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SC Court of Appeals

Exhibit A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON) Civil Action Number: 2020-CP-32-00005

R. Kent Porth and Panorama Point, LLC,)
)
) Plaintiffs,)

ORDER GRANTING MOTION TO DISMISS

vs.)

Robert P. Wilkins, Jr., RPW Development,)
)
) Inc., Southern Visions Realty, Inc., and)
)
) Consolidated Multiple Listing Service,)
)
) Inc.,)

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Defendants.)
_____)

SC Court of Appeals

This matter came before this Court for a hearing on December 16, 2020, based on Defendants’ Robert P. Wilkins, Jr. (“Wilkins”), RPW Development, Inc. (“RPW”) and Southern Vision Realty, Inc. (“SVR”)¹ motions to dismiss² the Plaintiffs’ Complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.³ After reviewing extensive submissions to the Court and after having entertained the arguments of counsel, the motion is hereby **GRANTED AND THE COMPLAINT IS HEREBY DISMISSED WITH PREJUDICE** for the reasons set forth herein.

A Review of the Complaint

While the Plaintiffs’ Complaint consists of 93 pages and 473 numbered paragraphs, the issues presented by the Complaint are not complex. The Realtor Defendants criticize the

¹ Collectively, the moving parties are also identified herein as the “Realtor Defendants.”

² Realtor Defendants filed an original and then an Amended Motions to Dismiss dated May 6, 2020 and October 9, 2020, respectively.

³ The Complaint also names as a Defendant the Consolidated Multiple Listing Service, Inc. (“CMLS”), although the CMLS is not a party to this Motion to Dismiss. The Plaintiffs have not yet served the Summons and Complaint upon the CMLS.

Complaint as an effort by the Plaintiffs to overcome by sheer volume the legal defects in their claims. The Complaint is summarized as follows.

On January 2, 2020, the Plaintiffs, R. Kent Porth (“Porth”) and Panorama Point, LLC (“Panorama Point”), filed their Complaint in connection with a dispute arising out of the development and sale of the Plaintiffs’ and his family members’ real property located on Lake Murray (the “Property”). According to the Complaint, the Property consisted of approximately 27 acres, with around 4,750 feet of frontage on Lake Murray. In late 2005 and early 2006, the Plaintiffs began exploring options to best develop and sell all or a portion of the Property as a residential subdivision. [Compl., ¶¶ 20-21.] The Plaintiffs engaged the Realtor Defendants to develop, market, and sell the Property in early 2006. [Id. at ¶ 57.] Plaintiff Porth signed a Development Agreement on behalf of Panorama Point with Defendant RPW on or about December 21, 2006. [Id. at ¶ 87.] The Development Agreement contained provisions for the payment of fees to the Developer as well as provisions for the payment of real estate commissions for listing and sales with Defendant SVR serving as the exclusive listing agent.

Central to the Plaintiffs’ Complaint is the allegation that the Realtor Defendants failed to have written listing agreements as required by South Carolina Code 40-57-135 and 137, as well as by the rules of the CMLS. The Plaintiffs advance several theories of recovery all of which allege in essence that given the alleged lack of written listing agreements, it was unlawful for the Realtor Defendants to collect and to retain commissions and development fees associated with the sale of the Property that is the subject matter of this action. According to the Complaint, without the required written listing agreements, between January 2007 and December 2016, the Plaintiffs sold interests in the Property on 23 separate occasions in which Defendant SVR represented the Plaintiffs as the listing agent. The prices for the lots sold by the Plaintiffs ranged from \$70,000 to \$535,000, totaling more than \$6 million in sales to the Plaintiffs. SVR received a commission on

each sale ranging from \$1,400 to \$26,750, typically a fee equal to 5% of the sales price. [Id. at ¶¶ 166-198]. The Complaint also alleges that certain development fees were paid to Defendant RPW in connection with the sales of the lots from June 2007 through May 2015. The development fees ranged from \$3,325 to \$25,412 for each lot sold, approximately 4.7% of each sales price instead of the contracted 5% amount. [Compl., ¶¶ 199-218; Mtn. to Dismiss, ¶¶ 33-54.]

