THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master in Equity

Case No.: 2016-CP-49-6794
Case No. 2015-002361

Mathes Auto Sales, Inc. Respondent/Appellant

v.

Otis Morris, Jr., Pro Bowl Motors, Inc., Travelers Casualty & Surety Co., of America, Inc.; Gerald Scott Dixon, Michael Tyrone Moore, and Dixon's Automotive, LLC, Defendants, of whom Otis Moore, Jr., Pro Bowl Motors, Inc., Gerald Scott Dixon, Michael Tyrone Moore, and Dixon's Automotive, LLC are the Appellants/Respondents.

FINAL **BRIEF OF APPELLANTS/RESPONDENTS GERALD SCOTT DIXON, MICHAEL TYRONE MOORE, AND DIXON'S AUTOMOTIVE, LLC.**

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STATEMENT OF THE CASE

Plaintiff filed suit on November 11, 2016 against Otis Morris, Jr., Pro Bowl Motors, Inc. and Tamika Worthy regarding the purchase of a vehicle on behalf of the Plaintiff when Defendant Morris prior to such time had allegedly sold the vehicle to Ms. Worthy. On February 1, 2017 Plaintiff amended the Complaint by adding additional defendants including the Defendant, Dixon Automotive, LLC. (R. pp. 425-433).

This matter came before the Honorable Joseph M. Strickland, Master of Equity for Richland County for a non-jury trial over the days of February 8, 2018 and February 12, 2018. At the time of the hearing the remaining defendants in the matter were Otis Morris, Jr., Pro Bowl Motors, Inc., and Dixon Automotive, LLC and Defendant Dixon Automotive made a motion for Summary Judgment. (R. pp. 17-18). At the close of Plaintiffs case Plaintiff moved to amend the pleadings by adding Gerald S. Dixon and Michael T. Moore as individual defendants. (R. pp. 322-335). Defendants objected and the issue was taken under advisement. Defendants Dixon

Automotive, LLC and Gerald Dixon and Michael Moore moved then for a non-suit pursuant to Rule 41(b) of the South Carolina Rules of Civil Procedure at the close of Plaintiff's case (R. pp. 336-337) and it was taken under advisement.

The Court issued its Judgment in favor of the Plaintiff against all defendants, including Gerald S. Dixon and Michael T. Moore, both who the Court added as parties in the same Order of Judgment on June 20, 2018. (R. pp. 1-16). All Defendants filed Motions for the Court to Reconsider its ruling. A hearing was held on January 3, 2019 and all of Defendants' motions were denied. This appeal followed.

STATEMENT OF FACTS

In May 2016 Michael Moore, on behalf of Dixon Automotive, LLC purchased an automobile via OVE from Mannheim Tampa dealer auction. Dixon Automotive, LLC is a wholesale car dealership. Otis Morris, Jr., a retail dealer and owner of Pro Bowl Motors, Inc., with whom Michael Moore had done business in the past, had indicated to Mr. Moore that he may have a buyer for the car purchased by Dixon Automotive. L.L.C. (R. pp. 117-118) Mr. Moore therefore had the car dropped by Pro Bowl Motors, Inc in Columbia, South Carolina on its way from Tampa, Florida to Rock Hill, South Carolina. (R. 123-125) Subsequently Mr. Morris lied to Mr. Moore telling him that the perspective buyer was unable to obtain financing and he would be delivering the car back to Dixon Motors, LLC. (R. 127-128). Thus, Dixon Automotive LLC still owed its floor plan company, NextGear, for the price of the car and NextGear still held the title.

Unknown to Dixon Automotive, LLC was that Mr. Morris had sold the automobile to Tamyka Worthy of Columbia, South Carolina. (R. p. 77) Yet, Mr. Morris eventually had the car delivered to Dixon Motors, LLC at Gerald Dixon's home in Fort Mill, South Carolina. Mr. Morris then arranged for the vehicle to be sold at the Mannheim Auction OVE in Darlington, South Carolina August 2016. Mr. Morris, who was authorized to buy vehicles on behalf of Mathes Auto Sales, the Plaintiff, purchased the car on Mathes' behalf at the auction. (R. p 85-89). Mathes' floor plan company NextGear provided the funds which were eventually paid Dixon Automotive L.L.C. debt with NextGear for the car. In September 2016 Mathes discovered that the car had been sold to Ms. Worthy in May 2016. Dixon Automotive, LLC discovered the car had been sold by Mr. Morris to Ms. Worthy in October 2016 when it was contacted by its floor plan provider NextGear. (R. , 124, lines 24-25).

