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**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM THE BEAUFORT COUNTY  
COURT OF COMMON PLEAS

HONORABLE BROOKS P. GOLDSMITH

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CASE NO.: 2018-CP-07-00409

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Gary Victory,

Appellant,

vs.

Wells Fargo Bank, NA and  
Mortgage Contracting Services, LLC,

Defendants.

Of Whom Mortgage Contracting Services, LLC is

Respondent.

and

Mortgage Contracting Services, LLC,

Respondent,

v.

Ryan Davis d/b/a Davis Home Preservation

Defendant.

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APPELLANTS' INITIAL BRIEF

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## STATEMENT OF THE CASE

### A. INTRODUCTION

The Plaintiff in this action was the owner of a house and the contents therein located at 5614 Freemont Court. Defendant Wells Fargo Bank, NA (“Wells Fargo”) assigned foreclosure details to Defendant Mortgage Contracting Services, LLC “Mortgage Contracting” with regard to a home located at 5614 Fredrick Drive. Mortgage Contracting then contracted with the individual who, knew or should have known, he was at the wrong address, while Plaintiff was out of town and not at home, broke into the Plaintiff’s residence located at 5614 Freemont Court and removed all of the items in the home. Further, Mortgage Contracting, by and through its’ agent, Ryan Davis d/b/a Davis Home Preservation (“Davis”) placed a sign in Plaintiff’s yard stating that the house was being foreclosed upon. Davis, as agent for Mortgage Contracting, and Mortgage Contracting as agent for Wells Fargo took approximately \$7,000.00 of the Plaintiff’s property, defamed, and humiliated him to his neighbors causing him great embarrassment and actual damages.

### B. PROCEDURAL HISTORY

This action was commenced by the filing of a Summons and Complaint in the Beaufort County Court of Common Pleas on February 26, 2018. The Appellant alleges was the owner of a residence located at 5614 Freemont Court, located in Beaufort County, State of South Carolina which contained numerous items of valuable personal property therein and the Defendant, Mortgage Contracting Services, LLC, its agents, servants and employees working in Beaufort County, State of South Carolina for Wells Fargo Bank NA, was attempting to foreclose on a piece of property at 5614 Fredrick Drive, located in Beaufort County, State of South Carolina and in fact, engineered and directed a foreclosure on said property which was the incorrect property.

On March 30, 2018, Mortgage Contracting filed their Answer to the Appellant’s Complaint denying the denying the material allegations thereof.

On April 30, 2018, Wells Fargo filed their Answer to Appellant's Complaint denying the material allegations thereof.

On November 1, 2018, Mortgage Contracting filed a Third-Party Summons and Complaint adding Ryan Davis d/b/a Davis Home Preservation ("Davis") as a Third-Party Defendant

On November 2, 2018, Wells Fargo filed a Third-Party Summons and Complaint adding Ryan Davis d/b/a Davis Home Preservation ("Davis") as a Third-Party Defendant.

On December 27, 2018, Davis filed their Answer to Mortgage Contracting's third-party Complaint. Davis never responded to the Complaint of Wells Fargo.

On May 6, 2019, Wells Fargo filed a Motion for Summary Judgment alleging that the acts and conduct of Davis were unrelated to Wells Fargo.

On June 21, 2019, Mortgage Contracting filed a Motion for Summary Judgment.

On July 23, 2019, Appellant filed a Motion to Amend Complaint alleging more clearly Appellant's damages with regard to conversion, slander, and libel.

On July 23, 2019, Appellant filed a Return in Opposition to Wells Fargo's Motion for Summary Judgment.

On July 24, 2019, Mortgage Contracting filed its Memorandum in Support of its Motion for Summary Judgment alleging that Davis was responsible for the mistake in going to the wrong residence.

On July 29, 2019, Appellant filed a "Return to Motion to Dismiss" when in actuality it was a Return to Wells Fargo's Motion for Summary Judgment requesting a dismissal of the same and alleging that not enough discovery had been completed in order for a summary judgment to be ruled upon at that time.

On July 29, 2019, Mortgage Contracting filed a Supplement to its Motion for Summary

Judgment.

On August 7, 2019, Davis filed a Motion for Summary Judgment alleging that Mortgage Contracting accepted sole responsibility for the acts and conduct of its subcontractors and that Davis should be dismissed as a Third-Party Defendant.

On October 12, 2019, Wells Fargo filed a second Motion for Summary Judgment alleging it had contracted with Mortgage Contracting alleging that Mortgage Contracting was responsible for its acts and that of the acts of Davis.

On October 14, 2019, Davis filed its Memorandum in Support of Wells Fargo's Motion for Summary Judgment.

On October 15, 2019, Mortgage Contracting filed its Memorandum in Opposition to Wells Fargo's Motion for Summary Judgment.

On October 16, 2019, Appellant came before the trial court making his motion to amend his complaint and Defendants had no objection to Appellants' amendment.

On October 16, 2019, Defendants' Motions for Summary Judgment were heard, and all were granted.

On October 29, 2019, the trial court granted Defendants' Motions for Summary Judgment.

On November 7, 2019, Appellant filed his Motion for Reconsideration.

On November 22, 2019, Wells Fargo filed their Response to Appellant's Motion for Reconsideration.

On November 27, 2019, Mortgage Contracting filed its Response to Appellant's Motion for Reconsideration.

On January 10, 2020, Appellant's Motion for Reconsideration was denied without the benefit of a hearing.

Appellant filed their Notice of Intention to Appeal.

### C. FACTUAL BACKGROUND

This case arises out of the acts and conduct of Third-Party Defendant, Davis, who was requested to perform certain duties, to include removing items, and putting up signs, regarding a foreclosure on a home located at 5614 Frederick Drive. Unfortunately, Davis, under the direct supervision of Mortgage Contracting, who, under the direct supervision of Wells Fargo, performed the duties on the Appellant's home located at 5614 Freemont Drive, one block over from the actual residence.