The development fees and the realtor commissions of which the Plaintiffs now complain were disclosed on closing statements for each sale and were signed off on by Plaintiff Porth.⁴ The last lot sold giving rise to the allegations of the Complaint was sold by the Plaintiffs on **May 1, 2015**, more than four years before the Complaint was filed on January 2, 2020. [Compl., ¶ 198; Mtn. to Dismiss, ¶¶ 31-32]. The latest alleged payment of a development fee giving rise to the allegations of the Complaint was paid on **May 7, 2015**, more than four years before the Complaint was filed on January 2, 2020. [Compl., ¶ 201; Mtn. to Dismiss; ¶¶ 36-37.]

Complicating the Plaintiffs' efforts to explain their delay in filing this action are allegations in the Complaint that establish the sophistication and experience of the Plaintiffs, despite the Plaintiffs attempt to minimize their experience and legal sophistication. According to the Complaint, Plaintiff Porth was sworn in as a licensed attorney in South Carolina in November of 1983, and practiced law until December 31, 2003, when he resigned as an equity partner and became "of counsel." [Comp. ¶ 161]. Thereafter, Porth practiced law on a part time basis until sometime in 2007 when he effectively "retired" from the practice of law. [Id. ¶ 161]. In the

⁴ As the closings and Deeds were integral to the Complaint, the Court accepted for review copies of Contracts of Sale, Deeds and HUD-1 statements which reflected that Plaintiff Porth executed the contracting and closing documents on behalf of Plaintiff Panorama Point, LLC. Additionally, the Court believes it proper to take judicial notice of the public record which would reflect Plaintiff Porth's knowledge and participation in the sales and marketing with associated listing prices which are the subject of this action. Plaintiffs were aware of the fees and commissions being charged with each and every lot sale and were aware of the same at the time of the sales and this constituted a course of dealing between and amongst the parties.

“Discovery of Issues” section of the Complaint, the Plaintiffs allege that after the breakdown in the relationship between the parties “in the months following January 2017, Plaintiff RKP (“Porth”) began to research the laws governing Defendants RPW’s and SVR’s handling of the marketing of the Phase I lots and related parcels ...” [Id. ¶ 159]. The Complaint alleges that it was “only in early 2018” that Plaintiff Porth “had **determined conclusively**” that the Defendants had not complied with applicable laws.” [Id. ¶ 160]. [Emphasis added]. Because the Plaintiffs had not “determined conclusively” until early 2018 that the Defendants had not followed the law, the Plaintiffs now contend that their filing on January 2, 2020 was timely. Accepting the allegations of the Complaint to be true, it is clear that the Plaintiffs knew that there were no written listing agreements as required by South Carolina law. What the Plaintiffs contend to have discovered and to have “determined conclusively” in early 2018 was not fact – it was law. Moreover, to have “conclusively determined” that one has a claim is not the standard in South Carolina for the commencement of the running of the statute of limitations as discussed hereinbelow.

While the Complaint contends that the Plaintiffs had not “determined conclusively” until early 2018 that the Defendants had committed actionable offenses, the Complaint describes several earlier events which placed the Plaintiffs on actual notice that some right of theirs had been invaded by the Defendants. Beginning at Page 42 of the Complaint, the Plaintiffs complain about “**Lot 15 Issues.**” Lot 15 was sold on September 26, 2013. [Id. ¶ 194]. In short, the Plaintiffs complain that the Defendants knew the purchaser of Lot 15 and misled the Plaintiffs to reduce the purchase price of the lot by \$2,500.00 on the false representation that the purchasers would incur expense in blasting rock from the lot using dynamite. No blasting occurred. The Complaint alleges that the Defendants “abused their relationship of trust with the Plaintiffs to advance the interests of a friend.” Again, Lot 15 was sold in 2013.

