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

Noel Owens,...……..……...Appellant,

v.

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

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

FINAL BRIEF OF APPELLANT IN REPLY TO RESPONDENT SOUTH MARKET

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STATEMENT OF ISSUES

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II. Did the lower court err in granting summary judgment on the basis that the Appellant's claim was not beyond the scope of the release language at issue?

III. Did the lower court err in finding that summary judgment was proper on the question of whether Respondent Caldera was an agent of Respondent South Market?

IV. Did the lower court err in finding that Appellant was not entitled to a jury trial on the remainder of the Respondents' claims?

ARGUMENT

Respondent South Market Real Estate (hereinafter "South Market") repeats in its brief several arguments Respondent Demetra Caldera (hereinafter "Caldera") makes in her brief. Accordingly, the Appellant, Noel Owens (hereinafter "Owens"), incorporates her reply brief to Caldera's brief and Owens' reply arguments set forth there into this brief by reference. This brief will focus on replying to arguments that South Market makes that Caldera does *not* make and on replying to South Market's similar arguments to which a different reply is warranted given the different status of these Respondents in the case.

I. The record has more than a scintilla of evidence of agency and of apparent agency.

a. South Market's claim that Appellant "did not raise" and "abandoned" her argument regarding the agency relationship between South Market and Caldera is unfounded.

Owens repeatedly argued that the record showed an issue of fact concerning whether Caldera was South Market's agent, and the lower court issued a final order that addressed that issue. Therefore, it is preserved for appeal.

In Owens' complaint, she alleges that "Caldera was, at all times material hereto, an agent and servant of South Market." (R. p. 11.) At the hearing for Respondents' motion for summary judgment, both parties discussed the issue extensively. (R. p. 96 ln. 11 through p. 98 ln. 25, p. 103 ln. 6 through p. 104 ln. 15, p. 105 ln. 20 through p. 106 ln. 1, p. 106 ln. 8-10.) In her motion to reconsider, Owens "specifically incorporate[d] into this motion by reference all arguments she made at the hearing on [South Market and Caldera's] motions and her previous memorandum in this case." (R. p. 75.) Finally, the lower court's order granting the motions for summary judgment explicitly (and incorrectly) rejects Owens' arguments on the matter, stating that "at all times

material to the sale, Defendant Caldera was an independent contractor or Defendant South Market's 'licensee.'" (R. p. 3.)

It is "[w]here a matter is not ruled on by the circuit court [that] the issue is not preserved for appellate review unless the complaining party moves to amend the judgment pursuant to Rule 59(e)." Vespazziani v. McAlister, 307 S.C. 411, 413, 415 S.E.2d 427, 428 (Ct. App. 1992). Rule 59 motions are not necessary to preserve issues that have been ruled upon by the circuit court; rather, "they are used to preserve issues that have been raised to the trial court but not yet ruled upon by it." Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731, 734 (1998); accord Bailey v. Segars, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001).

Here, the issue of whether facts in the record supported that Caldera was South Market's agent was raised to the lower court and ruled upon by the lower court. It is preserved for review.

b. South Market's claim that Owens did not provide "any" evidence of agency and "relied solely on allegations contained in her complaint" is incorrect.

South Market notes that "[a] purported principal must consciously or impliedly represent another to be his agent," just as Owens states in her brief. Froneberger v. Smith, 406 S.C. 37, 47, 748 S.E.2d 625 (Ct. App. 2013). South Market goes on to state that Owens has not shown any evidence of South Market representing Caldera to be its agent and points to South Market's logo or letterhead as only a "semblance" of evidence supporting agency. (Respondent South Market's Initial Brief p. 13.) Despite South Market's characterization of its own argument, what it has done is point out some facts in the record that tend to show it having represented Caldera as being its agent. Owens is entitled to the benefit of those facts and every reasonable inference that may be drawn from them. Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

Further, South Market's brief ignores that South Market made both implicit and explicit representations to Owens to the effect that Caldera was its agent and that Owens, based on them, believed Caldera to be South Market's agent. (R. pp. 118-19, 123-25.) South Market evidently gave Caldera the authority to act as its agent for getting its self-exculpatory form signed. (R. p. 53, 118-19.) Caldera evidently worked out of South Market's office and transferred calls within it to a South Market employee, who then transferred Owens' call back to Caldera, all, one would reasonably infer, using the same telephone line. (R. p. 118.) The presence of South Market's mark on Caldera's email signature and on top of the release document are representations by South Market to the effect that Caldera was South Market's agent. (R. pp. 53, 118-19, 121.) Moreover, Tonya Graves' extensive communications with Owens in attempt to address the very issue that gave rise to this litigation belie South Market's contention that Caldera was merely an independent contractor. (R. pp. 119, 123-25.) Graves, broker-in-charge at South Market, stated that South Market was engaging in behavior that showed a right to control how Caldera did her job: calling Caldera in to explain herself and noting that it appeared that Caldera had done everything "by the book[,]" i.e., in accordance with South Market's procedures Caldera was required to follow. (R. p. 124.) That is evidence of right to control, the touchstone of agency. See, e.g., Bank of N.Y. Mellon Trust Co. v. Grier, 416 S.C. 63, 70, 785 S.E.2d 208, 212 (Ct. App. 2018). Even the description that South Market's broker-in-charge gave of Caldera, "standard independent contractor licensed sales agent[,]" contains the word "agent." (R. p. 110.)

