Narrative	Amount Task	Activity	Narrative	Original Post Year	Original Post Year
2/11/2019	WRP	0.30	0.30	300.00	\$90.00		Review file status.					
2/11/2019	KRP	2.00	2.00	215.00	\$430.00		Preparation of Motion for Summary Judgment and email correspondence to Drew Radeker regarding case.					
2/15/2019	KRP	0.10	0.10	0.00	\$0.00		Phone call to Drew Radeker regarding status of this case - left a message.					
	<u>Post Date</u>	<u>Status</u>	<u>Entry Date</u>	<u>Original Post Period</u>	<u>Original Post Year</u>							
	02/15/2019	Current Period	02/15/2019	2	2019							
Billed Time												
Totals		11.00	11.00		\$1,943.50							

Billed Expenses												
Date	Amount	Exp Code	Narrative	Amount	Exp Code	Narrative	Amount	Exp Code	Narrative	Fee Amount	Expense Amount	Total Amount
8/30/2018	\$6.52	PST1	Postage Charge									
11/5/2018	\$0.47	PST1	Postage Charge									
11/6/2018	\$0.25	CPY1	Copy Charges - Columbia office									
11/15/2018	\$31.74	FF1	Filing Fees									
Billed Expenses												
Totals										\$1,943.50	\$38.98	\$1,982.48
Report Totals		11.00	11.00									

*** End Of Report ***

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Noel Owens,)
)
Plaintiff,)
)
v.)
Mountain Air Heating & Cooling,)
South Market Real Estate, Demetra)
Caldera, and Ronald E. Gilmer,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS

Case No.: 2018-CP-40-01561

**AMENDED NOTICE OF MOTION AND
MOTION TO DISMISS 12(b)(6);
IN THE ALTERNATIVE
MOTION FOR JUDGEMENT ON THE
PLEADINGS; AND MOTION FOR
SUMMARY JUDGEMENT**

**TO: THE PLAINTIFF, NOEL OWENS, BY AND THROUGH ANDREW S. RADEKER,
ESQUIRE:**

You will please take notice that ten (10) days from the date of filing or as soon after as they may be heard, Defendant South Market Real Estate (“Defendant South Market”), by and through its undersigned counsel, Margaret A. Collins, Esquire, shall move before the Court for a Motion to Dismiss Plaintiff’s Complaint, as to this Defendant South Market, for Failing to State a Claim for Which Relief can be Granted- 12(b)(6). Defendant shall rely upon previously proffered Affidavits, the documents submitted herein and received in discovery, as well as any applicable statutory or common law. This Motion is based upon the following:

1. The Plaintiff has failed to bring a claim against the Defendant South Market for which relief can be granted.
2. Defendant South Market is not the employer of Defendant Caldera, rather the relationship between them is of company and independent contractor. As such, the attempt to impose employer liability on Defendant South Market for any alleged actions of Defendant Realtor must fail. Specifically, at all times material to the Plaintiff’s claim, Defendant Caldera was an independent contractor, as the industry standard and Defendant South Market can prove.
3. As such, Defendant South Market is not liable for any representations that Defendant Caldera did, or did not, make to the Plaintiff.

4. Further, prior to Defendant Caldera working with the Plaintiff, the Plaintiff was required to sign a Release of Liability- **Exhibit A**.
5. In pertinent part, the Release of Liability states, “The buyer *hereby releases, indemnifies, and holds harmless South Market Real Estate* and its licensees give no warranty of any kind, expressed or implied as to. . . *the reliability or accuracy of any individual, company, or entity, or governmental agency selected by, hired by the buyer to perform any inspection . . .*” (emphasis added).
6. The Release of Liability was on one page, in regular sized font and clearly labelled “Release of Liability.” The Plaintiff knowingly and willingly signed this Release of Liability on April 3, 2015. The Plaintiff’s signature indicates that she read and understood the Release of Liability, as well as agreed to it.
7. Further, the Disclaimer in this same document signed by Plaintiff specifically states “The buyer acknowledges that South Market Real Estate and its [contractors] give no warranty of any kind, express or implied as to: (1) the physical condition of the property, or as to the condition of . . . improvements, services or systems including but not limited to . . . Heating and air conditioning systems; (2) the reliability or accuracy of any individual, company, [or] entity . . . selected by, hired by, or consulted by the [Plaintiff] to perform any inspection, provide consultation or verify information pertaining to the property.”
8. Plaintiff’s complaint alleges derivative liability to this Defendant South Market for an allegedly inaccurate HVAC inspection.
9. The allegation of fraud should be dismissed. Fraud must be plead and proven with specificity and all elements must be alleged. Fraud cannot be plead generally but must be supported by specific facts tending to show fraud. The Plaintiff has not plead or shown what fraudulent acts, if any, that Defendant South Market engaged in.

10. The Plaintiff has also failed what acts, if any, Defendant South Market engaged in that makes its hand unclean and bars them from equitable relief. As such, Defendant South Market avers that this defense should be stricken.
11. For the above listed reasons, the Plaintiff's claim must fail as a matter of law, as no relief can be granted.
12. In the alternative, Defendant South Market is informed and believes that it is entitled to a judgement on the pleadings, or summary judgement.
13. Further, Defendant South Market is entitled to attorney's fees and costs for having to defend this action and bring the Motion.

WHEREFORE, based on the foregoing reasons, Defendant requests an Order of this Court:

- A. Dismissing all claims in the Plaintiff's Complaint and Reply with prejudice;
- B. Awarding Defendant attorney's fees and costs for having to defend in this action and bring this Motion;
- C. Requiring the Plaintiff to fully indemnify and hold this Defendant harmless from all liability resulting from the filing of this action;
- D. Awarding Defendant any other relief this Court deems just and appropriate.

PALMETTO STATE LAW

//s// Margaret A. Collins
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Attorney for Defendant

April 22, 2019
Columbia, South Carolina

Exhibit

A



Due Diligence Period: A designated period of time during which the buyer is free to investigate a property for which they're under contract to purchase. Performing this type of investigation contributes significantly to informed decision making by enhancing the amount and quality of information available about the property to the buyer. Investigating the property can include, but is not limited to conducting inspections of the property and its components and systems, verification of pertinent information disclosed by the seller, and verification of information deemed important to the buyer regarding the property and its purchase.

Disclaimer

In the state of South Carolina, it is always the buyer's decision which inspections the buyer elects to conduct on the property and which companies, individuals, or entities they hire to conduct inspections and perform these services. South Market Real Estate and its licensees advise the buyer that all inspection results and verification of information deemed important to the buyer be received and documented in writing from the providing source.

The buyer acknowledges that South Market Real Estate and its licensees give no warranty of any kind, expressed 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.

Release of Liability

The buyer hereby 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.

Seller or Buyer *Nail Owen* Date *4/18/15*

Seller or Buyer _____ Date _____

Licensee *[Signature]* Date *4/13/18*

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
CASE NO. 2018-CP-40-01561

Noel Owens,

Plaintiffs,

vs.

**Mountain Air Heating & Cooling, South
Market Real Estate, Demetra Caldera,
and Ronald E. Gilmer,**

Defendants.

MOTION TO RECONSIDER

YOU WILL PLEASE TAKE NOTICE that the Plaintiff moves before this court pursuant to Rules 52 and 59, SCRPC, for an order reconsidering, altering, amending, and/or clarifying the order filed November 1, 2019, that granted summary judgment in favor of Defendants Demetra Caldera and South Market Real Estate (hereinafter “the Defendants”) in the above-captioned action.

The Plaintiff so moves on the following grounds:

1. While the release and indemnification document upon which the court’s order depended does not have the effect that the order states it does, the court also appears to have overlooked a very important point, as was briefly noted during argument on the underlying motions: the Plaintiff’s claims against the Defendants never wholly fell within the scope of the terms of that document anyway.
2. The release and indemnification language in the document states that it applies to “recommendation of and selection of inspectors, contractors, and service providers[,]” to “the acts, claims, performance, and omissions of selected

inspectors, contractors, and service providers[.]” and to “the verification of property information.”

3. One of the principal things that the Plaintiff sued the Defendants for was Defendant Caldera’s affirmative (and false) representation to the Plaintiff that “[t]he heating and air looks good[.]” That representation was not within the scope of the release and indemnification language – certainly not when viewed in the light most favorable to the Plaintiff. Consistently with principles of contract law generally and with the summary judgment standard, the court had to construe the language of the release and indemnification document in the light most favorable to the Plaintiff, drawing every reasonable inference in the Plaintiff’s favor.
4. Accordingly, even if the court concluded that the release and indemnification language were 100 percent effective as far as its terms went and that it applied to these Defendants and to claims arising after the execution of the release (which conclusion would be wrong), that language would not entitle the Defendants to summary judgment on the Plaintiff’s causes of action against them.
5. The court’s order presents no analysis of why the general rule regarding applicability of releases would not apply here. That general rule is that a release does not operate to get rid of claims that have not arisen when the release is signed. Gardner v. City of Columbia Police Dept., 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950). The court’s order points to no language in the release document, nor is there any, that would support a reading that the general rule does not apply here. There are no other facts in the record that would support such a determination. To conclude, as the court did, that the parties intended the release to apply

prospectively to claims that were not in existence at the time it was signed was to draw an inference – and, given the lack of support for it in the record, an unreasonable one – in favor of the Defendants.