In addition, beginning at Page 60 of the Complaint, the Plaintiffs complain about “**The Bonded Plat Issues with Lexington County**.” In short, the Plaintiffs complain that on June 7, 2012, Defendant Wilkins told Plaintiff Porth that he had convinced Lexington County to accept a “cash bond” in the amount of \$6,500.00 in order to bond off a check list of items required by the County to release the neighborhood. [Id. ¶ 339]. After completing the punch list, Lexington County issued a refund of the cash bond to Defendant RPW and RPW kept the money without telling the Plaintiffs. [Id. ¶ 341-342]. Ultimately, Defendant RPW only returned Porth’s money to him on April 25, 2013, after RPW specifically inquired about the status of the refund. [Id. ¶ 343]. The Plaintiffs’ allegations regarding the “issues” that they were experiencing with the Defendants over the course of the development culminates with the allegations of Paragraph 345:

The failure of Defendants Wilkins and RPW to complete the punch list items in a timely manner, and RPW’s failure to refund the Cash Bond to Plaintiff LLC when received from Lexington County, are examples of Defendants Wilkins’ and RPW’s negligence, incompetence, and lack of attention in performing the duties for which they received the Development Fees. [Emphasis Added].

Despite their actual knowledge of these acts of negligence, incompetence, and breach of duties as early as 2013, the Complaint makes it clear that the Plaintiffs not only failed to take any action against the Defendants within the applicable statutes of limitations, but instead continued to develop, market and sell the Property through the efforts of the Defendants and continued to retain the benefit of the Defendants’ efforts. While not seeking to upset or rescind any of the transactions underlying this action, the present suit now purports to divest the Defendants of any and all fees or commissions which they earned by virtue of the services that were provided to the Plaintiffs. By the allegations of the Complaint itself, the Plaintiffs are not entitled to the relief they seek.

Standards of Review

1. Rule 12(b)(6)

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint; however, the trial court should grant the motion “if the facts alleged in the complaint do not support relief under any theory of law.” Flateau, 355 S.C. at 201-02, 584 S.E.2d at 415; see also Gray v. State Farm Auto Ins. Co., 327 S.C. 646, 650-51, 491 S.E.2d 272, 274-75 (Ct. App. 1997) (motion must be granted if facts and inferences reasonably deducible from them show that plaintiff could not prevail on any theory of the case).

2. Statute of Limitations

Statute of limitations defenses may be raised via a Rule 12(b)(6) motion to dismiss for failure to state a claim when the facts pleaded establish that the claim is untimely. See Clearwater Trust v. Bunting, 367 S.C. 340, 351-53, 626 S.E.2d 334, 339-40 (2006) (affirming trial court’s grant of Rule 12(b)(6) motion to dismiss for failure to state a claim because action for breach of fiduciary duty owed by officer as a corporate officer was precluded by statute of limitations); Logan v. Cherokee Landscaping and Grading Co., 389 S.C. 611, 698 S.E.2d 879 (Ct. App. 2010) (affirming trial court’s grant of Rule 12(b)(6) motion to dismiss plaintiff’s negligence action because plaintiff failed to bring action within the statute of limitations).

Statutes of limitation “are designed to promote justice by forcing parties to pursue a case in a timely manner.” Gibson v. Bank of Am., N.A., 383 S.C. 399, 410, 680 S.E.2d 778, 784 (Ct. App. 2009) (quoting State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 413 (2000)). As this Court has observed;

Statutes of limitation . . . protect people from being forced to defend themselves against stale claims. The statutes recognize that with the passage of time, evidence becomes more difficult to obtain and is less reliable. Physical evidence is lost or destroyed, witnesses become impossible to locate, and memories fade. With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense. Additionally, statutes of limitation encourage plaintiffs to initiate actions promptly while evidence is fresh and a court will be able to judge more accurately.

Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 163-64, 511 S.E.2d 699, 706 (Ct. App. 1999).

Statutes of limitations aim to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. McKinney v. CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989). The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 175, 609 S.E.2d 548, 552 (Ct. App. 2005).