c. It does not matter what the parties now call their relationship.

As stated in Owens' brief, it is of no consequence to agency or apparent agency that Tonya Graves stated that the relationship between the Respondents was that of "standard independent contractor licensed sales agent[,]" nor is it dispositive what the "customs" or common practices of

the residential real estate industry are. (R. p. 110.) Further, the fact that "[t]here is a statutory scheme in place that directly defines and determines the relationship between a real estate 'agent' and the Broker-in-Charge" is not dispositive of whether South Market and Caldera engaged in behavior that created an agency relationship or held out to Owens that there was one, nor is the type of tax form that Caldera fills out dispositive of this, as is well settled under South Carolina law. See Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 475–76, 753 S.E.2d 416, 419 (2013); Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002). None of the authority or evidence cited by South Market does away with the agency evidence in the record or does away with the legal principle that 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).

The evidence set forth on this matter in Owens's brief amply demonstrate at least a scintilla of evidence of representations by both Respondents indicating an agency relationship. Thus, granting summary judgment for Respondents was inappropriate.

II. Owens made the required showing for a negligent misrepresentation claim, and Harrington does not help South Market.

South Market states that "Harrington [v. Mikell, 321 S.C. 518, 524, 469 S.E.2d 627, 630 (Ct. App. 1996),] specifically holds that, although brokers have a duty to avoid fraudulent conduct and misrepresentation, they do not owe a generally [sic] duty to verify information." (Respondent South Market's Initial Brief p. 10.) South Market mischaracterizes Harrington and presents it misleadingly, given the very different facts of the instant case. First of all, Owens has not brought suit about verification of information. She has sued South Market because its agent, falsely and negligently, made her own affirmative misrepresentation about the status of the heating and air conditioning system. (R. pp. 10-17, 118-21.)

Second, in Harrington, this court held that the broker – who did not even represent the plaintiff, but, rather, represented the other party to the sales transaction – did not have "a general duty to verify information *concerning the power of attorney*" that was there at issue, i.e., did not owe someone who was not his client the duty to verify the legal effect of a document. Harrington, 321 S.C. at 524 (emphasis added). That is a far cry from what happened in this case, where Caldera and South Market represented Owens and undertook to make a representation about the physical condition of the heating and air conditioning system.

Indeed, this court's words in Harrington and this state's law on negligent misrepresentation work in favor of Owens, not against her.

> [T]he plaintiff must allege and prove the following essential elements to establish liability for negligent misrepresentation: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that [s]he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of h[er] reliance upon this representation.

Id. at 521-22 (citing AMA Management Corp. v. Strasburger, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992)). Viewed in the light most favorable to Owens, the record contains evidence tending to support each of these elements, especially in light of Caldera's role as Owens' realtor. "[I]f the defendant has a pecuniary interest in making the statement and [s]he possesses expertise or special knowledge that would ordinarily make it reasonable for another to rely on h[er] judgment or ability to make careful enquiry, the law places on h[er] a duty of care with respect to representations made to plaintiff." Strasburger, 309 S.C. at 223.

Owens' affidavit establishes that she did rely on Caldera's representation that the heating air looks good. (R. pp. 119, 121, 123.) That reliance cost her over $8,000.00. (R. p. 120.) South

Market argues that Owens had no right to rely on Caldera's statement, but whether a party has the right to rely on a statement (and whether the reliance is justified) is ordinarily a fact question for the jury. See Armstrong v. Collins, 366 S.C. 204, 220, 621 S.E.2d 368 (Ct. App. 2005) (fact question concerning right to rely). Caldera was Owens' realtor and, as such, took it upon herself to affirmatively (and incorrectly) represent the condition of the heating and air system. Under these circumstances, there is a jury question, not just about whether Owens' reliance was justified, but about each element of negligent misrepresentation.

