

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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**Mar 12 2021**

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

**SC Court of Appeals**

Walton J. McLeod, Circuit Judge

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Appellate Case 2021-000033  
Case No. 2018-CP-32-04329

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John Deere Construction & Forestry Company, Respondent,

v.

North Edisto Logging, Inc. and Paul Gunter, Appellants.

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INITIAL BRIEF OF APPELLANTS

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March 12, 2021

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TABLE OF CONTENTS

Table of Authorities ..... ii

Statement of Issues on Appeal ..... 1

Statement of the Case ..... 1

Statement of Facts ..... 2

Disputed Issues of Material Fact.....2

Standard of Review.....3

Arguments

1. THE TRIAL COURT ERRED IN CONCLUDING THAT A BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING IS ONLY ACTIONABLE IF THERE IS ALSO A BREACH OF AN EXPRESS TERM OF THE CONTRACT. ....4
2. THE TRIAL COURT ERRED IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDETNT'S COMPLAINCE WITH THE S.C CLAIM AND DELIVERY STATUTE WAS FORECLOSED BY THE PRESEIZURE HEARING.....6
3. THE TRIAL COURT ERRED IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDETNT'S LOAN ORIGINATION WAS FORECLOSED BY THE COURT'S RULING ON GOOD FAITH AND FAIR DEALING.....7
4. TO THE EXTENT THAT THE TRIAL COURT GRANTED JUDGMENT IN THE AMOUNT OF \$946,378.65 ALONG WITH INTEREST AND ATTORNEY’S FEES, SUCH A RULING WAS ERRONEOUS.....8
5. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' CLASS ACTION CLAIMS BEFORE A MOTION FOR CLASS CERTIFICATION WAS BEFORE THE COURT.....9

Conclusion .....9

TABLE OF AUTHORITIES

CASES

*Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).....3

*Butler Contracting, Inc. v. Court St., L.L.C.*, 369 S.C. 121, 631 S.E.2d 252 (2006).....6

*Doe v. Batson*, 525 S.E.2d 909 (Ct. App. 1999).....3

*Doe ex rel. Doe v. Batson*, 548 S.E.2d 854, 857 (2001).....3

*Gilmore v. Ivey*, 348 S.E.2d 180, 183 (Ct. App. 1986).....3

*Hancock v. Mid-South Management Co.*, 673 S.E.2d 801, 803 (2009).....3

*Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988).....3

*McNair v. Rainsford*,499 S.E.2d 488, 493 (Ct. App. 1998).....3

*ML-LEE Acquisition Fund, L.P. v. Deloitte & Touche*,463 S.E.2d 618, 624 (Ct. App. 1995),  
affirmed in part, reversed in part, 489 S.E.2d 470 (1997).....3

*Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951).....4

*Pilkington v. McBain*, 274 S.C. 312, 262 S.E. 2D 916(1980).....6

*Redwend Ltd. Ptnrship*, 354 S.C. at 468, 581 S.E.2d at 501 (Ct. App. 2003) .....3

*RoTec Svcs., Inc. v. Encompass Svcs. Inc.*, 359 S.C. 467, 597 S.E.2d 881(S.C. App. 2004).....:4

*Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 514 S.E.2d 126 (1999).....4

STATUTES

S.C. Code § 15-69-30(5).....6

S.C. Code § 15-69-50.....6  
S.C. Code § 15-69-70.....5  
S.C. Code § 15-69-210.....5

OTHER AUTHORITIES

SCRCP Rule 56.....4

## STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN CONCLUDING THAT A BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING IS ONLY ACTIONABLE IF THERE IS ALSO A BREACH OF AN EXPRESS TERM OF THE CONTRACT?
2. DID THE TRIAL COURT ERR IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDETNT'S COMPLAINE WITH THE S.C CLAIM AND DELIVERY STATUTE WAS FORECLOSED BY THE PRESEIZURE HEARING.?
3. DID THE TRIAL COURT ERR IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDETNT'S LOAN ORIGATION WAS FORECLOSED BY THE COURT'S RULING ON GOOD FAITH AND FAIR DEALING?
4. TO THE EXTENT THAT THE TRIAL COURT GRANTED JUDGMENT IN THE AMOUNT OF \$946,378.65 ALONG WITH INTEREST AND ATTORNEY'S FEES, WAS SUCH A RULING ERRONEOUS?
5. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' CLASS ACTION CLAIMS BEFORE A MOTION FOR CLASS CERTIFICATION WAS BEFORE THE COURT?

