

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

L. Casey Manning, Presiding Judge

Case No.: 2012-CP-40-0249

Branch Banking and Trust Company.....Respondent,

v.

Graphic Express, LLC; Lanny R. Gunter, II; and Harry B. Benenhaley.....Appellants.

**APPELLANT'S MEMORANDUM IN OPPOSITION
TO MOTION TO DISMISS AND/OR EXCLUDE**

This matter comes before the Court pursuant to Respondent Branch Banking and Trust Company's Motion to Dismiss or, alternatively, Motion to Exclude Matter. For the reasons set forth below, the Respondent's Motion should be denied.

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SC Court of Appeals

ARGUMENT

I. RESPONDENT'S VIOLATION OF SOUTH CAROLINA CODE SECTION 36-9-610 IS PROPERLY BEFORE THIS COURT

A. This Issue Was Properly Raised By Appellant

To preserve an issue for review, a party must raise the issue to the court in a timely manner. E.g., *Centaur, Inc. v. Richland County*, 301 S.C. 374, 392 S.E.2d 165 (1990); *Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989); *Adams v. B & D, Inc.*, 297 S.C. 416, 377 S.E.2d 315 (1989); *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989); *Talley v. South Carolina Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 347 S.E.2d 99 (1986); *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983); *State v. Thomas*, 248 S.C. 573, 151 S.E.2d 855 (1966); *State v. Nathari*, 303 S.C. 188, 399 S.E.2d 597 (Ct. App. 1990).

Respondent's argument to this Court that the Appellant failed to raise any questions of law or fact below the Lower Court lacks merit. In addition, the Respondent's argument that the Appellant is raising these questions/issues for the first time on appeal is not supported by the record of the hearing before Judge Manning.

Counsel for the Appellant clearly framed the issues that were before the Court pursuant to Respondent's Summary Judgment Motion. "If the Court will look at the promissory note and security agreement, what happened basically, is that BB&T has come in, and seized various equipment as security, and they have disposed of that equipment and yet to provide anybody with our side with any accounting, nor any notice of sale, nor anything as required by the Code." (Transcript of Record, p.5, lines 2-8). Counsel for Appellant further added, "As we understand that law, unless a secured debtor complies with the UCC in regard to the notice of sale, it is presumed that a debtor has, in

effect taken the collateral back in satisfaction for the debt.” (Transcript of Record, p.5, lines 9-12). Counsel argued to the Court, “In this case the depositions we have taken indicate that, in fact, BB&T has seized the equipment, seized the collateral. To our knowledge has either disposed of it, without telling us they were going to, or simply kept it in satisfaction of the debt.” (Transcript of Record, p.5, lines 13-17). Counsel further stated, “My understanding is that if, in fact, they have taken the property, not seized, not disposed of it, that there basically is no debt; therefore denial (of summary judgment) would be appropriate.” (Transcript of Record, p.5, lines 23-25; p.6, lines 1-4). Counsel concluded his argument by informing the Court, “They have our equipment. They have had it for an extended period of time. There has been no sale, no notice of sale, no accounting in regards to sale, nor any indication as to what they’ve done with it. Under those facts as we understand the law, the law would presume that the collateral has been taken in satisfaction of the debt and it would be a question of fact then as to whether or not the debt was owed.” (Transcript of Record, p.6, lines 5-12).

B. This Issue Was Ruled Upon By The Trial Judge

Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it. *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939). In *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731, (1998), the court found that the parties’ amortization schedules clearly conflicted on the issues. The buyer propounded the issue had not been preserved for appellate review because the judge failed to rule on the issue. The court disagreed, stating “[t]hese issues were, in fact, integral to the computation of the final balances reached by either side. Thus, in this context, seller's objection was specific

enough to allow the trial judge to understand and rule upon the alleged error.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733-34 (1998). Because the order was based on one party’s schedule of computations and not the other, the court held that the order was a specific ruling on the issue. *Id.* The trial court ruled on seller’s objections by expressly adopting buyer’s amortization schedule in its order. Consequently, it was unnecessary for seller to make any post-trial motions.