6. Further, the court accepted the Defendants’ argument that the indemnification/hold harmless language in the release document applies to claims arising out of *the Defendants’* tortious conduct. That is incorrect as a matter of law. See Hazel v. Blitz U.S.A., Inc., 425 S.C. 361, 822 S.E.2d 338 (Ct. App. 2018); Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989).
7. The Defendants are not entitled to the summary judgment ruling they received in this case. “[S]ummary judgment may be rendered only when 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 judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law.” Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986). “All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). Under that standard, the Defendants are not entitled to summary judgment. Respectfully, the Plaintiff must note that the court did not view the record and draw reasonable inferences from it in the light most favorable to the

Plaintiff. The record contained at least a scintilla of evidence (more, really) to support each element of the Plaintiff's causes of action.

8. Further, for the court to determine that the Plaintiff and the Defendants must have meant that the release language would be prospective and would apply to claims arising in the future required the court to draw an inference or inferences in favor of the Defendants. Doing so was impermissible.
9. Even were the court's substantive determinations about summary judgment to stand (which they should not), the Plaintiff would still be entitled to a jury trial – not a damages hearing, as though she were in default – on the Defendants' claims against her. The process the order provides for arriving at the amount of the Defendants' judgment against the Plaintiff on those claims violates the Plaintiff's due process rights, deprives her of the right to a jury trial, and impermissibly shifts the burden of proof.
10. This motion is also based upon all applicable statutory law, case law, common law, and the record in this action. Further, the Plaintiff specifically incorporates into this motion by reference all arguments she made at the hearing on the Defendants' motions and her previous memorandum in this case.¹

Pursuant to Rule 11, SCRCP, the undersigned consulted with opposing counsel in an attempt to resolve the matter subject of this motion.

¹ While not material to the outcome of the motions at issue, the Plaintiff also notes that the order incorrectly states that Stephen Surasky and Trippett Boineau were in attendance at the hearing. They were not.

Respectfully submitted,

/s/ Andrew S. Radeker

Andrew S. Radeker

S.C. Bar No. 73743

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ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
November 11, 2019

State of South Carolina
County of Richland

Court of Common Pleas

Noel Owens,)	
)	
Plaintiff,	)	Transcript of Record
v.	)	2018-CP-40-01561
)	
Mountain Air Heating &)	
Cooling, South Market)	
Real Estate, Demetra)	
Caldera, and Ronald E.)	
Gilmer,)	
)	
Defendants.))	

October 17, 2019
Columbia, South Carolina

B E F O R E:

The Honorable Thomas A. Russo, Judge.

A P P E A R A N C E S:

Andrew S. Radeker, Esquire
Attorney for the Plaintiff

Adrian D. Dukes, Esquire
Margaret Collins, Esquire
Kelley Leddy, Esquire
Attorneys for the Defendants

Bethanie K. Creppon
Circuit Court Reporter

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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(No Exhibits.)

P R O C E E D I N G S

* * *

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3 THE COURT: All right. We've got a couple
4 matters here. There's a defendant's motion for
5 summary judgment and then --

6 MR. RADEKER: Your Honor, Drew Radeker here for
7 the plaintiff. I believe it's two motions by two
8 separate defendants that are here today. One is
9 South Market Real Estate's amended motion to dismiss
10 or for summary judgment and one is Demetra Caldera's
11 motion for summary judgment. And I'm sure these
12 fine folks sitting at this other table will correct
13 me if I'm wrong.

14 THE COURT: Okay.

15 MS. LEDDY: That's correct, Your Honor. Kelley
16 Leddy. I'm here for Demetra Caldera, Your Honor.

17 MS. COLLINS: Meg Collins on behalf of South
18 Market, Your Honor.

19 MR. DUKES: Adrian Dukes with Mountain Air.

20 THE COURT: All right. The first one I have --
21 I don't know if -- we'll take them as they're
22 listed -- is the Caldera's motion.

23 MS. LEDDY: Yes, Your Honor. Kelly Leddy;
24 again, I'm here for Demetra Caldera. We're first.
25 And I'm just going to kind of give some very brief

1 background on this issue. And I'm sure some of the
2 other counsel may want to give some as well.

3 THE COURT: Yeah.

4 MS. LEDDY: But this is an issue arising out of
5 a real estate transaction. The plaintiff, Noel
6 Owens, purchased a home. Her real estate agent,
7 when she purchased the home, was Ms. Caldera, my
8 client, who was working under the umbrella of South
9 Market Real Estate.

10 At the time of the purchase, we have home
11 inspections on the new home. The home inspection
12 for the heating and air system was done by Mountain
13 Heating & Air. Ms. Owens then purchased the home,
14 moved into the home, and had, I guess, some issues
15 with the heating and air system. So that's when we
16 brought this lawsuit against Ms. Caldera, South
17 Market Real Estate, Mountain Heating & Air. And
18 there is one other defendant, Mr. Gilmer, who, I
19 believe, is the seller of the home. I don't think
20 he's here today.

21 So we filed this motion for summary judgment.
22 And the issue here is pretty simple. I did submit a
23 memorandum. I'm not sure if you have it up there.
24 If you don't, I do have a copy.

25 THE COURT: If you don't mind. We have -- I'm

1 sure we've got it on this thumb drive. But --

2 MS. COLLINS: Your Honor, we have duplicate
3 motions in part. I'm going to pass mine up as well.

4 THE COURT: Yes, that's fine. Thank you. I
5 appreciate that.

6 MS. LEDDY: So as for Demetra Caldera, like I
7 said, this issue is actually relatively simple, as
8 far as motions for summary judgment go. Exhibit A
9 to our motion is a contract that was signed by
10 Ms. Owens, the plaintiff in this case. It was
11 signed on April 3rd, 2015, at the time of closing of
12 her house.

13 And the main issue that I want to bring up to
14 the Court is the bottom paragraph labeled Release of
15 Liability. I know Your Honor will read it. But it
16 does say: The Buyer hereby are releases,
17 indemnifies, and holds harmless South Market Real
18 Estate and its licensees from any and all actions,
19 claims, or demands regarding the recommendation and
20 selection of inspectors, contractors, the rest; two,
21 the acts, claims, performance, and omissions of the
22 selected inspectors, contractors, blah, blah, blah;
23 and, three, the verification of property
24 information.

25 In discovery -- I think it's also attached as

1 exhibit -- I'm sorry. I think the contract is
2 Exhibit B to our memorandum. Exhibit A is our
3 discovery questions to the plaintiff. We did
4 requests to admit, attaching that contract to the
5 request to admit asking for an admission that she
6 signed this document.

7 Counsel did not answer those discovery
8 responses in 30 days; so, under Rule 36, they are
9 deemed admitted. But she actually did respond to
10 them later and did admit that she did sign that
11 document. So she has signed this release of
12 liability.

13 The release of liability pretty clearly lays
14 out that she is releasing Demetra Caldera from --
15 and South Market Real Estate, for that matter, from
16 any and all claims as to the contractors,
17 inspectors, any of their acts or omissions. And
18 that's exactly what this case is about.

19 The plaintiff has brought this case against
20 them claiming that Mountain Heating & Air missed
21 something in their inspection and her heating and
22 air system doesn't work. She's admitted that she
23 signed this. And we have an affirmative defense in
24 this case of release. And we do have a counterclaim
25 against the plaintiff as well on -- we are seeking

1 summary judgment for indemnification.

2 She signed this release and indemnification
3 agreement. She's admitted that she signed it. And
4 it does release Demetra Caldera from all
5 responsibility and makes it so that Noel Owens owes
6 her indemnification for defending this claim. And
7 I'll hand it over to Meg.

8 MS. COLLINS: Your Honor, may it please the
9 Court? Meg Collins on behalf of South Market. On
10 that release of liability, I always want to point to
11 the paragraph above that, that indicates,
12 specifically, that -- that -- under disclaimer: It
13 is always the Buyer's decision which inspectors the
14 Buyer elects to conduct the property and which
15 companies, individuals, or entities they hire to
16 conduct inspections and perform these services.

17 Also provided in our affidavit is -- and it may
18 be attached to the motion itself -- is the list that
19 Ms. Caldera provided to the buyer that provided two
20 HVAC contractors, as well as the statement below it
21 that says: This is just a list; you can get
22 whomever you're comfortable with.

23 So, assuming the facts as true that there was
24 something missed in this HVAC inspection, neither
25 Ms. Caldera nor South Market should be liable, based

1 on the buyer's selection.

2 Now, her pleadings indicate that Ms. Caldera
3 selected it. Well, that is not true. Now,
4 Ms. Caldera scheduled it, as an agent usually does,
5 and Ms. Caldera made the house available. But she
6 didn't select -- and we've also provided an invoice
7 to my client's affidavit that was in the name of the
8 plaintiff for the HVAC inspection.

9 So the HVAC was done for the plaintiff at her
10 request; she paid for it. And it is clear she had
11 the right to choose that. And I'll get into my -- I
12 have some other arguments as well, Your Honor. But
13 that's the one relating to the release itself. And
14 I'll be happy to continue on with my motion or just
15 let the --

16 THE COURT: Well, let's stay with this issue.

17 MS. COLLINS: Yes, sir.

18 THE COURT: Okay.

19 MR. RADEKER: Thank you, Your Honor. First of
20 all, as to the release argument, I point the Court
21 to the Gardner vs. City of Columbia Police
22 Department case we cited in our memorandum for a
23 proposition of law that is just pretty clear anyway,
24 if you think about it. And that's that a release
25 signed on one day doesn't release a claim that

1 doesn't arise until a point that exists in the
2 future.