## STATEMENT OF THE CASE

This action was commenced by the Respondent's filing of a Summons and Complaint on December 20, 2018.(R. p.\_\_) Appellant served an Answer and Counterclaims alleging respondent had breached the implied duty of good faith under several contracts. (R. p.\_\_)

Respondent filed a Notice of Right to a preseizure Hearing (R. p.\_\_) and an affidavit. (R. p.\_\_) Appellants filed a Demand for Presiezure Hearing. (R. p.\_\_) An Order granting possession was entered (R. p.\_\_).

Respondent served a Reply to the Counterclaims (R. p.\_\_), and an Amended Reply. (R. p.\_\_)

Respondent filed a motion for summary Judgment. (R. p.\_\_),The Circuit Court granted the

motion as to Appellants Counterclaims (R. p. \_\_). A notice of appeal was filed and served (R. p. \_\_) .

### STATEMENT OF FACTS

This action involves several contracts financing the purchase of various pieces of heavy equipment. Respondent sought and was granted immediate possession of the equipment, but a substantial time passed before the equipment was sold, with the first sale being canceled because of the actions of Respondent and its agents.

### DISPUTED ISSUES OF MATERIAL FACT

Was it appropriate for Respondent's dealer to create two inconsistent invoices, with one set of figures indicating that no part of the payment for an extended warranty went to Respondent?

Was it appropriate for Respondent's dealer to create two inconsistent invoices, with materially different prices for the equipment sold?

Was it appropriate for Respondent to use an affidavit that was defective in form, and stated wholesale value rather than the required actual value for the equipment that it sought immediate possession of?

Did the Respondent's letter of October 8, 2015 (See Paula Gunter Depo. P 41-42) created an obligation to fairly and in good faith consider modifications for all of defendant's loans?

Did the Respondent ever request any financial information from Appellants to evaluate a modification? (See Paula Gunter Depo. P 66 lines 7-13).

Did the Respondent ever notify Appellants of any decision on the modifications? Appellants deny receiving the unsigned letter relating to one account attached to Respondent's affidavit( see Paula Gunter Affidavit dated October 22, 2020, Paragraphs 2 and 3). and no evidence was submitted by Respondent of any notifications on the other accounts.

Did Paul Whelan's repeated failures to communicate with Appellants constitute a breach of

Respondent's duty of good faith and fair dealing? (See Paula Gunter Depo. P 61 line 22 to P 62 line 13)  
Were Respondent's actions with regards to the claim and delivery process, the issue of whether the sales of the collateral in this action were commercially reasonable, and the loan origination issues also breaches of the duty of good faith and fair dealing.

What is the impact of these issues on the defense of unclean hands?

### STANDARD OF REVIEW

In determining whether any triable issues of fact exist, the trial court was required to view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988). Further, a court must consider everything in the record, pleadings, depositions, interrogatories, admissions on file, affidavits, etc.” *Gilmore v. Ivey*, 348 S.E.2d 180, 183 (Ct. App. 1986). “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Management Co.*, 673 S.E.2d 801, 803 (2009). Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *Doe v. Batson*, 525 S.E.2d 909 (Ct. App. 1999) affirmed in part, vacated in part, remanded, *Doe ex rel. Doe v. Batson*, 548 S.E.2d 854, 857 (2001). The party seeking summary judgment has the burden of establishing the absence of a genuine issue of material fact, *McNair v. Rainsford*, 499 S.E.2d 488, 493 (Ct. App. 1998). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary

judgment should be denied. *Redwend Ltd. Ptnrship*, 354 S.C. at 468, 581 S.E.2d at 501 (Ct. App. 2003). Summary judgment also should not be granted if further inquiry into the facts is desirable to clarify the application of the law.” *ML-LEE Acquisition Fund, L.P. v. Deloitte & Touche*, 463 S.E.2d 618, 624 (Ct. App. 1995), affirmed in part, reversed in part, 489 S.E.2d 470 (1997). Summary Judgment is not appropriate in this case because it is only appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law (Rule 56, SCRCP) and Respondent failed to meet its burden of proof on both prongs of this test.

#### ARGUMENT 1

THE TRIAL COURT ERRED IN CONCLUDING THAT A BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING IS ONLY ACTIONABLE IF THERE IS ALSO A BREACH OF AN EXPRESS TERM OF THE CONTRACT.