### STANDARD OF REVIEW

A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders. Rule 15 South Carolina Rules of Civil Procedure.

The Appellate Court reviews the granting of a summary judgment motion under the same standard applied by the Trial Court pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure. *Huffman v. Sunshine Recycling, LLC*, 426 S.C. 262, 270, 826 S.E.2d 609, 615 (2019). Summary judgment is properly granted when, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the non-moving party, the pleadings, depositions, answers

to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCPP; *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014).

In determining whether any triable issues of fact exists for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party who is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-South Management Company, Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 802 (2009).

When reviewing a grant of summary judgment, the Appellate Court reviews questions of law *de novo*. *Ziegler v. Dorchester County*, 426 S.C. 615, 828 S.E.2d 218, 220 (2019).

“In determining whether any triable issues of fact exists, the Trial Court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment.” *Pallares v. Seinar*, 407 S.C. 359, 365, 756 S.E.2d 128, 131 (2014).

“Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial.” *In Re Estate of Brown*, 424 S.C. 589, 596, 818 S.E.2d 770, 774 (Ct.App. 2018).

I. THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF'S MOTION TO AMEND COMPLAINT WHERE ALL DEFENDANTS' AGREED TO SAME

Leave to amend pleadings shall be freely given. *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368. In this instance, the Defendants, at the commencement of the motion hearings roster, agreed to the Appellant's amendment.

Further, Rule 15, SCRPC states in pertinent part: a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party. In this instance, the Defendants consented, on the record, for the Plaintiff to amend his pleadings. (*See transcript of record pg. 4. Lns. 17-25*).

The Trial court erred in failing to grant the amendment and therefore should have continued any additional motions scheduled regarding this matter until after the amendment was filed, the parties answered the amended pleadings and discovery was concluded.

II. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WHERE ALL PARTIES AGREED TO ALLOW PLAINTIFF TO AMEND HIS COMPLAINT AND DISCOVERY WAS NOT COMPLETE.

The Trial Court states in its Order that "Once the party moving for summary judgment meets the initial burden of shown and absence of evidentiary support for the non-moving party's case, the nonmoving party cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.

The Appellant respectfully submits that the Trial Judge erred in reaching his above conclusions, inasmuch as: (1) the Defendants, on the same date as the summary judgment hearing, did not object to the Appellant amending his Complaint. The trial court failed to order that the

amendment was granted. As such, Appellant never had the opportunity to file his amended pleading, nor did he have an opportunity for discovery which would have proven that there were specific facts showing a genuine issue for trial.

#### CONCLUSION

This Appellant, through no fault of his own, has suffered an entering and taking of his property. Discovery was not completed even prior to the Defendants' agreement to the Appellant's amendment to add a cause of action for defamation. The granting of summary judgment would have been improper in any event as discovery was not complete; however, since all parties agreed to an amendment of the pleadings, the Defendants' motions for summary judgment, at the very least, should have been continued and further discovery granted.

It is accordingly respectfully requested that the Order the Honorable Brooks P. Goldsmith be reversed, and judgment rendered in favor of the Appellant, or alternatively, that this case be remanded to the Beaufort County Court of Common Pleas for further proceedings.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

By: 

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March 19, 2021

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HONORABLE BROOKS P. GOLDSMITH

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vs.

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Defendants.

Of Whom Mortgage Contracting Services, LLC is

Respondent.

and

Mortgage Contracting Services, LLC,

Respondent,

v.

Ryan Davis d/b/a Davis Home Preservation

Defendant.

CERTIFICATE OF SERVICE

Undersigned certifies that the **Appellants' Initial Brief and Designation of Matter** to which this certificate is affixed, was served upon the party (s) to this action by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

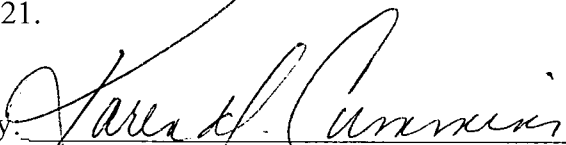
Kristen B. Fehsenfeld, Esquire  
Amanda K. Dudgeon, Esquire  
Chandler & Dudgeon, LLC  
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Charleston, South Carolina 29402

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in a post office or official depository under the exclusive care and custody of the United States  
Postal Service, on March 19, 2021.

By:



Karen M. Cummins, MPS, SCCP, PP

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MAR 22 2021  
SC Court of Appeals

March 19, 2021

Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE: Gary Victory v. Mortgage Contracting Services, LLC  
Appellate Case No.: 2020-000128

Dear Mrs. Kitchings:

Enclosed for filing is the original and one copy Appellant's Initial Brief and Designation of Matter to be included in the Record on Appeal and Certificate of Service. Please file the enclosures and return a clocked copy of each to me in the enclosed self-addressed stamped envelope.

By copy of this letter, and the enclosures, I am serving a copy of the same on John P. Seibels, Jr., Esquire, Kristen B. Fehsenfeld, Esquire, and Amanda K. Dudgeon, Esquire.

With kindest regards, I am

Very truly yours,

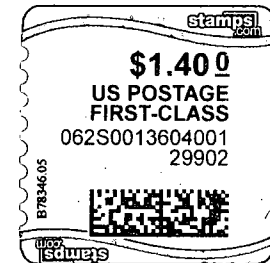
MOSS, KUHN & FLEMING, P.A.

James H. Moss

JHM:kmc

Enclosures

C: John P. Seibels, Jr., Esquire (w/enclosures)  
Kristen B. Fehsenfeld, Esquire (w/enclosures)  
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