3 This document that is their release of
4 liability document was signed on April 3rd of 2015.
5 It's not until April 13th of 2015 that the
6 inspection -- which Ms. Caldera set up, as my
7 client's affidavit makes abundantly clear. She
8 didn't pick the inspector; Demetra Caldera did that.
9 And documents that are attached to her affidavit
10 will bear that out. But that didn't happen until
11 April 13th. And that's when Ms. Caldera tells her
12 the heating and air looks good.

13 So I can't release on Monday a claim that
14 doesn't arise until Friday, because I don't have it
15 to release. So as far as their release argument is
16 a release that happened before the claim arose,
17 that's just not going to work.

18 As this is mentioned -- it wasn't mentioned by
19 counsel in the oral argument, but was mentioned in
20 Ms. Caldera's motion for summary judgment, is
21 there's a case, Gladden vs. Boykin. Gladden vs.
22 Boykin is certainly not on all fours with this case.

23 What Gladden is about is a case where, in a
24 home inspection contract, there's a provision in the
25 contract that says if I screw up as your home

1 inspector, your liability is limited to the amount
2 of the fee that you paid me to do the inspection.
3 That's just nothing like this case.

4 As to their indemnification argument, we point
5 the Court toward a case that was decided last year
6 by the Court of Appeals, Hazel vs. Blitz USA,
7 Incorporated. And that case notes that a contract
8 of indemnity will not operate to indemnify the
9 indemnitee against losses for it's own negligence
10 unless that intention is expressed in clear and
11 unequivocal terms.

12 What they're trying to do is to use that
13 language to get my client to indemnify them for the
14 wrongs that they've done, for the torts that
15 they've -- and the Hazel case stands for the
16 proposition that it doesn't work like that. And so
17 I note that, on that issue, they're not entitled to
18 summary judgment. Thank you.

19 MS. COLLINS: Very briefly, Your Honor?

20 THE COURT: Yes, ma'am.

21 MS. COLLINS: I'm -- I have to take exception
22 to the plaintiff's statement of the holding of
23 Gardner vs. City of Columbia Police Department.
24 Now, that one was not prospective, but it related to
25 a workers' comp claim. And the employee signed a

1 release after the incident. And I don't agree with
2 the premise that is not usually prospective. If I'm
3 jumping out of an airplane and I sign an assumption
4 of risk and limitation of liability or waiver of
5 liability, it clearly has to be done beforehand.
6 And so --

7 THE COURT: Hold on. Hold on.
8 Address that, Mr. Radeker.

9 MR. RADEKER: I'll say this: I'll point the
10 Court to what counsel just said. If I sign an
11 assumption of liability or waiver of liability, all
12 right, what this document is, is a release. And
13 that's all it says it does, is it releases claims.
14 And, obviously, you can't release a claim that
15 doesn't exist at the time it's purporting to release
16 it.

17 MS. COLLINS: I just want to pass up the case,
18 because I didn't read the same holding in this case
19 as --

20 MS. LEDDY: Your Honor, when we're looking at
21 the Gardner case, you know, a part of that that
22 Plaintiff's counsel did leave out is that -- what it
23 says specifically is -- and I'm on page 3 of the
24 case, Your Honor: It is uniformly considered that a
25 general release, such as the one before us now, is

1 not restricted by its terms to particular claims or
2 demands; ordinarily covers claims and demands due at
3 the time of its execution and within the
4 contemplation of the parties.

5 This release language is clearly contemplating
6 that the inspector is going to do it -- do an
7 inspection, and she is releasing South Market Real
8 Estate and Demetra Caldera from all liability as to
9 those inspectors' claims.

10 And, moreover, Your Honor, as far as the
11 indemnity -- do you want me to keep going or would
12 you like to read the case?

13 THE COURT: Go ahead.

14 MS. LEDDY: Well, so I'd just point out that it
15 says there within the contemplation of the parties.
16 Based on the language of the release, it's very
17 clear what kind of claims they were contemplating.
18 They were contemplating the claims that they had
19 against any inspection company for failing to do
20 inspections correctly or whatever the case may be.

21 That release is very clear as to what it's
22 releasing for. And she signed it and she admitted
23 that she signed it. And, moreover, on the fact of
24 indemnity, Your Honor, if someone calls a law office
25 and I'm handling a claim for them and I refer them

1 to another attorney due to the probate matter, I'm
2 not liable for malpractice that that probate
3 attorney commits.

4 And that is what they're doing here. They're
5 trying to say even if, for argument's sake,
6 Ms. Caldera did hire Mountain Heating & Air to go in
7 and do the inspection, if Mountain Heating & Air did
8 it negligently, that is their responsibility, not
9 Ms. Caldera's responsibility. She is not a heating
10 and air unit person; I am not a heating and air unit
11 person. You would not want us to inspect your unit,
12 that's why you hire a professional.

13 So it's not a tort against Ms. Caldera; it's a
14 tort against who committed the negligent inspection.
15 So we would say that the indemnity agreement holds
16 just as it is written in the release indemnity
17 agreement and she is entitled to indemnity for her
18 claims that she has had to defend now that
19 Ms. Owens disregarded the release she signed and has
20 sued her for this.

21 MR. RADEKER: If I may speak to that, Your
22 Honor?

23 THE COURT: Yeah.

24 MR. RADEKER: The language in Gardner says you
25 got to have both things. Both things have to exist

1 at the time the release is executed and it's got to
2 be within the contemplation of the parties. The
3 arguments you just heard about that is, well, if it
4 was within the contemplation of the parties, that's
5 good enough. No. You've got to have both.

6 Also, respectfully to counsel, I think she's
7 not mentioning some factual material in the record
8 that is not helpful to her client's position. On
9 April 13th, long after this release was signed,
10 Demetra Caldera makes an affirmative representation
11 to my client in her e-mail that the heating and air
12 looks good. So that's a false statement. There's
13 plenty of evidence in the record that shows that
14 that's not true --

15 THE COURT: Let me -- I hate to do this,
16 Mr. Radeker. But I'm going to back us up a little
17 bit --

18 MR. RADEKER: Sure.

19 THE COURT: -- because I'm still hung up on
20 your position that this release -- you can't release
21 someone from a claim that has not occurred yet.

22 I'm just going to use simple stuff. My kids
23 love going over to this trampoline park. They
24 sign -- I sign a release holding them harmless from
25 any injuries that may occur or whatever during their

1 time they're jumping and carrying on. That's not a
2 valid release?

3 MR. RADEKER: I would say it may be a valid
4 agreement to hold harmless, but it can't release the
5 claim that hasn't arisen yet. People call stuff a
6 release all the time. I mean, really, that's not
7 what it is. It's like counsel was talking about
8 earlier, an assumption of liability or a prospective
9 waiver or something like that.

10 But, here, what this document says it does is
11 just release. It's like this --

12 MS. LEDDY: Your Honor, I would just submit
13 that it specifically says hold harmless as well.

14 MR. RADEKER: So that all -- and I'll talk
15 about the hold harmless language in just a second.

16 It's like -- as far as release language is
17 concerned, it's like this: Say you signed a release
18 releasing me of all claims today, then later this
19 week, I negligently drive into you with my car and
20 injure you. You have not, with the release you
21 signed today, released me from the claim you have
22 against me for what I haven't done to you yet.

23 THE COURT: Well, in looking at this release,
24 it specifically says: Any actions, claims, or
25 demands regarding the recommendation of and the

1 selection of inspectors, contractors, and service
2 providers; the acts, claims, performance, and
3 omissions of selected folks.

4 So does that not make a difference?

5 MR. RADEKER: Well, I guess I would say this:
6 First of all, this claim may not be within the scope
7 of that. Ms. Caldera makes an affirmative
8 representation as to the quality of the heating and
9 air unit, which is a false representation. She
10 might not have known it was false at the time. I'm
11 sure she would say that didn't.

12 But, in any event, if she doesn't know whether
13 it was true or false, she doesn't have any business
14 saying that it's any good. That wouldn't fall
15 within the scope of this language. To the extent
16 that this language is an indemnification or
17 hold-harmless agreement purporting to make my client
18 liable to indemnify, hold harmless these defendants
19 with regard to their tortious actions, the Hazel
20 case says that doesn't hold up.

21 So, to the extent it says that, it's
22 ineffective, as a matter of law. What we have to
23 show to survive summary judgment on this point is a
24 scintilla of evidence and that it's possible for a
25 finder of fact to determine if we're right. We're

1 there, so they're not entitled to summary judgment
2 on that point.

3 THE COURT: Okay. Anything else on that issue?

4 MS. LEDDY: Well, I'd agree with him that the
5 standard for summary judgment is whether there's a
6 genuine issue of material fact. And that's why
7 we -- I started this out by not really arguing over
8 who selected the inspector or who said what.
9 That -- those are issues of fact.

10 The only issue that we're seeking summary
11 judgment on is this release. And she has admitted
12 in discovery that she signed this release. And this
13 claim falls squarely under this release of
14 indemnification agreement.

15 I think Your Honor made a very good point that
16 when you go to a trampoline park, when you go
17 skydiving, which I would never do, you sign a
18 release for anything that may happen in the future.
19 This is not a novel idea. She signed this agreement
20 and she released Demetra Caldera and South Market
21 Real Estate and agreed to indemnify them for any
22 claims and then decided to sue them and made them
23 incur attorneys' fees for defending these claims.

24 As for their claim against Mountain Heating &
25 Air, whatever it may be, that can continue on. But

1 as to this release agreement, it releases Demetra
2 Caldera and South Market Real Estate from all
3 liability as to any actions by the home inspectors.

4 MS. COLLINS: I have nothing further, Your
5 Honor, other than that the affirmative statement
6 literally quotes what the report says. So it's
7 not -- it's just a restatement of the HVAC report;
8 it is not an affirmative assertion of anything
9 relating to the HVAC. So I just wanted to make sure
10 that was classified as well.