Under South Carolina law, in determining when a cause of action arises courts apply the “discovery rule.” Rumpf v. Mass. Mut. Life Ins. Co., 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004). According to this rule, the statute of limitations begins to run “when a cause of action reasonably ought to have been discovered,” or, in other words, “when a plaintiff has notice that he might have a remedy for a harm.” Id. Thus, “the clock starts running when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist.” Gibson, 383 S.C. at 406, 680 S.E.2d at 782.

The standard as to when the statute of limitations begins to run is objective rather than subjective. Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994); Gibson, 383 S.C. at 406, 680 S.E.2d at 782. Therefore, the test is not whether the particular plaintiff actually knew a claim existed. Rumpf, 357 S.C. at 395, 593 S.E.2d at 187. The test is when a person could or should have known through reasonable diligence that some cause of action exists against another

person rather than when a person obtains actual knowledge of a potential claim or of the facts giving rise thereto. Dorman v. Campbell, 331 S.C. 179, 184, 500 S.E.2d 786, 789 (Ct. App. 1998).

The key element of reasonable diligence is notice. Reasonable diligence requires that a party act with some promptness where facts and circumstances would put a person on notice that some right has been invaded or that some claim against another party might exist. Gibson, 383 S.C. at 406, 680 S.E.2d at 782; see also Dean v. Ruscon Corp., 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996). The statute begins to run at this point and not when:

- the advice of counsel is sought;
- a full-blown theory of recovery is developed; or
- the injured party comprehends the full extent of the damage.

Gibson, 383 S.C. at 406, 680 S.E.2d at 782; see also Dean, 321 S.C. at 363-64, 468 S.E.2d at 647; Wiggins, 314 S.C. at 128, 442 S.E.2d at 170; Dorman, 331 S.C. at 184-85, 500 S.E.2d at 789; Barr v. City of Rock Hill, 330 S.C. 640, 645, 500 S.E.2d 157, 160 (Ct. App. 1998). The failure of a plaintiff to fully understand his claim or the ramifications of a potential claim does not toll the accrual of the statute of limitations. Young v. South Carolina Dep't of Corrs., 333 S.C. 714, 720, 511 S.E.2d 413, 416 (Ct. App. 1999). Where there is no conflicting evidence or where only one reasonable inference can be drawn from the evidence, the trial court should determine as a matter of law when a party knew or should have known it had a claim. Gibson, 383 S.C. at 406-07, 680 S.E.2d at 782.

3. Ignorance of the Law

Ignorance of the law does not suspend the accrual of a statute of limitations. See Ott v. Maryland Dep't of Pub. Safety and Corrs. Servs., 909 F.3d 655, 661 (4th Cir. 2018) (“Ignorance of the law does not justify tolling, even when a party does not have legal representation); United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004) (observing ignorance of the law is not a basis for tolling). The Plaintiffs argue they should not be expected to have knowledge of law applicable to

real estate professionals as if this law were locked behind some secret vault. The Plaintiffs' position is contrary to the well-established principle that "[c]itizens are presumed to know the law and are charged with exercising reasonable care to protect their interests." American Legion Post 15 v. Horry Cnty., 381 S.C. 576, 584, 674 S.E.2d 181, 185 (Ct. App. 2009); Smothers v. U.S. Fidelity and Guar. Co., 322 S.C. 207, 210–11, 470 S.E.2d 858, 860 (Ct. App. 1996) ("Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests.").

4. The Existence of a Duty

"An affirmative legal duty, . . . , may be created by statute, contract relationship, status, property interest, or some other special circumstance." Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 388, 520 S.E.2d 142, 149 (1999). The existence of a duty owed is a question of law for the courts. Doe v. Batson, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001).

5. Private Causes of Action for Statutory Violations

Plaintiffs' complain throughout the Complaint that there purportedly were no written, signed listing agreements for the property transactions as required by S.C. Code Ann. Section 40-57-135. This section does not expressly allow a private cause of action for any violation of its requirements. "In determining whether a statute creates a private cause of action [in South Carolina], the main factor is legislative intent." Doe v. Marion, 373 S.C. 390, 396 645 S.E.2d 245, 248 (2007):

The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty is determined primarily from the language of the statute In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability. When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party.