The court came to the same conclusion in *Spence v. Wingate*, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009). In that case, the Court of Appeals had held that an argument was not preserved because the trial judge did not mention petitioner’s alternative theory of liability in its order. However, the Supreme Court of South Carolina held otherwise: “The trial judge’s order granted respondents’ motion for summary judgment on *precisely* the grounds argued by respondents at the summary judgment hearing. While that order did not restate the ground on which petitioner opposed the motion—a duty based on the existence of a prior attorney-client relationship—the order explicitly addresses that argument by ruling respondents “owed no duty or obligation” to petitioner. This ruling is sufficient to preserve petitioner’s argument” *Spence v. Wingate*, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009).

Just as in *Spence* and *Wilder*, the fact that the Court failed to specifically mention the arguments of the Appellant does not preclude preservation of the issue for appeal. This issue was ruled upon by the trial judge. In his Order dated September 10, 2012, Judge Manning awarded Respondents the full amount of debt allegedly owed under the promissory note and agreement. (Order filed 9/12/2012). In awarding the Respondents the full amount owed under the promissory note and agreement, the lower court

disregarded and failed to apply the statutory reduction pursuant to South Carolina Code Section 36-9-610. His order failed to make any findings regarding the collateral or any potential sale of the collateral. His order awarding the Respondent the full amount owed clearly ignored and/or misapplied South Carolina Law. There was no need for Appellants to file a Rule 59(e) Motion to preserve this issue for review.

II. THE RESPONDENT EXCEEDED ITS SECURITY INTEREST WHEN IT SEIZED THE GOODS, INVENTORY AND EQUIPMENT OF APPELLANT GRAPHIC EXPRESS

Further, the Respondent clearly exceeded its security interest when it seized the goods, inventory and equipment of Appellant Graphic Express. Even if the Court disregards the deposition testimony of Larry Gunter, whether or not the Respondent exceeded its rights in seizing all of the Appellant's assets, including its inventory creates a question of fact that was ignored by the Court and also an error of law. The trial court therefore erred in granting the Respondent's Motion for Summary Judgment and the trial court's Order is clearly erroneous. Further, the question of whether or not the Respondent exceeded its security interest creates questions of fact and summary judgment was improper.

III. THE COURT'S ORDER GIVES RESPONDENT AN IMPROPER WINDFALL

It is well settled that under South Carolina law that the purpose of actual or compensatory damages is to compensate a party for injuries suffered or losses sustained; the goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. See, *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000); *Roberts v. Sheriff Constr. Co.*, 284 S.C. 618, 328 S.E.2d 123 (Ct. App. 1985). Actual damages above and over this amount, or

“wind fall” damages are not favored. See, *McMaster v. Strickland*, 322 S.C. 451, 472 S.E.2d. 623 (1996).

The trial court’s Order effectively grants the Respondent an improper windfall. Following the Appellant’s alleged default under the terms of the Loan Agreements, the Respondent seized all of the goods, inventory and equipment of Appellant Graphic Express. As set forth above, the Appellants have, despite due and diligent demand, not received any information regarding the condition, location, and disposition of these goods, inventory and equipment.

Respondent brought suit and obtained judgment against Appellants for the entire amount allegedly due and owing on the promissory note. This judgment amount was in no way altered or reduced by the value of the inventory, goods and equipment of Appellant Graphic Express seized by Respondent and presently in Respondent’s possession. (Order of the Honorable L. Casey Manning). Respondent has therefore received not only the money it claims that it is owed under the note, but also the Appellant’s goods, inventory and equipment. This amounts to a windfall recovery to the Plaintiff above and beyond what it is owed.

The trial court’s Order, granting Respondent the full amount due and owing under the note and allowing the Respondent to keep Appellant’s goods, inventory and equipment without any offset of reduction in debt, constitutes a potential windfall recovery by Respondent. Trial judge’s Order granting Respondent summary judgment without determining the value of the goods, inventory and equipment seized by Respondent and applying it against the balance Respondent claims is due and owing to it is therefore fatally flawed and should be reversed by this Court.

CONCLUSION

For the reasons set forth above, the Order of the trial court granting Respondent summary judgment overlooks issues of fact and contains errors of law and should be reversed by this Court.



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May 2, 2013

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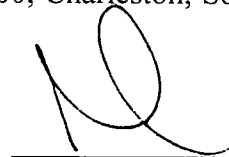
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PROOF OF SERVICE

I certify that I have served the Appellant's Memorandum in Opposition to Motion to Dismiss and/or Exclude by mail, to Laura S. Greaver, Esquire, CLAWSON & STAUBES, LLC, 126 Seven Farms Drive, Suite 200, Charleston, South Carolina 29492, on May 2, 2013.



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