

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Daniel D. Hall, Circuit Court Judge

Case No. 2018-CP-46-01592

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SC Court of Appeals

Karen K. Baber, Appellant,

v.

Summit Funding, Inc., Appraisal Innovations, LLC, Brian L. Blue, The Gillen Law Firm, P.A.,
Michael F. Gillen, Allen Tate Co., Inc., Colleen Coesens, Jonathan Garvey, Robert Ouzts, Connie
Delaney, and Gloria Long-Robinson,

Of Which Summit Funding Inc., Allen Tate Co., Inc., Colleen Coesens, Jonathan Garvey, Robert
Ouzts, Connie Delany, and Gloria Long-Robinson are the Respondents.

APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

Table of Authorities	4
Statement of Issues on Appeal	5
Statement of the Case	6
Standard of Review	6
Facts	7
Argument	
I. THE TRIAL COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT	8
II. THE PLAINTIFF'S DISCOVERY WAS NOT COMPLETED	10
III. NEGLIGENCE CASES ARE NOT SUSCEPTIBLE OF SUMMARY JUDGMENT	11
IV. THE VERIFIED COMPLAINT WAS NOT CONSIDERED AS AN AFFIDAVIT	12
V. DISPUTED ISSUES OF FACT	13
VI. ACCEPTING THE PROPERTY IN ITS "AS-IS" CONDITION	15
Conclusion	16

TABLE OF AUTHORITIES

CASES

<u>Baughman v. American Tel. and Tel. Co.</u> , 306 S.C. 101, 410 S.E.2d 537 (1991)	6, 8, 9
<u>Hancock v. Mid-South Management Co., Inc.</u> , 673 S.E.2d 801 (2009)	6, 8, 12
<u>Koester v. Carolina Rental Ctr.</u> , 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994)	6, 8
<u>BPS, Inc. v. Worthy</u> , 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005)	6, 8
<u>Froneberger v. Smith</u> , 406 S.C. 37, 748 S.E.2d 625 (Ct. App. 2013)	9
<u>Dawkins v. Fields</u> , 354 S.C. 58 (S.C. 2003)	10, 12
<u>Schmidt v. Courtney</u> , 357 S.C. 310 (Ct. App. 2003)	11

OTHER AUTHORITIES

Rule 56, SCRCP	8
Appellate Rule 220(c)	16

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT?
2. WHETHER THE SUMMARY JUDGMENT WAS APPROPRIATE WHEN THE PLAINTIFF'S DISCOVERY WAS NOT COMPLETED?
3. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THIS CASE, WHICH INVOLVES NEGLIGENCE?
4. WHETHER THE TRIAL COURT ERRED IN NOT CONSIDERING THE VERIFIED COMPLAINT AS AN AFFIDAVIT?
5. WHETHER THERE ARE DISPUTED ISSUES OF FACT?
6. WHETHER ACCEPTING THE PROPERTY IN ITS "AS-IS" CONDITION BASED ON NEGLIGENT MISREPRESENTATIONS WARRANTS SUMMARY JUDGMENT?

STATEMENT OF THE CASE

This litigation was initiated on May 29, 2018, by Karen K. Baber (“Baber”) against Summit Funding, Inc.; Appraisal Innovations, LLC; Brian L. Blue; The Gillen Law Firm, P.A.; Michael F. Gillen; Allen Tate Co. Inc.; Colleen Coesens; Jonathan Garvey; Robert Ouzts; Connie Delaney; and Gloria Long-Robinson. The causes of action involved fraud, conspiracy, negligent misrepresentation, promissory estoppel, negligence and breach of contract. (R. pp. 30-65). The Defendants answered denying liability for all causes of action. (R. pp. 66-95).