Id. (internal citations omitted).

A duty created by a statute will support an action in negligence only if the plaintiff can show “(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.” Hurst v. Sandy, 329 S.C. 471, 478, 494 S.E.2d 847, 850 (Ct. App. 1997). Licensing statutes will not ordinarily provide a basis for a negligence per se action. Id.

For purposes of determining whether an alleged violation of S.C. Code Ann. Section 40-57-135 gives rise to a private cause of action, the answer to the question is provided in Code itself. Section 40-57-490, “Civil actions,” states that “a civil action may be brought for violations of this chapter as provided for violations of Article 1, Chapter 1, in accordance with Section 40-1-210.” According to S.C. Code Ann. Section 40-1-210, “Civil proceedings before Administrative Law Court,” the civil actions which are authorized for violations of Article 1, Chapter 1 are limited to civil actions instituted by the department (i.e. LLR) “for injunctive relief against a person violating this article.” While it is clear that a violation of S.C. Code Ann. Section 40-57-135 does not give rise to a private cause of action, it is equally clear that the Code does not supplant common law causes of action: “Except as otherwise stated, nothing in the section precludes an injured party from bringing a cause of action against licensees, their companies, or their brokers-in-charge.” S.C. Code Ann. Section 40-57-350(M), “Real estate brokerage firm duties to clients; agency relationship; applicability of common law.” As set forth herein, however, all of the Plaintiffs’ common law claims are fatally flawed.

6. Quantum Meruit

Quantum meruit requires a showing of (1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.

Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000). Similarly, “[t]o recover on a theory of restitution, the plaintiff must show: (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff its value.” Niggel Assocs., Inc. v. Polo’s of North Myrtle Beach, Inc., 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1988). Furthermore, if the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the plaintiff may not recover under quantum meruit. Swanson v. Stratos, 350 S.C. 116, 120, 564 S.E. 2d 117, 122 (Ct. App. 2002), citing 66 Am.Jur.2d *Restitution and Implied Contracts* § 81 (2001) (“[I]t is a defense to an action in quantum meruit that there is an express contract covering the issue of compensation for services or materials furnished.”); cf. Strickland v. Coastal Design Assocs., 294 S.C. 421, 424, 365 S.E.2d 226, 228 (Ct.App.1987) (“The law is well settled in this nation that where an express contract has been rescinded or abandoned, one furnishing labor or materials in part performance may recover in quantum meruit unless the original contract remains in force.”); Johnston v. Brown, 290 S.C. 141, 148, 348 S.E.2d 391, 395 (Ct.App.1986), *rev’d on other grounds*, 292 S.C. 478, 357 S.E.2d 450 (1987) (“While a recovery may be had in quantum meruit for services fully performed under an express contract, the plaintiff’s recovery is limited to the amount the parties agreed should be paid for the services.” (footnote omitted)).

Legal vs. Equitable Claims

A. Legal Claims

The Plaintiffs' Complaint advances several causes of action, some of which the Plaintiffs contend are equitable. Several of the causes of action are unquestionably actions at law. Plaintiffs' claims for negligent misrepresentation, negligence, conversion, constructive fraud, and violation of South Carolina's Unfair Trade Practices Act are each actions at law. See Advance Int'l, Inc. v. North Carolina Nat'l Bank of South Carolina, 316 S.C. 266, 271, 449 S.E.2d 580, 583 (Ct. App. 1994), aff'd in part and vacated in part on other grounds, 320 S.C. 532, 466 S.E.2d 367 (1996) (action alleging, *inter alia*, fraud, negligence, and unfair trade practices and seeking damages is one at law); Bivens v. Watkins, 313 S.C. 228, 230, 437 S.E.2d 132, 133 (Ct. App. 1993) (stating negligent misrepresentation and fraud are actions at law); Blackwell v. Blackwell, 289 S.C. 470, 471, 346 S.E.2d 731, 732 (Ct. App. 1986) ("An action for damages for conversion is an action at law."); see also Turner v. Kellett, 426 S.C. 42, 47, 824 S.E.2d 466, 468 (Ct. App. 2019) (observing action for unfair trade practices is one at law); Bateman v. Rouse, 358 S.C. 667, 673-74, 596 S.E.2d 386, 389 (Ct. App. 2004) (conversion is an action at law).