11 MR. RADEKER: I just want to say it doesn't say
12 the inspector says the heating and air looks good.
13 It starts with the words "the heating and air looks
14 good," and then it goes on to say what the inspector
15 says. It's an affirmative representation of the
16 heating and air looks good.

17 MS. COLLINS: Your Honor --

18 MR. RADEKER: And if there's any doubt about
19 how to characterize it, that now has to be resolved
20 in our favor because we're the party opposing the
21 motion for summary judgment.

22 MS. COLLINS: Your Honor, if you look at the
23 attached report, it says: Good, good, good, good,
24 good, good, good, good, good. So, I mean, it is a
25 restatement and it is not an affirmative assertion

1 of the condition of the HVAC.

2 THE COURT: Okay. Now, is that --

3 MS. COLLINS: I'll be happy to proceed with my
4 motion, Your Honor.

5 THE COURT: Yes, ma'am.

6 MS. COLLINS: Your Honor, we've also filed a
7 motion to dismiss or, in the alternative, a motion
8 for summary judgment, the first being on the release
9 issue. And I won't repeat.

10 THE COURT: Right.

11 MS. COLLINS: Your Honor, the -- subsequent to
12 that, I wanted to talk a little bit about agency and
13 apparent agency.

14 The plaintiff cites a case that -- generally,
15 agency is a determination of fact for the jury;
16 however, it leaves a modifying turmoil. If there
17 are any facts tending to prove a relationship of
18 agency that modifies the -- then it's a question of
19 fact for the jury.

20 I quote to you Gathers vs. Harris Teeter, is
21 what he quoted, but -- and, well, that's the case I
22 found on it, if that's the one he quoted.

23 Generally, he's trying to say that it's never
24 appropriate on a summary judgment motion. My
25 client, the broker-in-charge, hires a 1099 licensee,

1 and he's trying to hold the broker-in-charge who has
2 specific duties over that licensee, but not
3 employment duties, vicariously liable.

4 And there is no evidence whatsoever that South
5 Market controlled or managed or required her to use
6 certain HVAC contractors or told her how to sell
7 homes. That's just not the way real estate works in
8 our world. She's an independent contractor; has
9 nothing to do with South Market, other than the
10 fiduciary broker-in-charge and advertising and
11 office space. Other than that, there is no agency
12 duty that has been shown in this case.

13 Also, even under the plaintiff's own affidavit,
14 she says that she knew Ms. Caldera from high school
15 and that's how she hooked up with her; nothing to do
16 with South Market. And it has to be detrimentally
17 relied on the agency and changed the position in
18 favor of -- of the agent -- no; of the employee or
19 the person that's reportedly the agent because of
20 that.

21 There's nothing in her affidavit that supports
22 any liability of South Market as broker-in-charge
23 for Ms. Caldera's -- whether she recommended or
24 didn't recommend any certain HVAC person.

25 So that is not something that my client can be

1 vicariously liable for, because Ms. Caldera may have
2 recommended -- I don't concur that the evidence
3 shows that, but even if she did recommend the
4 heating and contractor, that South Market should be
5 liable for that, based on that representation.

6 I'd point to you Bank of New York Mellon Trust
7 vs. Grier where the Court of Appeals upheld summary
8 judgment motion not finding Nationwide Insurance
9 liable on agency hearing. So it's commonplace that
10 you cannot find a -- it's not submitted to the jury
11 unless there is a scintilla of fact supporting the
12 agency. And there's no scintilla of fact that South
13 Market had anything to do with the selection of this
14 HVAC contractor at all.

15 South Market also provided proper notice, did
16 everything right in its forms, that she has the
17 right to choose; she needs to be comfortable with
18 the HVAC; she's responsible for getting this home
19 inspected. They had no liabilities for the
20 condition of this home under that same release; they
21 had no liabilities associated with the selection
22 that she ultimately made for the inspections or
23 whether she even had inspections. And so South
24 Market is not liable on a vicarious liability theory
25 on that.

1 Gladden vs. Boykin is a limitation of liability
2 case for the premise, Your Honor, between limitation
3 of liability or release of liability is a matter of
4 degrees. I do think it's relevant in that.

5 I want to go through the complaint. The second
6 third, fifth, seventh, and tenth -- what's indicated
7 as the tenth -- causes of actions related to my
8 client. The second is Unfair Trade Practices Act.
9 Real estate professionals and brokers are highly
10 regulated by the Labor Licensing Regulation, as well
11 as the HVAC company. So we would say that this
12 action cannot stand for unfair trade practices based
13 on that regulation.

14 Furthermore, both federal and state law
15 have -- and, you know, attorney and contractor
16 preferences that are in favor of the buyer. These
17 clearly can't be changed, as she's trying to argue.
18 The selection of the HVAC contractor cannot be an
19 issue for unfair trade practices, period, in my
20 opinion.

21 The third cause of action: The duty to inform
22 the condition of the home. And this is where, in
23 his complaint, he indicates that Caldera made an
24 affirmative representation. Your Honor, briefly,
25 again, all she did is the heating and air looks

1 good, because it says good, good, good, good, good,
2 good, good, good on the report, and she repeats what
3 the HVAC agent says. She never makes an affirmative
4 statement as to the condition of the HVAC ever.

5 And, specifically, this whole release and contract
6 indicates we're not responsible for the condition of
7 the home.

8 THE COURT: I've read it. You know, I must
9 have read it off Mr. Radeker's e-mail, so I don't
10 have it in front of me. But the e-mail y'all are
11 referring to, that's the one from Ms. Caldera to the
12 plaintiff?

13 MR. RADEKER: Yeah.

14 THE COURT: The one where you had said she says
15 that it's --

16 MS. LEDDY: It's Exhibit A --

17 MS. COLLINS: It's Exhibit A to his memorandum,
18 Your Honor.

19 MR. RADEKER: To Ms. Owens' affidavit.

20 MS. COLLINS: Sorry. Yeah, to Ms. Owens'
21 affidavit, Your Honor. I'll be happy to provide it
22 to you.

23 THE COURT: Let me look at it real quick,
24 because I do remember reading that. Because if you
25 go further, it says that the heating and air looks

1 good; the inspector said it was well taken care of;
2 but you do have a home warranty, so if anything
3 happens, they will repair or replace it, if needed.

4 MS. COLLINS: Yes, Your Honor. And what was
5 attached to that e-mail is the next page.

6 THE COURT: Right, which is the report.

7 MS. COLLINS: Yes, sir.

8 THE COURT: So your position, Mr. Radeker, is
9 that's Ms. Caldera telling your client that the
10 heating and air is all good?

11 MR. RADEKER: Heating and air looks good,
12 that's what she says. The fact that her punctuation
13 is poor and she doesn't put a period at the end of
14 that obvious sentence and the beginning of the next
15 one doesn't get her out of summary judgment.

16 You have got to look at the factual record in
17 the light most favorable to Ms. Owens. That's a
18 statement: The heating and air looks good. It's
19 not merely a restatement of what's in the report.
20 She could have phrased it as, like, I've looked at
21 the report and the report says the heating and air
22 looks good. But that's not what she says.

23 You know, clearly, she requested it. I mean,
24 we've got the document from Mountain Heating & Air
25 that says: Requested by Demetra Caldera. So this

1 whole idea of no, no, no, my client picked it out or
2 something like that, is false. We're not --

3 THE COURT: Well, now, come on, it could say
4 that, even though your client was the one who
5 selected him. Your client could -- I'm just saying
6 that's not a fair statement. Your client could have
7 said, Ms. Caldera, let's go with Mountain Heating &
8 Air.

9 MR. RADEKER: But she didn't.

10 THE COURT: And so Mountain Heating & Air puts
11 down "requested by Caldera" because she's the one
12 who made the contact.

13 MR. RADEKER: And, Your Honor, it says Realtor,
14 slash, requested by. She is the Realtor.

15 And I'd say this: I suppose it could have
16 happened that way. But it's not how it happened.

17 THE COURT: Right.

18 MR. RADEKER: And the only facts in the record
19 are that Ms. Caldera is who picked the inspectors.
20 But she's not liable for just picking the
21 inspectors. She makes this affirmative
22 representation that the heating and air looks good.
23 And if you look at the other attachments to my
24 client's affidavit, it's clear that she relies on
25 that statement. In her e-mails with Tanya Graves,

1 she brings it up. She said: Hey, your agent,
2 Demetra, told me heating and air looks good. If I
3 had -- I would have behaved differently if I had
4 thought differently, but she told me it's good. And
5 so, I mean, I guess I'll just say that.

6 I heard a bunch about agents in here. I'd say
7 this: Even if Demetra Caldera wasn't South Market
8 Real Estate's actual agent, there's certainly facts
9 in the record here from which you could infer that
10 she was their apparent agent, they hold her out to
11 be their agent.

12 Noel Owens, when she gets in touch with them
13 and she calls South Market Real Estate and talks
14 with Demetra, Demetra transfers her to another South
15 Market Real Estate person working in the office.
16 They transfer her back. It certainly appears to her
17 she works there. So they're acting as though she's
18 their agent. Couple that with what -- Demetra's
19 representations. Demetra e-mails her. Her
20 signature block right under her name says South
21 Market Real Estate, LLC.

22 Now, that alone wouldn't be enough to get us
23 past summary judgment. But you can look at the
24 agent's representations, coupled with all the other
25 facts in the record, and deduce that there's facts

1 about agency. Agency, normally, is a question of
2 fact. No, I'm not saying that one can never get
3 summary judgment on an agency question. I'm saying
4 summary judgment on this agency question in this
5 case is not proper.