On March 5, 2019, Defendants Allen Tate Co. (“Allen Tate”), Colleen Coesens (“Coesens”), Jonathan Garvey (“Garvey”), Robert Ouzts (“Ouzts”), and Connie Delaney (“Delaney”) filed a Motion for Summary Judgment. (R. pp. 454-840). On March 15, 2019, Summit Funding, Inc., filed a Motion for Summary Judgment. (R. pp. 841-843). The motions were heard by the Honorable Daniel D. Hall on April 3, 2019. (R. pp. 96-164). Judge Hall granted summary judgment on May 29, 2019. (R. pp. 6-25). A Motion to Alter or Amend the Judgment was filed by the Plaintiff on June 6, 2019. (R. pp. 1191-1192). Judge Hall denied the Motion to Alter or Amend on July 29, 2019. (R. pp. 26-28). Notice of Appeal was timely filed on August 28, 2019. (R. pp. 1206-1224).

STANDARD OF REVIEW

In reviewing a summary judgment, the evidence and all reasonable inferences that are deducible from the evidence are to be viewed in the light most favorable to the party against whom the judgment was granted. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991); Hancock v. Mid-South Management Co., Inc., 637 S.E.2d 801 (2009); Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994); BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005).

FACTS

In 2014, the Plaintiff began looking for a home to purchase in Rock Hill, South Carolina. Garvey was the realtor who showed her various properties. Allen Tate employed Garvey. One of the properties the Plaintiff considered and ultimately purchased was listed by Allen Tate with Delaney as the agent. Garvey recommended working with Summit to obtain a loan. Steve Reynolds ("Reynolds") was Summit's loan office in Charlotte, North Carolina. Reynolds helped Plaintiff to obtain a loan to purchase the property. The real estate agents, Delaney and Garvey, failed to disclose damage to the property, which they knew existed. (R. pp. 34-35, 51.)

The purchase was contingent upon approval and acceptance of the lender and subject to a termite/wood infestation report ("CL-100") and a home inspection. Summit also required the CL-100 and a home inspection for the FHA loan that was to be made to the Plaintiff; these requirements were confirmed by Reynolds. Summit also required an appraisal of the property. (R. pp. 35-36, 39-47, 49, 51-53).

The Plaintiff reasonably relied upon the representations from Summit and Reynolds that a CL-100 and a home inspection would be required to verify the condition of the property before the loan closed. The CL-100 inspection, the home inspection and a valid appraisal of the correct property were never done. The Plaintiff claims that had any one of these inspections taken place, she and Summit would have been alerted to the damages to the property, and the loan would not have closed due to FHA's strict standards concerning the condition of the property purchased with an FHA loan. (R. pp. 36-65).

ARGUMENT

I. The trial court erroneously granted summary judgment.

Summary judgment is appropriate when there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law. “Rule 56, SCRPC. Summary judgment is not appropriate where there are genuine issues of material fact in dispute. Moreover, Rule 56 requires that summary judgment should not be granted, even when there is no dispute as to evidentiary facts, if there is disagreement concerning the conclusion to be drawn from those facts. In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” Hancock v. Mid-South Management Co., Inc., 673 S.E.2d 801 (2009) quoting Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

The S.C. Court of Appeals held in BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005):

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct.App.2004). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct.App.2004). Because it is a drastic remedy, summary judgment should not be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on

dispute factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004); *Hawkins*, 358 S.C. at 289, 594 S.E.2d at 561-62; *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct.App.2001).

Baughman v. American Telephone and Telegraphy Company, 306 S.C. 101, 410 S.E.2d 537 (S.C. 1991). Hancock v. Mid-South Management Co., Inc., 673 S.E.2d 801, 381 S.C. 326 (S.C. 2009). “Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” Froneberger v. Smith, 406 S.C. 37, 748 S.E.2d 625 (Ct. App. 2013).

In this case, there are a number of factual disputes as well as disagreement with regard to the conclusions to be drawn from the documentary evidence. First, the documentary evidence referenced by the Defendant in the Motion for Summary Judgment does not establish the absence of genuine issues of material fact; rather, the documentary evidence actually establishes the existence of genuine issues of material fact. (R. pp. 456-840, 844-876). Second, summary judgment is a drastic remedy that denies a person his day in court; it “should be cautiously invoked so that no person will be improperly deprived of a trial of the dispute factual issue.” Baughman, 306 S.C. at 112, 410 S.E.2d at 543.