III. Owens of course has the right to a jury trial on South Market's breach of contract counterclaim.

Citing *equitable* indemnity cases for its argument, South Market argues that Owens does not have a right to trial by jury on South Market's *contractual* indemnity claim against her. South Market seeks to substitute the law of apples for that of oranges. There is a fundamental difference between an action to enforce a claimed right to equitable indemnification and one to enforce a contract of indemnity: the former sounds in equity, and the latter is an action at law for breach of contract. Johnson v. Little, 426 S.C. 423, 430, 827 S.E.2d 207, 211 (Ct. App. 2019) ("right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party").

Under the South Carolina Constitution, as it similarly is under the Seventh Amendment to the Constitution of the United States, "[t]he right of trial by jury is preserved inviolate." S.C. Const. art. I, § 14.[1] "The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless

[1] Through a scrivener's error, Owens did, regrettably cite the wrong section of Article I of the South Carolina Constitution in her initial brief. She has addressed this in her final brief by correcting the reference, with an explanatory footnote.

a jury trial be waived." Rule 38(a), SCRCP. "This guarantee preserves the right to a jury trial in those cases where jury trials were allowed at the time of the adoption of the Constitution in 1868." Cooper v. Poston, 326 S.C. 46, 48, 483 S.E.2d 750 (1997).

It is well settled that such cases include breach of contract actions, which is what South Market's claim for contractual indemnity is. A breach of contract action is an action at law for the recovery of money. E.g., Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 307, 698 S.E.2d 773, 777 (2010); Branche Builders, Inc. v. Coggins, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009). "Under the common law, legal actions for the recovery of money were triable by a jury." Cooper, 326 S.C. at 48. An action seeking to enforce a contractual indemnity provision is a "breach of contract action" that is "an action at law." Johnson, 426 S.C. at 426, 428. South Market seemed below to agree, stating in its response to Owens' motion to reconsider that it "does not deny that [Owens] is entitled to a jury trial. . . . If [Owens] wishes to respond to that request [for a damages hearing] with a demand for jury trial, that is her right." (R. pp. 136-37.) Owens had already demanded a jury trial on South Market's counterclaim in her reply to it. (R. p. 38.) Accordingly, she had already done everything she needed to do to preserve her right to a jury trial on the contractual indemnity claim. Rule 38(b), SCRCP.

Nor is Owens' argument unpreserved, as South Market contends. The lower court's order granting summary judgment stated that Owens "is to indemnify [South Market and Caldera] for their defense of this action," and "[i]f any dispute arises as to the amount of the indemnification, then the matter will be set for a damages hearing[.]" (R. p. 4.) The issuance of that order was the first time that an issue arose about whether Owens was entitled to a jury trial on South Market and Caldera's contractual indemnity claims. (R. p. 4.) In her motion to reconsider, Owens stated that "[e]ven were the court's substantive determinations about summary judgment to stand (which they

should not), [Owens] would still be entitled to a jury trial – not a damages hearing, as though she were in default – on [South Market and Caldera's] claims against her." (R. p. 75.) Owens raised this argument at the right time – once, for the first time, the lower court's order created an issue about whether she is entitled to trial by jury. When an order grants relief not previously argued for or contemplated by what was presented to the court, the aggrieved party must address the new issue through a motion made under Rule 59(e), SCRCP, to preserve the issue for appeal. Stevens Aviation, Inc. v. DynCorp Intern. LLC, 394 S.C. 300, 307, 715 S.E.2d. 655, 659 (Ct. App. 2011); Bennett v. Rector, 389 S.C. 274, 284, 697 S.E.2d 715, 720 (Ct. App. 2010). That is exactly what Owens did. (R. p. 75.)

South Market also misses the mark in contending that Owens' argument is unpreserved to the extent it implicates constitutional jury trial rights. No magic words are required to have been said below in order for an issue to be preserved for review on appeal. See e.g. Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973); State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (issue was preserved even though defendant did not use the exact words "corpus delecti" in his request for directed verdict); In re: Robert D., 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000) (although party did not specifically mention any constitutional provisions to the trial court, the record reflected that he complained the testimony would violate his right of confrontation), *overruled on other grounds by* State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012). The state and federal constitutions are just sources of the jury trial right that Owens plainly argued, at her first opportunity, that she had. Her argument that she has the right to a jury trial on South Market's contractual indemnity claim against her is preserved for this court's review. Stevens Aviation, 394 S.C. at 307; Bennett, 389 S.C. at 284.

CONCLUSION

Respectfully, the lower court erred prejudicially in granting Caldera's and South Market's motions for summary judgment. The court should reverse these rulings and remand this case for a trial in which a jury will determine questions of material fact that are present here.

Respectfully submitted,

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CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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