Each of these claims, being actions at law, are therefore subject to the applicable statutes of limitations. In particular, Plaintiffs' claims for negligent misrepresentation, negligence, conversion, and fraud are subject to the three-year statute of limitations set forth in S.C. CODE ANN. § 15-3-530. See Walbeck v. I'On Co., 426 S.C. 494, 519, 827 S.E.2d 348, 361 (Ct. App. 2019) ("The three-year statute of limitations, section 15-3-530(5) of the South Carolina Code (2005), applies to negligent misrepresentation claims."); Gibson v. Bank of Am., N.A., 383 S.C. 399, 405, 680 S.E.2d 778, 782 (Ct. App. 2009) (three-year limitations period set forth in § 15-3-530(5) applies to negligence actions); Walsh v. Woods, 358 S.C. 259, 264, 594 S.E.2d 548, 551 (Ct. App. 2004) ("The statute of limitations for . . . a conversion claim is three (3) years [under § 15-3-530(5).]"); Dorman v. Campbell, 331 S.C. 179, 183-84, 500 S.E.2d 786, 788-89 (Ct. App. 1998) (applying three-year statute of limitations set forth in § 15-3-530 to claim for constructive

fraud); see also S.C. CODE ANN. § 15-3-530(7) (providing “an action for relief on the ground of fraud” is subject to the three-year statute of limitations).

A claim for violation of South Carolina’s Unfair Trade Practices Act must also be brought within three years. S.C. CODE ANN. § 39-5-150 specifies a three-year statute of limitations period for actions brought under the Unfair Trade Practices Act: “No action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit.”

As to Plaintiffs’ at law claims for negligent misrepresentation, negligence, conversion, fraud and violations of South Carolina’s Unfair Trade Practices Act, all such claims are barred by the applicable statutes of limitations based upon the allegations of the Complaint and the pleaded language of the Plaintiffs. I find that the Plaintiffs, by their own allegations, knew or should have known of acts of “negligence, incompetence, dishonesty and/or breaches of duty” by the Defendants as early as 2013, yet no action was commenced until January 2, 2020. The Plaintiffs’ contention that they had not “determined conclusively” that they had claims against the Defendants until sometime in 2017 is unavailing as it pertains to the commencement of the running of the applicable statutes of limitations under South Carolina law. To the contrary, the Plaintiffs were on actual or reasonable notice as early as 2013 that a right of theirs had been invaded by the Defendants. Based upon their own allegations of the Complaint, the notice was more than sufficient to have constituted a cause of action at that time and cause the Plaintiffs to make reasonable inquiry into the conduct of the Defendants. This would have led to the discovery of the same facts that give rise to the present action. As a result of the Plaintiffs failure to bring their

legal claims timely within the applicable statutes of limitations, each of the Plaintiffs' legal causes of action are hereby dismissed.⁵

B. Breach of Fiduciary Duty

The Plaintiffs have additionally brought a cause of action for breach of fiduciary duty. While the Plaintiffs contend that their breach of fiduciary duty claim is equitable in nature, and therefore not subject to a statute of limitations, I find that the Plaintiffs' claim for breach of fiduciary duty is also legal in nature and thus subject to the statute of limitations. A breach of fiduciary duty claim may be legal or equitable. Deborah Dereede Living Trust dated December 18, 2013 v. Karp, 427 S.C. 336, 340, 831 S.E.2d 435, 438 (Ct. App. 2019). The court must therefore look at the main purpose of the action to determine whether it is a legal or equitable claim. Id. "The main purpose of the action should generally be ascertained from the body of the complaint.However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." Insurance Fin. Servs., Inc. v. South Carolina Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (internal citation omitted). The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable. Bell v. Mackey, 191 S.C. 105, 119–20, 3 S.E.2d 816, 822 (1939) (internal citations omitted).