6 MS. COLLINS: Your Honor, I do take exception
7 to the fact that there's no evidence that she
8 selected the HVAC and only Ms. Caldera selected it.
9 There was a list provided -- I'm just reminding you
10 that there is competing evidence. And the only
11 evidence that Ms. Caldera selected it is the
12 affidavit of the plaintiff and not the documentation
13 that was provided. So I just wanted to correct
14 that.

15 So, Your Honor, again, we'll leave it to the
16 Court to determine whether that's an affirmative
17 statement or if that's just a restatement of the
18 report.

19 The fifth cause says: There's a duty to
20 exercise reasonable care. And the reasonable care
21 was exercised; they provided a list of licensed HVAC
22 providers. And, assuming the facts as true, there
23 was a bad inspection. It still doesn't prove there
24 was a lack of duty of care in this case by providing
25 the list. And there is no such duty, based on this

1 same piece of paper, the release and disclaimer,
2 that they -- they don't warrant the information or
3 even selection of the HVAC providers.

4 The seventh cause of action is against my
5 client for failing to disclose the true condition of
6 the property. Well, assuming the facts as true that
7 the HVAC inspection was bad, there was no reason for
8 the broker-in-charge to know that there was a bad
9 inspection. And so I would say that that one needs
10 to fail as well.

11 And, finally, what is marked as the tenth is
12 the breach of contract in failing to disclose this
13 condition. There is absolutely no contract term.
14 In fact, we have contract terms contrary to that,
15 that indicates there's a duty to disclose the true
16 condition of the property. That is not what a
17 buyers agent contract indicates at all, would never
18 indicate that. So that cause of action must fail as
19 well.

20 And, Your Honor, I think I've already told you
21 about -- that we believe that the proper approach is
22 that if there's any fact tending to support an
23 agency, then it's a question of fact. But, in this
24 case, there is no facts that support the agency,
25 especially as it relates to the selection of the

1 HVAC provider in this case.

2 We talked about Gardner vs. City of Columbia.
3 So, Your Honor, I would ask that this defendant,
4 South Market, be dismissed from those causes of
5 action that I've named. And we also had them
6 indemnificate the same indemnification clause. I
7 mean, this is just overreaching, Your Honor.

8 Not only is the seller sued -- not only is the
9 seller sued and the HVAC inspector sued, but the
10 agent and agent's broker-in-charge, over an \$8,400
11 unit and we're sitting here, you know, over year
12 later still in litigation over the purported bad
13 inspection by an HVAC. So we'd say that these
14 defendants, both the agent and the broker-in-charge,
15 need to be released.

16 THE COURT: All right.

17 MR. RADEKER: One thing and then I'll shut up.
18 I guess I'd say this: These -- counsel for these
19 defendants saying over and over there's no facts to
20 show X, there's no facts to show X, doesn't make
21 that so. There's plenty of facts about all this
22 stuff that's in the record. All you have to do is
23 look at it. Read Ms. Owens' affidavit and the
24 attachments to it. They can't make that true by
25 repeating that like a mantra.

1 There are factual questions about all of these
2 issues that need to be resolved by the finder of
3 fact at the trial, if it happens like that. We
4 didn't sue the broker-in-charge. They said the
5 broker-in-charge was Tanya Graves.

6 Who we sued, with respect to these particular
7 defendants, is my client's real estate agent and the
8 company that she worked for. And so they're trying
9 to, like, garner sympathy and say, oh, you've sued
10 this woman who had nothing to do with it. Well, we
11 just sued Tanya Graves.

12 Another thing, I guess I would say, is, we
13 think our complaint is just fine the way it is. It
14 might have been written a little hastily. If you
15 don't, then their motion to dismiss -- the Skydive
16 Myrtle Beach case makes it abundantly clear that
17 you've got to give us an opportunity to amend before
18 looking at whether you dismiss it.

19 Like I said, I think it's fine. But if you
20 disagree with me and think that we haven't pled it
21 right, the only way you can dismiss under Skydive
22 Myrtle Beach is to conclude that there is no way
23 that we could plead a complaint that would be
24 satisfactory. Thank you, Your Honor.

25 THE COURT: I don't mean to ignore Mountain Air

1 here. Do you wish to add anything at all to this?

2 MR. DUKES: Mountain Air isn't taking a
3 position relative to these motions.

4 THE COURT: All right.

5 Folks, I -- let me return that to you, because
6 I've got it. I just didn't have it in front of me.
7 But I'm going to review all the things that you've
8 submitted to me and take it under advisement and
9 have an answer for you shortly.

10 MS. COLLINS: Thank you, Your Honor.

11 -- END OF TRANSCRIPT OF RECORD --

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Richland County, South Carolina, on the 17th of October, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

April 8, 2020

s/ *Bethanie K. Creppon*Bethanie K. Creppon
Circuit Court Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Noel Owens,)
)
Plaintiff,)
v.)
Mountain Air Heating & Cooling,)
South Market Real Estate, Demetra)
Caldera, and Ronald E. Gilmer,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS

Case No.: 2018-CP-40-01561

**AFFIDAVIT OF TONYA GRAVES ON BEHALF
OF SOUTH MARKET REAL ESTATE
(IN SUPPORT OF DEFENDANT'S MOTION)**

PERSONALLY, appeared before me, Tonya Graves, legal agent for South Market Real Estate, who first being duly sworn, deposes and says the following:

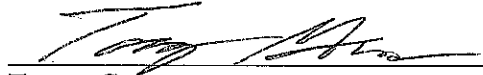
1. I am the Broker in Charge and owner of South Market Real Estate and have the power to represent South Market Real Estate in its defense of this action. I also have personal knowledge of the events that led to this lawsuit.
2. At all times material to the Complaint by Ms. Owen, South Market was not the employer of Ms. Caldera. Rather, the relationship between South Market and Ms. Caldera was the standard independent contractor licensed sales agent, compensated through a 1099, rather than a W-4. South Market provided Broker in Charged services only, which again, is standard throughout the residential real estate sales industry.
3. During this transaction, South Market is not authorized to control salespeople in their business operations. But, based on my experiences, Ms Caldera is a consummate professional and understands the role of a salesperson agent. Notwithstanding, South Market, as standard practice, had very little to do with the marketing, sale and closing of houses, other than as required under the South Carolina Regulations relating to Brokers and trust accounts, as well

as file maintenance. That being said, a review of the file shows that it appears Ms. Caldera followed our operating procedures as well as the industry standard operating procedures and did not do or represent anything against policy to Ms. Owens. Further, Ms. Caldera provided Ms. Owens with the Disclaimer and Release of Liability so that Plaintiff knew that an agent and agency are not able to make representations as to the condition of the property or the work-product of inspectors, that Ms. Caldera would have chosen.


4. As required by best practices and our agency, Ms. Caldera would have provided, and the records indicate she did provide Ms. Owens with the lists of service providers and inspectors that South Market provides as a matter of convenience so that a buyer unfamiliar with such providers have, at least, a starting point and a few inspectors, if they are unfamiliar with inspectors in the industry. But, the records show that Ms. Caldera also ensured that Ms. Owens was aware she could seek her own inspectors. **Exhibit A.** At this point, Ms. Owens would have selected inspectors of her choosing and the agent would have made the property available to the inspector.
5. Upon receipt of the inspection results, Ms. Caldera forwarded all the information to Ms. Owens as required, including the HVAC Inspection Invoice, which states in its entirety, “Performed single system HVAC inspection. Found everything is working well at this time.” **Exhibit B.** It is standard in the industry that an HVAC inspection does not make any finding as to the overall condition of the HVAC, how it was apparently maintained, or any other representations, other than whether the HVAC is, or is not, working at the time of inspection. Occasionally, the HVAC report may denote another issue, such as “low on coolant.” But again, this is only an observation made at the time of the inspection.

6. Ms. Caldera is no longer an agent at South Market Real Estate, however, she left on good terms and now owns and runs her own brokerage. But, South Market retains the sales file, as required. This information was obtained from the file retained with South Market's records kept in the usual course of business.

FURTHER AFFIANT SAYETH NOT


Tonya Graves
On Behalf of South Market Real Estate

SWORN TO and subscribed before me
This 23rd day of August 2018.