II. Plaintiff's Discovery Not Completed

The South Carolina Supreme Court has held that summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Dawkins v. Fields, 354 S.C. 58 (S.C. 2003). The Plaintiff's discovery requests had not been answer.

The Plaintiff stated in her Affidavit:

There is substantial outstanding discovery which I have not received from summit which bear directly on the issues raised in the Motion, and I request that no judgment be entered until I have had a chance to present evidence from the additional discovery.

(R. p. 891). Summary judgment should not be granted, nor should a hearing be held, until each party has a full and fair opportunity to complete discovery. In this case, the outstanding discovery due to the Plaintiff was not produced prior to the hearing on the Motion for Summary Judgment.

(R. p. 120). The outstanding discovery was relevant to the issues raised in the Defendants' Motions for Summary Judgment.

According to the Plaintiff's Affidavit, the outstanding discovery relates to the FHA requirement that a home appraisal and CL-100 Wood Infestation Report (termite inspection) be performed for purchases of existing homes with a mortgage insured by the FHA and whether Summit complied with FHA requirements. The Plaintiff claims the documents will show the termite inspection report was never received. (R. pp. 890-1175).

III. Negligence cases are not Susceptible of Summary Judgment

The South Carolina Court of Appeals held in Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (S.C. App. 2003):

Because this is a negligence claim, it is important to note that, “[g]enerally, **negligence claims are not susceptible of summary adjudication** because of the many questions normally present in such cases concerning the reasonableness of a party’s conduct, foreseeability, and proximate cause.” *Folkens v. Hunt*, 290 S.C. 194, 199, 348 S.E.2d 839, 842 (Ct. App. 1986). Concomitantly, we reverse the grant of summary judgment. (emphasis added)

The Plaintiff alleged negligence claims against the Defendants in her Complaint, including:

1. Not making sure the home and termite inspections were performed. (R. pp. 61-62).
2. The purchase contract was contingent upon a termite inspection. The realtor was negligent in not making sure the inspection was done and in not advising the Plaintiff as to the status of the inspection. (R. pp. 58-60).
3. Not delaying closing until the home inspection and termite inspections were completed and clear reports received. (R. pp. 57-59).
4. Negligently misrepresenting to the Plaintiff that the inspections had been completed and the home was cleared. (R. pp. 57-61).
5. Not following FHA requirements. (R. pp. 57-61).
6. Closing and funding the loan in violation of FHA requirements. (R. 57-58, 61-62).

IV. The Verified Complaint was not Considered as an Affidavit

The South Carolina Supreme Court has held that in cases applying the preponderance of the evidence standard, 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 Company, Inc., 381 S.C. 326, 673 S.E.2d 801 (S.C. 2009). In this case, the Plaintiff has submitted substantial evidence in support of each of the causes of action in the form of her affidavits in opposition to summary judgment, which included numerous documents. (R. pp. 890-1175). Furthermore, the South Carolina Supreme Court has held that a verified complaint constitutes an affidavit at the summary judgment phase. Dawkins v. Fields, 354 S.C. 58 (S.C. 2003).

The Plaintiff filed a verified complaint; however, it does not appear the verified complaint was considered as an affidavit during the summary judgment proceedings. (R. pp. 96-164). Plaintiff's Memoranda in Opposition to Summary Judgment and the verified complaint are replete with evidence showing the Defendants made material representations to the Plaintiff: the Defendants admitted a home and termite inspection and appraisal were required by the FHA-insured loan she was using to purchase the property had been performed and were paid. As it turned out, the Defendants misrepresented these facts to the Plaintiff. If the inspections and appraisal had been performed, the closing would not have taken place. (R. pp. 35-62, 890-1175).