ARGUMENTS

I.

THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANTS DIXON AUTOMOTIVE, L.L.C.'S, GERALD S. DIXON'S, AND MICHAEL TYRONE MOORE'S MOTION FOR A NONSUIT AT THE CLOSE OF THE PLAINTIFF'S CASE.

Plaintiff's cause of action against Dixon Automotive, LLC, Gerald S. Dixon, and Michael T. Moore is based on the South Carolina Dealers Act and alleges that the actions were "an unfair and deceptive act that was also arbitrary, in bad faith and unconscionable". See *Section 56-15-40, Code of Laws of South Carolina, 1976, as amended.* Although arbitrary conduct is not defined in the Dealers Act, our Supreme

Court has defined it for purposes of the Act to include "acts which are unreasonable, capricious or nonrational; not done according to reason or judgment; depending on will alone." *Taylor v. Nix, 307 S.C. 551, 555, 416 S.E.2d 619, 621 (1992).* Furthermore, our supreme court has defined bad faith as: The opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to [fulfill] some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. *State v. Griffin, 100 S.C. 331, 333, 84 S.E. 876, 877 (1915)* (quoting Black's Law Dictionary). The Dealers Act defines "fraud" to include its "normal legal connotation" as well as "misrepresentation in any manner. *DeBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 264, 536 S.E.2d 399 (S.C. App., 2000).

There must be evidence that Dixon Automotive, LLC was aware of the previous sale for them to have any connection in the least to the fraud Mr. Morris perpetrated on the Plaintiff. The record is devoid of any evidence of such knowledge or actions on the part of Dixon Automotive, LLC.

Plaintiff's first witness, Tamika Worthy, was the purchaser of the car in May, 2016. Her testimony was substantial regarding her dealings with Mr. Morris. However, she never offered any evidence regarding Dixon Automotive, LLC. Following her testimony, Plaintiff read from the deposition of defendant Otis Morris, Jr. Mr. Morris who was never called to the stand by the Plaintiff. The deposition offered no evidence against Dixon Automotive, LLC, regarding the matter before this court.

Plaintiff then read portions of the deposition of Mr. Michael Moore. Mr. Moore, an owner of Dixon Automotive, LLC discussed the purchase of the vehicle by

Dixon Automotive, LLC from an auction in Florida via OVE. At the time he purchased it he stated that Mr. Morris indicated to him he may have a buyer for the vehicle. He further stated that subsequently Mr. Morris indicated that the buyer was unable to secure financing and so Mr. Morris had the vehicle brought to Dixon Automotive in York County, South Carolina where it stayed until the car was taken to Darlington when it was purchased on behalf of the Plaintiff by Mr. Morris. The car had been financed by Dixon Automotive by way of its floor plan with Nextgear, Inc. At the time the car was sold in Darlington and the sale confirmed, Nextgear, Inc. applied the sale proceeds to Dixon Automotive's account. Lastly, Mr. Moore stated no one at Dixon Automotive knew of the previous sale by Morris to Worthy until October 2016, two months after the sale to the Plaintiff. Additionally, because of this Dixon Automotive had its floor plan of $250,000.00 shut down. No evidence whatsoever was offered by the Plaintiff to dispute this.

Plaintiff then called Donald Dease of Capital City Rides, in Columbia, South Carolina. Mr. Dease testified about his business history with Mr. Morris but offered no evidence regarding Dixon Automotive, LLC.

Following Mr. Dease's testimony, Plaintiff read portions of the deposition of Mr. Dixon which showed that he was an owner of Dixon Automotive, LLC; that he knew little, if anything about the transaction involved in this matter, and that he is retired as a player from the National Football League. As was read into the record from his deposition, Plaintiff's attorney characterized Mr. Dixon's lack of knowledge as "You don't know nothin' 'bout birthing any babies."