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: March 1/27/20

Exhibit

A

HOME INSPECTORS

HOME INSPECTION ONE 803-730-7954
PREFERRED HOME INSPECTIONS 803-407-3233

CL-100 LETTER

FIRST CHOICE EXTERMINATING 803-960-1980
COPELANDS 803-359-7926

HVAC LETTER

MOUNTAIN AIR 803-767-2694
CAROLINA COMFORT 803-794-5526

***THIS IS JUST A LIST PLEASE FEEL FREE TO USE ANYONE YOU ARE
CONFORTABLE WITH.***

Exhibit B



4611 Hardscrabble Rd, Suite 314
Columbia, SC 29229

WORK ORDER

Date: 4 / 13 / 15
Mountainairsc.com
803-767-2694

ELECTRONICALLY FILED - 2018 Aug 24 5:08 PM - RICHLAND - COMMON PLEAS - CASE #2018CP4001561

INVOICE

JOB ADDRESS				BILL TO			
NAME Robert Noel Owens				NAME			
ADDRESS 8025 Nightingale Dr				ADDRESS			
CITY Cola	STATE SC	ZIP 29206		CITY	STATE	ZIP	
PHONE 556-9716	EMAIL ADDRESS			PHONE	CUSTOMER P.O.		
MAKE	MODEL			SERIAL	TYPE	AGE	
MAKE	MODEL			SERIAL	TYPE	AGE	
MAKE	MODEL			SERIAL	TYPE	AGE	
ACCESSORY	FILTER SIZES			TYPE	OTHER	AUTHORIZATION	

DIAGNOSTIC ANALYSIS

INITIAL REQUEST: *Performed single system HVAC inspection. Found everything is working well at this time.*

Please Mail Payment

ACCEPTED BY	DESCRIPTION OF TASKS	STANDARD PRICING	MEMBER PRICING	YOU SAVE
	DIAGNOSTIC FEE: <i>Inspection</i>	<i>100.00</i>		

INITIALED TASKS ACCEPTED BY CUSTOMER **TOTALS**

CUSTOMER SIGNATURE x _____ DATE _____

AS A MEMBER OF OUR SYSTEM PERFORMANCE PLAN YOUR SAVINGS WILL BE \$ _____

SYSTEM PERFORMANCE PLAN EXPIRES _____

REFRIGERANT TRACKING				METHOD OF PAYMENT		TASK	AMOUNT
RECOVERED	R			CASH AMT	CHECK AMT	DIAGNOSTIC FEE	
USED	R			CREDIT CARD AMT	CHECK NO	SYSTEM PERFORMANCE PLAN	
				CREDIT CARD APPROVAL #		SYSTEM PERFORMANCE PLAN DISCOUNT	
TECHNICIAN COMMENTS						SUB TOTAL	
						TAX	
						TOTAL AMOUNT DUE	<i>100.00</i>
						NET DUE UPON COMPLETION	



4611 Hardscrabble Rd, Suite 314
Columbia, SC 29229
803-767-2694

HVAC Inspection Letter

Date 4/13/15 Address Of Property 8025 Nightingale Dr Cole SC 29206
Payment 100⁰⁰ Cash, Check, Credit Card
Realtor / Requested by: Demetra Caldera

Make Goodman Model PGR042100-1 Serial 9906605572
Make _____ Model _____ Serial _____
Make _____ Model _____ Serial _____
Make _____ Model _____ Serial _____

Check List:

Check Pressures Good Recommendations _____
Check Heat Exchanger Good _____
Coil Condition Good _____
Indoor Unit Good _____
Outdoor Unit Good _____
Duct Issues Good _____
Thermostat Good _____

Pass / Not Pass

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CASE NO. 2018-CP-40-01561

Noel Owens,

Plaintiffs,

vs.

**Mountain Air Heating & Cooling, South
Market Real Estate, Demetra Caldera,
and Ronald E. Gilmer,**

Defendants.

AFFIDAVIT OF NOEL OWENS

Personally appeared before me Noel Owens, who, first being duly sworn and under penalty of perjury, deposes and says as follows:

1. My name is Noel Owens. I am the plaintiff in this case. I have personal knowledge of the facts set forth in this affidavit and am competent to testify about them.
2. The facts stated in the complaint in this case are correct. In 2015, I wanted to purchase a home. I knew Demetra Caldera from going to high school with her, so I contacted her when I needed a realtor to help me get a house. When I first spoke to her, I called her at South Market Real Estate. Demetra transferred me over to another South Market Real Estate employee, Chris, in her office, for him to check out if I qualified for a loan and in what amount. Chris did that and transferred me back to Demetra.
3. Demetra represented to me that she was capable and qualified to act as a real estate agent on my behalf in purchasing a home. I told Demetra that I did not have much experience in the area of buying houses, and she told me not to worry and that she would take care of everything. She told me that she would take care of inspections, the closing, and anything else that was needed. I trusted her to take care of everything.
4. I signed up with South Market on a South Market form when I first met with Demetra about this, which was on or around April 3, 2015. Based on South Market Real Estate having acted like Demetra was their agent, I believed that she was their agent. They

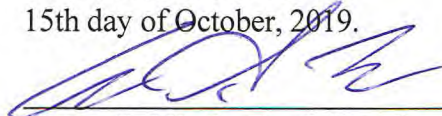
seemed like a stable, going concern as a real estate business, so, relying on that and Demetra's representations, I signed up.

5. Not long after that, I found a house I wanted to look at, the house involved in this case. I went and looked at it with Demetra, the seller (Mr. Ronald Gilmer), and the seller's realtor. The power in the house was not on at that time, and the seller evidently didn't live there. I signed up to buy the house on or around April 12, 2015. The contract had an inspection period that allowed me to walk away from the contract.
6. Demetra never showed me a document titled "real property condition disclosure statement" or anything like that for the house, and neither did anyone else.
7. Demetra ordered a general inspection of the house, and we talked about the inspection report and several things in it. She negotiated a few repair items as a result of the report.
8. Demetra chose the HVAC inspector, ordered the HVAC inspection, told me she was there for the inspection (which I could not make because of some work scheduling conflict), and told me that it had been done and that "[t]he heating and air looks good[.]" as shown on Exhibit A to this affidavit, which is an email from her to me that was sent on April 13, 2015.
9. The fact that Demetra ordered the inspection is further shown by Exhibit B to this affidavit, which is a document I got from Mountain Air Heating & Cooling after I started looking into this matter.
10. In fact, the HVAC unit for the house didn't work basically at all, which I discovered only a while after I moved into the house, after the weather started getting warmer. I had the unit and ducts inspected. I discovered that the ducts were improperly installed and that the HVAC unit had multiple problems and was incapable of working correctly.
11. I contacted South Market Real Estate about this, as shown by Exhibits C and D to this affidavit, which are emails between me and Tonya Graves with South Market Real Estate. I was told she was Demetra's boss, the broker in charge. She was no help to me.
12. Exhibits E and F to this affidavit are reports of HVAC inspections that were done after I discovered the HVAC wasn't working. Exhibit F accurately states the condition of the HVAC system at my house when it was sold to me.

13. I suffered through tremendous Columbia heat for quite some time. I spent about \$100.00 on a window unit, which didn't help much but was all I had for air conditioning until I got a new HVAC unit and got the ducts repaired. That cost me about \$8,400.00. FURTHER AFFIANT SAYETH NOT.


Noel Owens

SWORN to before me this
15th day of October, 2019.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 3/29/24

noel@brbdumpster.com

From: Demetra Caldera <demetracal@yahoo.com>
Sent: Monday, April 13, 2015 11:25 AM
To: noel@brbdumpster.com
Subject: HEATING AND AIR INSPECTION AND INVOICE
Attachments: HVAC-8025 NIGHTINGALE04132015.pdf

The heating and air looks good the inspector said it is well taken care of. But you do have a home warranty so if anything happens they will repair or replace if needed ;) I will have the other inspections soon and will send to you.

Demetra Caldera
South Market Real Estate, LLC
803-920-5720 Cell
<http://www.demetracaldera.com>





4611 Hardscrabble Rd, Suite 314
Columbia, SC 29229
803-767-2694

HVAC Inspection Letter

Date 4/13/15 Address Of Property 8025 Nightingale Dr Cole SC 29206
Payment 100⁰⁰ Cash, Check, Credit Card
Realtor / Requested by: Demetra Caldera

Make Goodman Model PGR042100-1 Serial 9906605572
Make _____ Model _____ Serial _____
Make _____ Model _____ Serial _____
Make _____ Model _____ Serial _____

Check List:

Check Pressures Good Recommendations _____
Check Heat Exchanger Good _____
Coil Condition Good _____
Indoor Unit Good _____
Outdoor Unit Good _____
Duct Issues Good _____
Thermostat Good _____

Pass / Not Pass



noel@brbdumpster.com

From: noel@brbdumpster.com
Sent: Friday, June 19, 2015 5:59 PM
To: 'Tonya D Graves'
Cc: 'tonyzamm'
Subject: RE: 8025 Nightingale Drive

Hey Tonya,

Hope this letter finds you cool. Lol

I did sign on the house on the 12th. I work from 7am to 7pm Monday through Friday and most Saturdays so it did take me some time to move in but I did spend my first night on Friday the 22nd . I thought the air was not working due to a user error because of the 4 settings on the thermostat. I finally gave up attempting to reset the air and called in my home warranty.

My air has not worked since I moved in and I was under the impression that the unit was in working condition. I did buy a house that was advertised as having working HVAC. It seems to me that if you buy a house with AC, the AC should work. I am not in your line of business but it just seems that it would work that way. Demetra definitely gave me the impression that the " The heating and air looks good the inspector said it is well taken care of. But you do have a home warranty so if anything happens they will repair or replace if needed ;)" I truly was under the impression that I had a working/running ac unit. I had no idea it was full of rust and the duct work was on the ground. The unit is definitely not well taken care of and the home warranty is definitely not taking care of any problems and I definitely cannot afford to fix the unit.

I did call Mountain air to let him know the findings from both companies and his response was "I have worked with Cool Care. They try to find problems. This is an older house so it does not have to be up to code. This is a waste of your time because it is not applicable because the house is old."

I wish I had known that the person Demetra chose for my HVAC inspection was not searching for problems. I thought the inspection report was to "inspect" and find problems any problems that the soon to be home owner should be aware of.

As far as getting a fourth opinion, I am out of money. It cost me \$100 for the home warranty- LCB, Cool Care, and my initial inspection from Mountain Air. That's \$300. Two out of three inspectors said my house was not up to code. The only one who said it was good/passed/ up to code was Mountain Air.

I do appreciate your time and advise.

