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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Bentley D. Price, Circuit Court Judge

Civil Action No. 2019-CP-10-00341
Appellate Case No.: 2020-000932

Miguel Oyuela-Martinez — Appellant,

v.

Kuhn & Kuhn, LLC and John Robert Kuhn, Defendants
Of which Kuhn & Kuhn, LLC is the — Respondent.

FINAL BRIEF OF RESPONDENT

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II. STATEMENT OF THE CASE

This lawsuit arises out of an automobile/pedestrian accident that occurred on or about October 24, 2018, whereby Appellant, Miguel Oyuela-Martinez (hereinafter "Martinez"), sustained injuries. [R. pp. 10-16]. On or about January 10, 2019, Martinez signed a Covenant Not to Execute as to John Robert Kuhn, and consideration for the Covenant was paid on behalf of Mr. Kuhn. [R. pp. 160-161]. Twelve days later, on January 22, 2019, Martinez filed the lawsuit against Mr. Kuhn and his law firm, Kuhn & Kuhn, LLC (hereinafter "the Firm"). [R. pp. 10-16]. In addition to the general negligence claims alleged against Mr. Kuhn, Martinez also alleged claims against the Firm contending that the Firm had vicarious liability for Mr. Kuhn's actions and/or negligently supervised Mr. Kuhn at the time of the accident. Id. However, Martinez did not allege, and has never attempted to allege in his pleadings, a cause of action for fraud of any kind. Id.

On June 7, 2019, Mr. Kuhn and the Firm moved for summary judgment. The motion was heard before Judge Culbertson on June 18, 2019. In Judge Culbertson's July 15, 2019 Order, the Firm was granted partial summary judgment as to the claims against it for direct negligence (negligent supervision and hiring). [R. pp. 2-3]. Judge Culbertson declined to grant the remaining portion of the motion as to vicarious liability and declined to make any findings of fact related to vicarious liability. Id.

Approximately four months after Judge Culbertson's Order and approximately eleven months after the lawsuit was filed, on or about November 29, 2019, Martinez executed a second, supplemental Covenant Not to Execute as to Mr. Kuhn, and consideration for the Covenant was paid on behalf of Mr. Kuhn. [R. pp. 205-206]. At this time, Martinez had still not raised or amended his pleadings to allege a cause of action for fraud of any kind. Instead, he knowingly entered into a second, supplemental agreement with Mr. Kuhn. Id.

On January 22, 2020, the Firm renewed its Motion for Summary Judgment as to Martinez's vicarious liability claim at the conclusion of discovery. [R. pp. 35-40]. A hearing on the Firm's motion was held on May 5, 2020. At the hearing, the Firm argued the claims against it must be dismissed as the signed Covenant that releases Mr. Kuhn as an agent, also releases the Firm as the principal. Id. Counsel for Martinez argued for the need of additional time to respond to the foregoing argument. [R. p. 110, Lines 10-13]. The hearing was adjourned, and counsel for Martinez was afforded additional time to prepare and file a brief in opposition to the Firm's motion. [R. p. 111, Lines 13-25]. The hearing was reconvened on May 14, 2020. Upon review of the written submissions and after having heard oral arguments from all counsel of record, Judge Price granted the Firm's Motion for Summary Judgment by way of Order dated May 28, 2020. [R. pp. 4-9]. On June 22, 2020, Martinez filed his Notice of Appeal. [R. pp. 45-46].

III. STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). "Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Id.; Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Id. "The moving party need not 'support its motion with affidavits or other similar materials negating the opponent's claim.'" Milligan v. Liberty Life Ins. Co., 313 S.C. 478, 480, 443 S.E.2d 381-82(1994) (nothing that where record is devoid of evidence, moving party is entitled to summary judgment as a matter of law). Once the party moving the summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in

the pleadings. Singleton v. Sherer, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). "It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine." Thompkins v. Festival Centre Group, I., 306 S.C. 193, 194, 410 S.E.2d 593 (Ct. App. 1991).

A respondent may argue any additional reasons why an appellant court should affirm the appealed ruling, "regardless of whether those reasons have been presented to or ruled on by the lower court." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). A reviewing court may, in its discretion, review the additional reasons presented by the respondent and "if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." Id. at 420, 526 S.E.2d at 723. See also Rule 220(c), SCACR.

IV. ARGUMENT

A. A Grant of Summary Judgment is Not Precluded by a Prior Denial of a Motion for Summary Judgment. Therefore, the Circuit Court Did Not Err Upon Hearing and Granting Respondent's Renewed Motion for Summary Judgment.

A denial of a motion for summary judgment does not establish the law of the case, and the issues raised in the motion to reconsider the summary judgment motion or by a motion for directed verdict. Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379(1994); see also Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1121 (10th Cir.), cert. denied, 444 U.S. 856, 100 S. Ct. 116, 62 L.Ed.2d 75 (1979) ("We see no merit in the contentions that summary judgment was improper because... an earlier motion for summary judgement, which raised the same issues, had been denied."); 21 C.J.S Courts § 149 at 183(1990) (a grant of summary judgment is not precluded by a prior denial of a motion for summary judgement). Further, "if the first motion of summary judgment is unsuccessful the court has the power to permit a second motion for summary

judgement prior to trial." Croswell Enter., Inc. v. Arnold, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992). The decision whether to reconsider a renewed motion for summary judgment is within the trial judge's discretion. Brown v. Pearson, 326 S.C. 409, 416-17, 483 S.E.2d 477, 481 (Ct. App. 1997).