In the Motion for Summary Judgment Respondent relied primarily on *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597 S.E. 2d 881 (Ct. App. 2004). However, the trial court found more in the RoTec decision than is there. While RoTec found that there is no special cause of action for breach of the duty of good faith and fair dealing, it does not make the breach of the duty no longer actionable. Rather, it makes clear that violation of the implied term requiring good faith and fair dealing is no different than breach of any of the express terms of the contract. The series of cases cited by respondent all involve situations where the claimants attempted to advance both a cause of action for breach of contract and a second cause of action for breach of the duty of good faith and fair dealing. Therefore these cases are not dispositive in this matter, in which the Appellants have brought a single cause of action for breach of contract.

The order appealed from contains the following language: “In sum, there is no breach of good faith and fair dealing without a separate and cognizable claim for breach of contract

connected with it ” (Order filed December 8, 2020 R. p.\_\_). The trial court’s finding that it is necessary to have violated one of the express terms of the contract in order to make a violation of the implied duty of good faith and fair dealing actionable cannot be sustained.

The trial court's citation of the order for immediate possession as a basis for granting summary judgment on Appellants' counterclaim for breach of the duty of good faith and fair dealing also exhibits a misconstruction of the statutory purpose of this hearing. S.C. Code § 15-69-70 which mandates that the preseizure hearing determine that claim for immediate possession is “probably valid”. This statutory language clearly indicates that the determination made at the preseizure hearing is provisional and subject to further review when the merits of the underlying action are tried. To conclude otherwise would render the word “probably” in the statute meaningless and violate one of the fundamental tenets of statutory construction.

Additionally Section 15-69-70 provides “The purpose of the preseizure hearing is to protect the defendant's use and possession of property from arbitrary encroachment, and to prevent unfair or mistaken deprivations of property.” Nothing in this language, which suggests a shield for defendants, allows this proceeding to be used as a sword against a defendant to finally adjudicate their counterclaims in a summary proceeding based on affidavits at the very inception of the case. The limited scope of the preseizure hearing is highlighted by the requirement that the hearing demand must be served within five days of notice.(See Notice (R. p.\_\_) ). Also the existence of S.C. Code § 15-69-210, which sets forth parameters for a final judgment in a claim and delivery action reinforces the conclusion that the order for immediate possession is not a final determination of all issues in the case.

There is also nothing in the brief text of the order for immediate possession that suggest s that the court was doing anything more than addressing the issues mandated by S.C. Code § 15-69-70. The order for immediate possession does not even mention the counterclaims or indicate an

intent to do anything more that direct the physical delivery of the property in question.

The Appellants have alleged the existence of a contractual provision, the implied duty of good fair and fair dealing. The existence of this duty under South Carolina Law is undisputed. They have alleged conduct which a reasonable jury could conclude violated that duty, as set forth above under the heading "Disputed Issues of Material Fact". This evidence is far more than the scintilla required in the context of summary judgment. Finally, they have alleged that they suffered damages. See *Pilkington v. McBain*, 274 S.C. 312, 262 S.E. 2d 916(1980). At this stage in the proceeding, that is enough.

## ARGUMENT 2

THE TRIAL COURT ERRED IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDETNT'S COMPLAINCE WITH THE S.C CLAIM AND DELIVERY STATUTE WAS FORECLOSED BY THE PRESEIZURE HEARING.

As noted above, there is no basis in the statute for concluding that a preseizure hearing under f S.C. Code § 15-69-70 inally adjudicates anything.

Further, in order to receive the statutory remedy under the S.C. Claim and Delivery statutes, the terms of the statute must be strictly complied with, see e.g. *Butler Contracting, Inc. v. Court St., L.L.C.*, 369 S.C. 121, 130, 631 S.E.2d 252, 257 (2006) (Mechanic's lien). S.C. Code § 15-69-30(5) requires the affidavit in a claim and delievery action to state the actual value of the property. In this case the affidavit state the lower wholesale value (See Notice (R. p. ) ).

The bond required by section S.C. Code § 15-69-50 is also rendered defective by being in an amount that it too low, because it is based on the lower wholesale value.

The affidavit offered in support of this claim does not comply with the form required for a valid affidavit in South Carolina. Specifically, the affidavit does not aver that it is made subject to the

penalties of perjury, or that the affiant would be competent to testify in court as to the matters contained in the affidavit, or that the substance of the affidavit would in fact be the affiant's testimony in a hearing before the court. Moreover, the affiant does not even allege the existence of any authorization to testify on behalf of the Respondent. No employment relationship is stated and it is impossible to determine whether the affiant works for the Respondent or for some other entity. What capacity the affiant is employed in by whoever the employer is also a mystery. Affiant could be an experienced senior executive or a new hire with a servicing company executing their first affidavit ever.