**Truly hot,
 Noel**

From: Tonya D Graves [mailto:tonyadgraves@gmail.com]
Sent: Friday, June 19, 2015 3:37 PM
To: Noel
Subject: 8025 Nightingale Drive

Noel,

Please know I am not an attorney nor I am giving legal advice. I am providing you my opinion and recommendation. If I were you and wanted assistance with the HVAC I would start by contacting Mountain Air and sharing the other reports with them. Find out their opinion of current reports. You have 3 very different reports which indicates to me one or me may be incorrect or misleading. I have reviewed the documents listed below:



- Disclaimer provided to you by Demetra Caldera dated April 3rd 2015
- List of service providers w/disclaimer at bottom
- Home Inspection report dated April 13th 2015
- Heating/Air Inspection dated April 13th 2015
- 2-10 Warranty brochure
- Heating/Air Inspection dated June 4th 2015
- Heating/Air Inspection dated June 12th 2015

The main issue I see here is the amount of time between initial inspections and the present. You closed on the house May 12, 2015 which means you had owned it more than 3 weeks when 2-10 sent a vendor out. Any issues at that time would be yours to handle for your property.

I would also read over warranty brochure very carefully and contact them. Try to get a supervisor on the phone. Find out why the issue isnt covered, if anything didnt seem right when LCB was there tell them and ask for another vendor to be dispatched.

It is important to understand that a heating and air letter is an explanation of a heating/air system at the time the letter is written. With time, usage of the unit, activity or persons in the crawl space, and other miscellaneous factors, the condition of a unit will change. It is then up to the property owner to elect who fill fix the problem and to compensate that vendor/individual for the work or however they arrange.

In closing I wish to tell you I am very sorry for this inconvenience for you. I have checked all the documents in this transaction and spoken with Demetra several times. I find that Demetra did everything by the book and went above and beyond after the closing to try and help with this issue.

Sincerely,

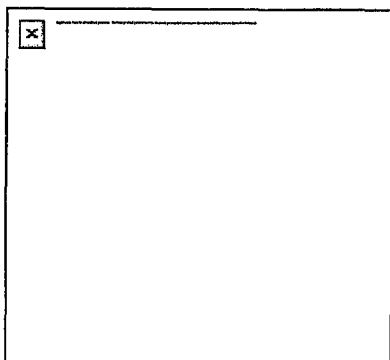
Tonya D. Graves

Direct: [803.238.8612](tel:803.238.8612)

Office: [803.470.6001](tel:803.470.6001)

E: info@TonyaGraves.com

W: www.SouthMarketRE.com



[Find a Home](#) | [Relocation Info](#) | [Home Buyer Guide](#) | [Mortgage Information](#)

noel@brbdumpster.com

From: noel@brbdumpster.com
Sent: Monday, June 22, 2015 2:07 PM
To: 'Tonya D Graves'
Subject: RE: 8025 Nightingale Drive

I appreciate any help you can offer and hopefully a quick resolve.
Still boiling ☺,
Noel

From: Tonya D Graves [mailto:tonyadgraves@gmail.com]
Sent: Monday, June 22, 2015 12:31 PM
To: Noel
Subject: Re: 8025 Nightingale Drive

Tonya D. Graves

Direct: 803.238.8612

Office: 803.470.6001

E: info@TonyaGraves.com

W: www.SouthMarketRE.com



[Find a Home](#) | [Relocation Info](#) | [Home Buyer Guide](#) | [Mortgage Information](#)

On Mon, Jun 22, 2015 at 12:19 PM, Tonya D Graves <tonyadgraves@gmail.com> wrote:
Noel,

Just sending you a quick note to let you know I have not forgotten about you. Client satisfaction is the most important thing. I believe some in the service industry have forgotten this fact. With regards to your circumstance I have little control but I will do what I can. I plan to let Mountain Air know about my disappointment, at a minimum, with the handling of your complaint/issue. I plan to also share with them the importance of reputation in a small market. My hope is they will assist you w/your HVAC and additionally that they will provide excellent customer service in the future.

Sincere Regards,



Office Phone: 803-800-1516
 Office Fax: 888-308-3730
 Email: info@lcb-contracting.com
 www.lcb-contracting.com

LCB Contracting Solutions
 Columbia Division
 PO Box 291388
 Columbia, SC 29229



6-4-15

Name: Noel Owens		Bill To: C.O. D Trade Fee 100 ⁰⁰	
Address: 8025 Nightingdale Dr		Address: 2-10 H.B.W.	
City: Cole	State: S.C.	Zip Code: 29209	City: State: Zip Code:
Home Phone:	Other:	Home Phone:	Other:
System: Goodman	Model: PGB042100-1 Rev A	Service(s) Requested: wo # 5082934	
Gas Pack	Serial Number: 9906605572	not cooling	
System:	Model:	Service(s) Performed:	
	Serial Number:	Charged unit with 2lbs	
Filter Sizes:		of R-22	
DIAGNOSIS:	Found unit low on charge	Checked Return Duct + all other	
	Also found Return 16" Duct	Duct. This Return Line is	
	messed up under house.	no longer good.	
RECOMMENDATIONS:	Charge unit with R-22		
	Replace 16" Return Duct		
	to improve Air Flow		
QUOTE FOR REPAIRS:		Paid in Full By:	Total 100 ⁰⁰
		Cash	Tax
		Check	Amount Paid
		Technician MUSA	Home Owner

PLAINTIFF'S EXHIBIT
 E



Cool Care, Inc.

P. O. Box 6764
 Columbia, SC 29260
 Phone: (803)772-7715 Fax: (803)782-5518

Noel Owens
 8025 Nightingale Dr
 Columbia, SC 29209

Noel Owens
 8025 Nightingale Dr
 Columbia, SC 29209

Call Slip Number	Invoice Date	Invoice Number	Due Date	Amount Paid
37202	6/12/2015	S-13375	06/12/2015	<input type="text"/>
37202	6/12/2015	S-13375	06/12/2015	

1999 Goodman Gaspac
 Model # PGB042100-1 REV A
 Serial # 9906605572

Checked 1999 10 SEER 3.5 ton 100,000 BTU Goodman Gaspac for no cooling. The condenser is extremely dirty and the evaporator coil is dirty. The unit top is missing insulation and the compressor has weak valves. This system has multiple issues and is not cooling or heating properly at this time. The gas line is improperly installed. The gas line is in contact with the ground and is supposed to be either 12" above ground or 18" below. That code precedes 1999 when this unit was manufactured. Code requires that gas line be hard pipe through unit casing, this system has flex gas line through casing. Numerous sections of supply ducts are missing insulation. The main supply and return trunk lines need to be replaced and hung off the ground. Shipping holes in Gaspac base should be filled to prevent rodent infestation under house. Flashing should be waterproof to keep duct insulation dry and in tact. PLEASE NOTE: Existing work does not have to be brought up to current code requirements but does have to meet code requirement from the time it was installed. Air conditioning duct supplies have always been required to be insulated and ductwork has never been allowed to be in contact with the ground. The gas line issues on this property were not up to code at the time of installation.

Due to the age and condition of the unit, we recommend the unit be replaced and that duct work be repaired to meet code requirements. This duct system is not that old but was improperly installed.

Please let us know if we can be of further service to you.

As Agreed	100.00
Subtotal	100.00
Tax	0.00
Grand Total	100.00

All payments are due upon completion of work.

The greatest compliment our customers can give us is the referral of their family and friends.
 Thank you for allowing Cool Care to serve your heating and air conditioning needs.

www.coolcarehvac.com



Drew Radeker

From: Drew Radeker
Sent: Tuesday, October 15, 2019 6:08 PM
To: Lizzy Moore; Kelley Leddy; Trippett Boineau
Cc: stephen@suraskylaw.com; Rhonda Schaub; Carl Hiller; Anna Marsh; Margaret A. Collins, Attorney
Subject: RE: Owens v. Mountain Air et. al: Consent Order of Continuance
Attachments: Affidavit Owens 10-15-19.pdf; Exhs Affidavit Owens 10-15-19.pdf

All:

FYI, that trial I was supposed to have this week fell through. (Opposing party fired his lawyer at the last minute.) The e-filing system has scheduled maintenance that started about seven minutes ago, so I could not e-file the attached affidavit and exhibits. Accordingly, I provide them to you now.

Thanks.

Drew Radeker



923 Calhoun Street,
 Columbia, South Carolina 29201
 Post Office Box 50143,
 Columbia, South Carolina 29250
 Telephone: (803) 779-2211
 Facsimile: (803) 779-6700
www.harrisonfirm.com

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From: Drew Radeker
Sent: Saturday, October 12, 2019 7:37 AM
To: Lizzy Moore <lizzy@pslawsc.com>; Kelley Leddy <kleddy@finkellaw.com>; Trippett Boineau <trippett.boineau@mgclaw.com>
Cc: stephen@suraskylaw.com; Rhonda Schaub <Rhonda@harrisonfirm.com>; Carl Hiller <chiller@FinkelLaw.com>; Anna Marsh <anna.marsh@mgclaw.com>; Margaret A. Collins, Attorney <meg@pslawsc.com>
Subject: RE: Owens v. Mountain Air et. al: Consent Order of Continuance

All:

I'm about to e-file the attached proposed continuance order as a result of the jury trial I've got next week that is supposed to start the day these motions are set to be heard.

Thank you.

Drew Radeker

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
CASE NO. 2018-CP-40-01561

Noel Owens,

Plaintiffs,
 vs.

**Mountain Air Heating & Cooling, South
 Market Real Estate, Demetra Caldera,
 and Ronald E. Gilmer,**

Defendants.