In his Initial Brief, Martinez asserts that because a summary judgment motion had previously been brought and heard before Judge Culbertson, a subsequent motion for summary judgment is therefore precluded. However, this assertion is simply not true. Martinez relies upon case law to support that assertion, particularly citing Brown v. Pearson and Croswell v. Enterprises, Inc. v. Arnold. Even a cursory reading of those cases reveal that South Carolina courts have specifically, deliberately, and repeatedly found that a grant of summary judgment is not precluded by a prior denial of a motion for summary judgment. See Brown and Croswell, *supra*.

In Brown, the facts are similar to the instant case and directly support the circuit court's decision in not only hearing a renewed motion for summary judgment, but also granting the motion. First, like counsel for Martinez, the appellants in Brown were allowed additional time to submit cases supporting their argument and prepare a memorandum in opposition to the renewed motion for summary judgment. Second, the appellants in Brown contended that the trial judge erred when he granted summary judgment in favor of Respondents when a previous judge determined a jury should decide the merits of the case. However, the Court of Appeals disagreed with that contention and found that, where there had been additional discovery since the prior ruling on the motion for summary judgment, the judge did not abuse his discretion by considering the renewed motion.

As briefly stated above, following Judge Culbertson's denial of summary judgment, a second, supplemental covenant was executed. [R. pp. 205-206]. Following the execution of the

second, supplemental Covenant Not to Execute, counsel for the Firm moved to renew its motion for summary judgment and presented the subsequent Covenant to further support its summary judgment argument related to vicarious liability. [R. pp. 122, Lines 3-11]. Martinez was ultimately unable to present evidence or cite case law to support a finding that a genuine issue of material fact existed as to the operation of both the covenants. Accordingly, the circuit court granted summary judgement and found that the executed covenants given to Mr. Kuhn, operated as a release of the Firm, who was only derivatively liable.

Public policy and South Carolina common law recognize the efficiency of summary judgment. The purpose of summary judgment is to avoid unnecessary trials and to expedite disposition of cases which do not require the services of a fact finder. Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E. 2d 703, 704 (1976). The circuit court was not barred from ruling upon the Firm's renewed motion for summary judgment, and as such, the circuit court's grant of summary judgement should be affirmed. See Brown, *supra*.

B. The Circuit Court Did Not Err When It Did Not Decide Upon Issues Related to Fraudulent Misrepresentation Because That Cause of Action Had Not Been Pled in Appellant's Complaint and was Not Properly Before the Court.

Pursuant to Rule 9(b), SCRCP, in averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence. Ardis v. Cox, 314 S.C. 512, 431 S.E.2d 267 (Ct. App. 1993). A complaint is fatally defective if it fails to allege all nine elements of fraud. Inman v. Ken Hyatt Chrysler Plymouth, Inc., 294 S.C. 240, 363 S.E.2d 691 (1988).

In his initial brief, Martinez correctly lays out the nine elements that must be shown in order to prove fraud. [See Appellant's Initial Brief, p. 10, footnote 1]. However, fraud, of any kind, was not alleged in Martinez' complaint nor did Martinez move to amend his complaint to assert

this cause of action or attempt to allege all nine elements of fraud. Instead, the first allegations related to fraud or misrepresentation were brought in opposition to the Firm's Motion for Summary Judgment. Therefore, any allegations or issues regarding fraud, were not properly before the lower court. [1]

The allegations of fraud raised by Martinez are simply a red herring and an attempt to distract from the real issue before the court. The issue before the court is whether the two covenants, which release Defendant Kuhn as the agent, also release the Firm as the principal. In South Carolina, it is well-established that a release of an agent releases the principal as to all vicarious claims. Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001) rev'd on other grounds, 356 S.C. 238, 588 S.E.2d 588 (2003)("[A] covenant not to sue, which ordinarily does not release another joint-tortfeasor from liability, does operate as a release of the master, liable only under respondeat superior, if given to the servant responsible.")[2] In an effort to defeat summary judgment, South Carolina courts have clearly held that it is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine. See Thompkins, *supra*.

Any allegation of fraud should have been brought in a separate action, or, at the very least, fraud should have been properly pled in Martinez' complaint. It was not. The covenants were and

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[1] Even if the allegations or issues regarding fraudulent misrepresentation were properly before the lower court, that claim still fails as it is neither reasonable nor creates a genuine issue of fact. It is undisputed that Martinez was furnished with the recorded statement Mr. Kuhn provided to his insurance company months prior to executing the second Covenant Not To Sue. Therefore, Martinez, who was represented by counsel at that time, would not have relied upon the recorded statement to his detriment before entering the second Covenant Not to Sue.

[2] In Andrade, the claimant signed a Covenant Not To Sue. "A Covenant Not to Sue and a Covenant Not to Execute are so closely akin that the only major distinguishing factor is that the latter is normally executed when a settlement occurs after the filing of a lawsuit while the former is entered into before a lawsuit is filed." Poston by Poston v. Barnes, 294 S.C. 261, 363 S.E.2d 888 (1987); see also Ackerman v. Travelers Indem. Co. 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995).

are still currently in place, and the consideration for each covenant was paid on behalf of Mr. Kuhn and was retained by Martinez. Therefore, the circuit court's grant to summary judgement should be affirmed.

V. CONCLUSION

The circuit court properly granted Respondent's Motion for Summary Judgment and properly found that issues related to related to fraudulent misrepresentation were not appropriately before the court. Therefore, Respondent respectfully requests that the circuit court's May 28 Order granting summary judgement be affirmed.

Respectfully Submitted by:

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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