Plaintiff then called as a witness Investigator Chauncey Duckett of the Columbia Police Department. Investigator Duckett indicated he investigated the transaction between Mr. Morris and Mrs. Worthy but pursued no criminal action. He offered no testimony regarding Dixon Automotive, LLC. Mr. Dixon or Mr. Moore.

The last witness for the Plaintiff's case was the Plaintiff. His testimony centered around the transaction wherein Mr. Morris purchased the car for his dealership in Florence, South Carolina; his conversations with Mr. Morris; the car being purchased with proceeds from his floorplan, Nextgear, being the same floorplan as used by Dixon Automotive, LLC; and finally his alleged damages arising from Mr. Morris' actions. No evidence was offered as to any participation in, or knowledge of, Dixon Automotive, LLC, Mr. Dixon, or Mr. Moore regarding Mr. Morris's actions in the sale to Ms. Worthy.

Additionally, any documentary evidence entered by Plaintiff were either records not regarding this matter, or records which confirmed the sales that were performed. However, none of it in any way linked Dixon Automotive, LL, Mr. Dixon, or Mr. Moore to the wrongdoing perpetrated by Mr. Morris.

In the case *Collins Entertainment, Inc. v. White*, the South Carolina Supreme Court ruled that when the record is devoid of evidence whereby the [factfinder] would have to speculate or conject to reach a decision, then a directed verdict should be granted. *611 S.E.2d 262, 363 S.C. 546 (SC, 2005).*

For this Court to find any connection between Mr. Morris' wrongdoing in this case and Dixon Automotive, LLC, it would need to be based on more than mere speculation and conjecture of theories propounded by the Plaintiff. The Order of Judgment in this matter contains more than 120 findings of fact by the Court. None of

the findings of fact show that Dixon Automotive, LLC, Mr. Dixon, or Mr. Moore knew of the transaction Mr. Morris had with Ms. Worthy.

II.

THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO AMEND THE PLEADINGS BY ADDING GERALD S. DIXON AND MICHAEL TYRONE MOORE AS INDIVIDUAL DEFENDANTS AFTER THE PLAINTIFF RESTED ITS CASE.

Section 15 of the South Carolina Rules of Civil Procedure provides the mechanism whereby a court, upon motion of a party, may allow the amendment of the pleadings to conform to the evidence following a trial on the merits. A party may request the adding of a cause of action or a defense dependent upon the evidence produced at trial. As is stated in *McMillan v. South Carolina Department of Agriculture, 364 S.C. 60, 611 S.E.2d 323 (Ct. App. 2005)*, "The rule covers two situations. First, if an issue not raised by the pleadings is tried by express or implied consent of the parties the court may permit amendment of the pleadings to reflect the issue. Second, if a party objects to the introduction of evidence as not being within the pleadings the court may permit amendment of the pleadings subject to a right to grant a continuance if necessary." *Sunvillas Homeowners Ass'n, v. Square D Co., 301 S.C. 330, 334, 391 S.E.2d 868, 870-71 (Ct. App.1990). McMillan at p. 331.* However, it is section (c) of the Rule which governs the amending of pleadings to add parties.

Rule 15(c), SCRCivP provides, "An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be

brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." Thus, there are two requirements that must be met before the Court is to add a party.

The first is whether the party had sufficient notice so that he would not be prejudiced in maintaining his defense on the merits. Mr. Dixon and Mr. Moore were aware that an action had been brought against Dixon Automotive, LLC regarding the sale of a vehicle at the time the company was served with the Complaint in the fall of 2016. Yet at that time, and throughout the proceedings, there was no indication that Plaintiff would attempt to involve them in their individual capacities. Up until the time of Plaintiff's motion to amend following the closing of the Plaintiff's case both were merely treated as witnesses in the matter. Neither of them had legal counsel. Neither of them participated, nor had the opportunity to participate in the suit, nor in the final hearing on the merits of Plaintiff's case.