**MEMORANDUM OF LAW
 CONCERNING MOTIONS FOR
 SUMMARY JUDGMENT, ETC., BY
 DEFENDANTS CALDERA & SOUTH
 MARKET REAL ESTATE**

The Plaintiff submits this short memorandum with some legal quotations and citations concerning the motions of Defendants Demetra Caldera and South Market Real Estate that are set to be heard on October 17, 2019.

Agency. “An agent is one appointed by a principal as his representative and to whom the principal confides the management of some business to be transacted in the principal’s name, or on his account, and who brings about or effects legal relationships between the principal and third parties.” Peeples v. Orkin Exterminating Co., 244 S.C. 173, 180, 135 S.E.2d 845, 848 (1964). “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal's control.” Froneberger v. Smith, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)).

“Generally, ‘[a]gency is a question of fact.’” Id. at 153 (quoting Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984)). “Usually, whether an agency relationship exists and the scope of the alleged agent’s authority are questions of fact for the jury.” Holmes v. McKay, 334 S.C. 433, 439, 513 S.E.2d 851, 854 (Ct. App. 1999). “[T]he

declarations of an agent alone as to his agency are insufficient to prove agency, but if there are other corroborating facts, agency then becomes a question for the jury. His statements are admissible and competent as circumstances in connection with other competent evidence to prove the legal relationship of principal and agent.” Id. An agency relationship does not require “express appointment and acceptance” to be created; rather, it “may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case.” Id. “The agent must have assumed to represent the principal and to have performed the acts in his name and on his behalf.” Id. at 440. Parties may have an agency relationship even where they have expressly agreed to the contrary. Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982).

Agents are servants within the master-servant rubric of *respondeat superior*. See Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013).

Apparent agency. Apparent agency has the effect of agency even when agency may not actually exist. Froneberger, 406 S.C. at 47.

Under South Carolina law, “[t]he elements which must be proven to establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party’s detriment.” Graves v. Serbin Farms, Inc., 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991). “Apparent authority to do an act is created as to a third person by written or spoken words *or any other conduct of the principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.” Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244–45, 473 S.E.2d 865, 868 (Ct. App. 1996). “Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief.” Id. at 245, 473 S.E.2d at 868.

Froneberger, 406 S.C. at 47.

Gladden v. Boykin. Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882 (2013), is a case about a clause in a contract for home inspection that limited liability of the inspection company to the amount of the fee paid by the company's client. Id. at 142. It is not about a release or an indemnification provision.

Release typically not prospective. A release "ordinarily covers all claims and demands due at the time of its execution," not those that arise after the release is executed. Gardner v. City of Columbia Police Dept., 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950).

Indemnification unavailable for party at fault. Under South Carolina law, "a contract of indemnity will not operate to indemnify the indemnitee against losses for its own negligence unless the intention is expressed in 'clear and unequivocal terms.'" Hazel v. Blitz U.S.A., Inc., 425 S.C. 361, 822 S.E.2d 338 (Ct. App. 2018) (quoting Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989)).

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
HARRISON, RADEKER & SMITH, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
October 16, 2019

2. The effect of this language is to disclaim any warranties as to the condition of the property and the reliability of any inspectors' reports. Plaintiff argued at the hearing that, specifically Defendant Caldera, made a false representation regarding the condition of the HVAC. However, South Market proffered evidence showing that Defendant Caldera's representations were verbatim what the Mountain Air inspector had written on the inspection report. As such, the complained of conduct falls squarely in the disclaimer and the effect is exactly as previously ordered. Viewed most favorably to the Plaintiff, this would mean that Mountain Air's representation is at issue. Not Defendant Caldera's mere reporting of the same representation. Further, South Market was never a party to these communications.

3. Plaintiff also takes issue with the Release of Liability. The full language is as follows:

*“The 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 by 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.

4. Plaintiff advances the argument that release cannot be prospective and cites Gardner v. City of Columbia Police Dept.. Plaintiff advanced this argument at the hearing and failed, as Defendant South Market's counsel established that this is not the holding of the case cited for this proposition, as well as the legal absurdity of a party purportedly not being able to obtain a prospective release. This was noted at the hearing, and now is being noted once again that, the holding of Gardner simply does not state that releases cannot be forward looking. Rather, “releases are given their ordinary meanings, unless the context indicates their use in a different sense. The scope and effect of a release must be gathered

from its terms, which may be interpreted in the light of the surrounding circumstances.” Essentially, when looking at a release, plain meaning and common usage applies. Here, the release is clearly forward looking based on the plain meaning of the words and the common usage of this type of Disclaimer and Release. Secondly, the case in Gardner is highly distinguishable- the case before the Supreme Court was a worker’s compensation case, where the injured employee released the tortfeasor so that his employer could not seek indemnification. Thirdly, to imply that releases cannot be forward looking would not only lead to an absurd result but would devastate the legal system. Releases signed by consumers for participating in extreme sport, for the use of gun ranges, for escape rooms, for any number of industries and activities worldwide would be deemed unenforceable and would flood the courts with a multitude of claims if the releases signed prior to participation were not forward looking. To suggest this is patently absurd.

5. Plaintiff argues that Defendants were sued for their own tortious conduct. As applied to South Market, they were an arms-length party and have no substantial involvement in purchase of the property by the Plaintiff. They were merely the company for which Defendant Caldera was a 1099 licensee. Further, no allegations have been shown to establish any tortious acts by Defendant Caldera. Plaintiff’s argument fails in that there was no conduct shown on the part of South Market or Caldera to be tortious. Again, as applied to Defendant Caldera the conduct being complained of was to repeat the report given by Mountain Air.
6. To support this argument, Plaintiff cites to two (2) cases- Hazel v. Blitz U.S.A., Inc. and Federal Pacific Electric V. Carolina Production Enters. A reading of Hazel shows that at least in part, the failure of the release was the appellant’s status, as it was a two-part

holding. Respondents were a mother and son; the son had been injured when a gas canister exploded. The Vendor (appellant) was sued and tried to use a release provided for by the Manufacturer's bankruptcy plan. However, the release only applied to "Participating insurers" of which the Vendor was not. The release was otherwise valid – they just did not qualify for the release. This is not comparable to the case at hand. The second holding dealt with Vendor's claim that the Manufacturer had entered into a broad indemnification agreement. However, the Court held that in order to be indemnified from one's own negligence, specific language indicating such was required. *Federal Pacific* also hold that specific language is required to in order for a party to have indemnification from their own negligence.

7. Where Plaintiff's argument fails here is that they failed in any pleading and during oral arguments to show that either Defendant acted negligently. South Market would argue that, based upon the clear language of the documents in this transaction, the selection of the HVAC was Plaintiff's to make and not Caldera. Even if there is a dispute of fact as to whether Plaintiff or Caldera made the ultimate selection for the benefit of Plaintiff, as her counsel attempted to argue, notwithstanding the lack of any evidence to that effect, the clear and unambiguous language of the agreement between Plaintiff and Caldera/South Market is that these were only suggestions and that the ultimate decision and responsibility fell on Plaintiff. It is also established that there were more than one HVAC contractors selected. Therefore, any arguments by Plaintiff of oral discussions that changed this clear and unambiguous language is not competent evidence. See Defendant South Market's Memorandum in Support of Motion to Dismiss. As such, the selection of the HVAC contractor, and what he found, or failed to find is not a source of liability pursuant to the

Release and Indemnification document signed by Plaintiff. Defendant Caldera met her obligations and responsibilities to the Plaintiff and cannot be found to have committed a tortious misrepresentation by merely reporting the results of the inspection accurately, as established on the record at the hearing.

8. Plaintiff's next arguments focus on the standard of summary judgment and that all facts should be construed in favor of the nonmoving party. South Market proffers that the Court did just that. Taking into consideration all proffered documents and pleadings in favor to the Plaintiff, there is a claim and a scintilla of evidence that the inspection performed missed the mark. However, South Market had no hand in selecting the inspector, in the inspection, or in writing the report. South Market did not even have any hand in reporting the results of the inspection to the Plaintiff. South Market had no more to do with this transaction, other than those responsibilities of a Broker in Charge over any agent. As applied to Defendant Caldera and even assuming for purposes of this Motion that Caldera was not an independent contractor, South Market avers that Caldera did her job and met her responsibility by informing the Plaintiff of the inspection report accurately. If the report was not done correctly by a licensed HVAC contractor, this cannot rise to the level of tortious action, as Caldera had no reason to know, and did not know, that any problems or issues existed with the inspection report.
9. As such, South Market would aver that the Court's granting of Summary Judgment on the basis that the Disclaimer and the Release of Liability cover the conduct complained of is correct. Even construing the facts most favorably to the Plaintiff.
10. South Market does not deny that the Plaintiff is entitled to a jury trial against those Defendants that Plaintiff has a sustainable claim against. The damages hearing requested

by South Market was at their discretion, as they would be taking the place of the complaining party. If Plaintiff wishes to respond to that request with a demand for jury trial, that is her right.

Respectfully submitted,

PALMETTO STATE LAW GROUP, LLC

//Margaret A. Collins
Margaret A. Collins, Esquire, Bar No.: 13290
2241 Bush River Road
Columbia, SC 29210
P. 803.708.7442
F. 803.753.9352
meg@pslawsc.com
Attorney for Plaintiffs

November 15, 2019
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Judge

Appellate Case No. 2020-000054

RECEIVED
Nov 23 2020
SC Court of Appeals

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.

CERTIFICATE OF COUNSEL

I certify that the record on appeal contains all material proposed to be included
by any of the parties and not any other material.

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
drew@harrisonfirm.com
Attorney for Appellant

November 2, 2020