The affidavit is also defective in not even attempting to establish a foundation for the conclusory statements it contains. It is unclear what, if any records were consulted in reviewing the affidavit, and what, if any role affiant had in drafting the affidavit.

Respondent has a duty of care to insure that its agents comply with the legal requirements for a claim and delivery action in South Carolina. It is manifest that respondent failed in such duty given the defects listed above. Appellants were damaged by the premature and wrongful loss of possession of the property that is the subject of this action. Negligence claims are particularly ill suited to grants of summary judgment, and the court's ruling on this claim was erroneous and controlled by the trial court's incorrect conclusion as to the impacts of the pre-seizure hearing.

### ARGUMENT 3

THE TRIAL COURT ERRED IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDENT'S LOAN ORIGINATION WAS FORECLOSED BY THE COURT'S RULING ON GOOD FAITH AND FAIR DEALING.

The trial court erroneously granted summary judgment on Appellants negligence claim for respondent's failure to supervise its dealer in the loan origination process.

Respondent has a duty of care to insure that its dealer originated the loans in question in a

manner that complies with South Carolina law. The trial court's grant of summary judgment is clearly controlled by its erroneous construction of the duty of good faith and fair dealing. Under a proper construction of the duty of good faith and fair dealing, Respondent's dealer violated the duty, and Respondent failed in its duty to supervise its agent. Appellants were damaged by being tricked out of the purchase price of a warranty which they were led to believe was from Respondnet, which was obviously untrue, when none of the consideration for the warranty went to Respondent. Appellants were further damaged by being charged a price for equipment that apparently had no basis except whatever they needed to be to get the right number. As noted above, negligence claims are particularly ill suited to grants of summary judgment, and the court's ruling on this claim was erroneous and controlled by the trial court's incorrect construction of the duty of good faith and fair dealing,

#### ARGUMENT 4

TO THE EXTENT THAT THE TRIAL COURT GRANTED JUDGMENT IN THE AMOUNT OF \$946,378.65 ALONG WITH INTEREST AND ATTORNEY'S FEES, SUCH A RULING WAS ERRONEOUS

Although the ordering paragraph of the order under appeal is silent about any judgment on Respondent's claim for a deficiency judgment (R. p. \_\_), and the entire order only mentions the amount that they were "seeking" in their complaint (R. p. \_\_), Respondents have taken the position in other litigation that they were awarded a judgment on their claim. Such a construction would be erroneous in light of the order's acknowledgment of Ms. Gunter's testimony "the sales were unreasonably delayed, duplicate expenses and interest were incurred, and the sale prices were inadequate" (R. p. \_\_). The court's further reference to there being no other evidence indicates an impermissible weighing of evidence rather than a proper exercise of the scintilla rule. Choosing between the competing

assessments of the sale of the collateral is the province of a jury, and therefore any ruling granting judgment of Respondent's claim is erroneous.

#### ARGUMENT 5

#### THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CLASS ACTION CLAIMS BEFORE A MOTION FOR CLASS CERTIFICATION WAS BEFORE IT..

The factual allegations that any party seeking class certification can make in the absence of discovery are necessarily limited by the party's lack of access to the records that would allow precise pleading about the elements to be considered on the merits of a class certification motion.

The trial court's ruling on class certification was premature as no such motion was before the court and this ruling was also controlled by the trial court's erroneous conclusions regarding the duty of good faith and fair dealing.

#### CONCLUSION

For the foregoing reasons, the Order of the Circuit Court should be reversed and the case remanded to Lexington County, for further proceedings on Appellant's Counterclaims and Respondent's claim for a deficiency balance..

Respectfully submitted,



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PROOF OF SERVICE

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I certify that I have served the Appellant's Initial Brief and the Designation of Matter to be Included in the Record on Appeal on Respondent listed above by emailing a copy of each of them on March 12, 2021, addressed to their attorney of record as follows:

Paul A. Fanning PAF@wardandsmith.com

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March 12, 2021

**From:** dwhitt2001@aol.com,

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**Subject:** North Edisto initial Brief and designation

**Date:** Fri, Mar 12, 2021 8:48 pm

**Attachments:** NEL initial brief scan.pdf (4325K), NEL designation scan.pdf (449K), NEL svc 2 scan.pdf (241K)

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Greetings All,

attached are scans of North edisto's Initial Brief, designation of Matter and proof of service, which I will also file by email shortly

Regards,  
Randy Whitt