V. Disputed Issues of Fact from Plaintiff's Affidavit

1. The Plaintiff was repeatedly told by the Defendants that a home inspection and wood infestation report (termite inspection) were required by the FHA before the loan could be issued.
2. The Summit loan officer repeatedly told the Plaintiff that the wood infestation report and home inspection were conditions of the loan, the realtor had obtained the reports and would provide the reports before the loan would be funded.
3. The realtors, the staff for the closing attorneys, and Summit employees repeatedly told the Plaintiff that a home inspection and termite inspection were mandated for her FHA-insured loan and had been provided before the loan closed and funded.
4. For a year after the closing, employees of Summit continued to represent to the Plaintiff that a termite inspection had to be done because it is required before the loan could have funded.
5. The Plaintiff was told by the Defendants that these reports had been received and were "clear," meaning there were no material defects with the house and her initial concerns were cosmetic rather than functional.
6. The Plaintiff was told by the Defendants that the termite inspection and home inspection had been arranged by the realtor Jonathan Garvey.
7. Defendant Jonathan Garvey told the Plaintiff he had arranged for Robert Evans to do the home inspection and termite inspection and that the inspections would be paid out of the \$10,000.00 the Plaintiff had for repairs and upgrades.
8. The purchase contract was contingent upon the property being inspected for termites.
9. The Plaintiff was told the home passed the inspections.

10. The Plaintiff was told the inspection reports were brought to closing but the closing attorney failed to make copies for the Plaintiff.
11. Plaintiff did not know the home inspection and termite inspections were not done.
12. Representations made by the Defendants to the Plaintiff were false.
13. The good faith estimate provided to the Plaintiff by the Defendants one week prior to the closing indicated a wood infestation report and a home inspection report were required. The good faith estimate indicated the termite inspection was \$75.00 and the home inspection was \$450.00 and the total settlement charges were \$7,910.66, leading the Plaintiff to believe these inspections were being paid through the closing.
14. The Plaintiff was also led to believe the termite and home inspection would be included in Robert Evans's invoice along with the charges for the repairs he made. Under these circumstances, the charges for the termite and home inspections would not necessarily be reflected on the HUD-1 settlement statement.
15. The realtor told the Plaintiff there were no problems with the home inspection or termite inspection and that he would bring the reports to the closing on May 29, 2015.
16. At closing the HUD-1 settlement statement had an attached document titled "Itemization of Amount Financed" which listed the home and termite inspections as being financed either from the loan proceeds or paid outside of closing.
17. The charges paid outside of closing identified on page 14 ¶ 16 of the Plaintiff's affidavit would lead a reasonable person to conclude the termite and home inspection were performed and paid. (R. pp. 903).

(R. pp. 890-1021).

VI. Accepting Property in its "As-Is" Condition

Based on these representations (misrepresentations), the Plaintiff proceeded to close on the loan and accept the house in its "as-is" condition. The Plaintiff signed the documents related to accepting the house in its "as-is" condition because the Defendants told her that the loan would not be issued if the reports and appraisal showed any major defects. The Plaintiff was specifically told the required reports came back showing no major defects with the property. Accepting the property in its "as-is" condition was itself contingent upon the home inspection, termite inspection, and valid appraisal. Once those were done and the home cleared those inspections, then it would be accepted in its "as-is" condition. (R. pp. 898-899).

Fundamentally, the acceptance of the home in its "as-is" condition is contingent upon the Plaintiff being fully informed of the condition of the house. The Plaintiff cannot reasonably be expected to accept a home in its "as-is" condition without first knowing the "as-is" condition. If a termite inspection were done and a wood infestation report completed, they would have disclosed major defects in the house, and the closing would not have taken place.

VII. Conclusion

The Plaintiff's affidavit, the verified complaint, and supporting documents constitute at least a scintilla of evidence that warrants the denial of summary judgment in this case. Whether or not the Plaintiff wanted to pay for the home and termite inspections is not relevant. These inspections were required by the FHA loan.

Based on the foregoing, the evidence submitted in the Plaintiff's affidavit in opposition to summary judgment, the verified complaint, and supporting exhibits, the Plaintiff submits she has submitted more than a mere scintilla of evidence demonstrating genuine issues of material fact exists justifying the denial of summary judgment in this case. The Appellant requests the court reverse the orders of the trial court granting summary judgment to the Defendants based upon any ground appearing in the record in accordance with Appellate Rule 220(c).

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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