I find that the main purpose of the Plaintiffs' breach of fiduciary duty cause of action is to seek the legal remedy of money damages. The Plaintiffs explicitly request money damages "in a sum sufficient to adequately compensate them for actual damages," as well as an unspecified recovery of punitive damages. [Compl., p. 92.] The Plaintiffs contend the Realtor Defendants'

⁵ Significantly, the last property sale giving rise to the allegations in the Complaint occurred on May 1, 2015, and the last payment of a development fee giving rise to the allegations in the Complaint occurred on May 7, 2015, both of which are also well outside of the applicable statutes of limitations.

purported actions caused the Plaintiffs to receive below fair market prices for the sales of the lots on the Property and further caused them to incur additional interest expenses due to an alleged delay in sales. While the Plaintiffs also allege that they are entitled to the return of commission and development fees paid to the Realtor Defendants, the Plaintiffs characterize these losses as “economic.”[Id. at ¶¶ 389-90, 397, 399-400, 411, 417, 426, 444-45, 471-73.]

The relief the Plaintiffs seek consists entirely of the economic losses they allege they suffered as a result of the Realtor Defendants’ supposed breaches. While the Plaintiffs seek a return of the commissions and fees earned by the Realtor and Developer Defendants, the basis for this relief is because the Realtor Defendants allegedly did not provide the services the Plaintiffs paid for, including the execution of written listing agreements. Even if the Plaintiffs attempt to characterize this relief as “restitution,” restitution is not automatically classified as an equitable remedy. “[R]estitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case, and whether it is legal or equitable depends on the basis for [the plaintiff’s] claim” and the nature of the underlying remedies sought.” Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002) (internal citation omitted).

In cases in which a plaintiff could not assert title or right to possession of particular property, but in which he nevertheless might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him,” the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit. In such cases, the plaintiff’s claim was considered legal because he sought “to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money.” Such claims were viewed essentially as actions at law for breach of contract, whether the contract was actual or implied. See id. (internal citations omitted).

“In contrast, a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.” Id. “A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,” and the plaintiff “cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant.] Thus, for restitution to lie in equity, the action generally must seek *not to impose personal liability on the defendant*, but to restore to the plaintiff particular funds or property in the defendant's possession.” Id. at 213-14 (internal citations omitted) (emphasis added).

Here, “[t]he kind of restitution that [the Plaintiffs] seek, therefore, is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon [the Realtor Defendants.]” Id. at 214. “Almost invariably . . . suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff are suits for ‘money damages,’ as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty. . . . And [m]oney damages are, of course, the classic form of *legal relief*.” Id. at 210 (internal citations omitted) (emphasis in original); cf. Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (Ct. App. 2010) (finding breach of fiduciary duty claim was equitable where relief sought was to restore profits to a trust for the trustee's breach of loyalty).

The Plaintiffs seek money damages on their claim for breach of fiduciary duty as compensation for their pecuniary injury. See Harleysville Group Ins. v. Heritage Comms., 420

S.C. 321, 353, 803 S.E.2d 288, 306 (2017) (“The goal [of compensatory damages] is to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred.”) (internal citation omitted). The relief sought is legal, and the breach of fiduciary duty claim is therefore one at law. A cause of action for breach of fiduciary duty is governed by the discovery rule and must be brought within three years of the time the person knew or should have known by exercise of reasonable diligence that he had a cause of action. See S.C.Code Ann. §§ 15–3–530(5) and 15–3–535 (Supp .2003); *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct.App.2004). Accepting the allegations of the Complaint as true, the Plaintiffs were aware as early as 2013 that the Defendants had breach their fiduciary duties, yet no action was brought until January 2, 2020. I hereby find that the Plaintiff’s cause of action for breach of fiduciary duty is barred by the statute of limitations and is therefore dismissed.