In 2016, the South Carolina Court of Appeals upheld the ruling of a probate court after it added a party to a matter in Probate Court following a hearing. The Court analyzed the prejudice prong of the analysis as to "Abbie" being added as a party. It found no prejudice. "The probate court's comments demonstrated it intended to allow Appointed Attorney and Abbie's GAL to fully participate at trial...The record demonstrates Abbie, through Appointed Attorney and Abbie's GAL, fully participated in the proceedings through depositions, presented an opening statement, and participated in

cross-examination of the other parties' witnesses before she was officially named a party to the petitions." *Dorn v. Cohen, et al., 418 S.C. 126, 791 S.E.2d 313 (Ct. App. 2016).* Mr. Dixon and Mr. Moore, although present during the trial, were never called by the Plaintiff as witnesses in his case. The only evidence presented by Plaintiff were excerpts from depositions of Mr. Moore individually and as the LLC representative, and Mr. Dixon, individually.. There is no evidence which raises an issue of whether this was a non- corporate matter, nor whether they operated outside of the company's corporate structure.

The fact that Mr. Moore and Mr. Dixon were without legal counsel, had no ability to participate, had never been given notice of any kind that the Plaintiff would seek to involve them individually while involving Mr. Morris individually and then seek judgment against each of them after having presented his case flies in the face of civil due process because the extent of prejudice suffered by them in the granting of such a motion is extreme.

And yet, not only does the Plaintiff not satisfy the first prong of the test, but he also fails regarding the second test in that Mr. Dixon and Mr. Moore never knew, or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against either, or both of them. Plaintiff attempts to argue that Dixon and Moore were acting partners in a legal partnership, as opposed to an LLC and that they tried to hide the LLC "shield" from the public eye. Plaintiff's partnership argument is based only on the fact Mr. Moore and Mr. Dixon described their relationship as "partners". The use of this term by lay people untrained in the law is reasonable without it designating one form of business designation from another.

And there is no evidence in the record that they attempted to hide the LLC shield from the public. The Plaintiff certainly had no trouble in correctly identifying the entity involved in the transaction of the automobile for Plaintiff got it correct on his first try when he amended his Complaint to add Dixon Automotive, LLC as a defendant.

Finally, to add a party by way of conforming the pleadings to the evidence, there must be evidence. And the record has no evidence in it to justify the adding of Mr. Dixon and Mr. Moore as individual defendants regarding a cause of action for fraud under the South Carolina's Dealer's Act. The Plaintiff offered no evidence as to any involvement either Mr. Dixon or Mr. Moore, nor Dixon Automotive, LLC had in conjunction with the Defendant Otis Morris, Jr. and Pro Bowl Motors, Inc, in the sale of the vehicle in May 2016. Actually, the only evidence in the record was that Dixon Automotive, LLC, and thus Mr. Moore and Mr. Dixon, were told of the problem with the title and the May 2016 sale in October, 2016, There is no evidence that their actions were "tortious" against the Plaintiff.

The only parts of the record that deals with Mr. Dixon and Mr. Moore are excerpts of their depositions. Those depositions were taken 5 months prior to this matter being heard on the merits. No new testimony was offered from either Mr. Dixon or Mr. Moore. The Plaintiff never called them as witnesses. For 5 months the Plaintiff had the information he now unsuccessfully uses to try and have them added as parties to the matter. It is submitted that Plaintiff, by way of his motions, is trying to merely increase the number of defendants in case, to include an NFL veteran, to pay a judgment he wants to have paid.

CONCLUSION

Plaintiff presented no evidence in this case, either clear and convincing or otherwise, to establish liability of Dixon Automotive, LLC, nor of Defendants Dixon and/or Moore as to the Plaintiff. Therefore, the trial Court should have granted the Defendants' motion for a non-suit. Additionally, there is no evidence on which the Court should have granted Plaintiff's motion to add Defendants Dixon and Moore after Plaintiff had rested its case. Plantiff's motion should have been denied.

Therefore, the Defendants' request this Court to reverse the ruling of the trial Court and dismiss them from this suit for lack of evidence.

Respectfully submitted,

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October 27, 2019.