C. Quantum Meruit / Restitution

I further find that the Plaintiffs have failed to state proper causes of action for quantum meruit and restitution and as such, these claims should also be dismissed for failure to state a claim pursuant to Rule 12(b)(6), SCRCF. Under these claims, the Plaintiffs in essence allege that they paid commissions and development fees to the Realtor Defendants which the Realtor Defendants retained despite allegedly engaging in unlawful acts and not fulfilling their legal duties with respect to the real estate transactions. [Compl., ¶¶ 427-34, 446-48.]

Under South Carolina law, a quantum meruit claim requires a showing of (1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value. Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000). Similarly, “[t]o recover on a theory of restitution, the plaintiff

must show: (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff its value.” Niggel Assocs., Inc. v. Polo’s of North Myrtle Beach, Inc., 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1988).

In their Complaint, the Plaintiffs are merely seeking a refund or return of fees paid by alleging that the Realtor Defendants did not fulfill their legal and contractual duties – the Plaintiffs are not alleging they provided a service to the Realtor Defendants for which they were not compensated.⁶ The Plaintiffs seek, in essence, a reverse quantum meruit cause of action in which someone who pays too much for a service seeks a refund of the amount overpaid. The South Carolina courts have never recognized such a claim. Instead, the Plaintiffs relief would be in the form of legal claims for the purported failure of the Realtor Defendants to fulfill their contractual obligations which, as set forth above, are conclusively barred by the three-year statute of limitations. Accordingly, the Plaintiffs’ causes of action for quantum meruit and restitution are hereby dismissed for failure to state facts sufficient to constitute a cause of action.

As an additional sustaining ground for the dismissal of Plaintiffs’ causes of action for quantum meruit and restitution (and/or for any other claim which they would contend to be equitable in nature), this Court finds that based upon the allegations of the Complaint, all such claims are barred by the doctrine of laches. Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or to enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. Muir v. C.R. Bard, Inc., 336 S.C. 266, 296, 519

⁶ In fact, the Complaint alleges that for over ten years, the developer Defendants took a large tract of raw land and developed it. Similarly, the realtor Defendant SVR marketed the Property, secured purchase contracts with the Plaintiffs and successfully closed millions of dollars of transactions for the benefit of the Plaintiffs.

S.E.2d 583, 598 (Ct. App. 1999). Accepting the allegations of the Complaint to be true, the Complaint alleges that the Plaintiffs were aware of the Defendants alleged improper conduct, yet continued to accept the benefit of their services in the development and sale of the Property.

Furthermore, the Plaintiffs do not have clean hands to request equity from the Court. As early as 2013, Plaintiff's own words indicate that they were on actual notice that the Defendants had acted negligently and incompetently towards them, yet they permitted the Realtor Defendants to continue to develop and market the lots for the financial benefit of the Plaintiffs and now contend that the Realtor Defendants should not be compensated for making the Plaintiffs millions of dollars through lot sales. The Plaintiffs now seek to have the Defendants answer for transactions dating back to 2007, although the obligation on real estate brokers to maintain sale contracts, listing agreements and other similar documents is only five (5) years. S.C. Code 40-57-135(D)(1). This Court does not consider the Plaintiffs' claims to be equitable in nature. Even if equity were to apply, equity would not permit recovery under the circumstances set forth in the Complaint. Plaintiffs' claims would be barred by the doctrines of laches, unclean hands and/or *in pari delicto*. No amount of discovery or repleading the allegations through an Amended Complaint would cure the legal impediments to Plaintiffs' proposed claims.

IT IS THEREFORE ORDERED that the Plaintiffs' Complaint be dismissed pursuant to Rule 12(b)(6) with prejudice.

AND IT IS SO ORDERED!

Edgar W. Dickson
Presiding Circuit Court Judge
11th Judicial Circuit

Orangeburg, SC
_____, 2021



Lexington Common Pleas

Case Caption: R Kent Porth , plaintiff, et al VS Robert P Wilkins Jr , defendant, et al

Case Number: 2020CP3200005

Type: Order/Dismissal

So Ordered

s/ Edgar W. Dickson #2153