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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2019-CP-10-4053

Blind Acre, Inc., Respondent-Appellant,

v.

Stash Storage Holdings, Inc., Appellant-Respondent.

APPELLANT-RESPONDENT STASH STORAGE HOLDINGS, INC.'S REPLY BRIEF

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ARGUMENT

1. *The contract's payment provisions call not for a flat fee, as Respondent-Appellant contends, but for payment in exchange for services rendered.*

Respondent-Appellant's argument for damages beyond the invoiced amount fails, because it relies on the erroneous proposition that "the agreement clearly called for a minimum of $25,000 [monthly] for a duration of 36 months." (Respondent-Appellant Response Brief, p.8.) This conclusion is not supported in the record and should be rejected.

Fundamentally, the contract was a professional services agreement, under which Appellant-Respondent would pay a fee for services rendered. To his credit, Mr. Holtkamp candidly acknowledged that this was the arrangement's intent: the contract's $25,000 monthly agency fee was owed "in consideration of the services performed by [Respondent-Appellant]," under a "points" system in which Appellant-Respondent's monthly fee purchased 500 points, one point being "a unit of work." (Hearing Transcript, p. 40-41.) That the contract called for a minimum purchase by Appellant-Respondent of 500 points, at a cost of $25,000, does not change the fact that the $25,000 monthly figure, as Mr. Holtkamp specifically agreed, is "not a flat rate…[but] a fee for services" rendered. (Hearing Transcript, p. 41.)

So, under the contract, what fees was Respondent entitled to? The fees owed in exchange for services rendered, a conclusion unavoidable as a matter of logic, and as a matter of the record. Mr. Holtkamp's admits that his company stopped delivering services, under this fee-for-services contract, in February 2019. (Hearing Transcript, p. 31.) And he admits, further, that his invoices subsequent to the discontinuation of services—limited solely to late fees—do not contain line items demanding payment for services rendered. (Hearing Transcript, p. 46). Mr. Holtkamp's testimony as to Respondent-Appellant's behavior plainly comports with the contract's payment scheme, under which fees are owed in exchange for services actually delivered.

Its demand for full contract payment—including for thirty months beyond its own discontinuation of performance in February of 2019—puts Respondent-Appellant's requested outcome at odds with South Carolina law's fundamental conception of contract damages, which is that damages for breach of contract consist of "out-of-pocket costs actually incurred as a result of the contract and the gain above costs that would have been realized had the contract been performed." *Bensch v. Davidson*, 354 S.C. 173, 177-178, 580 S.E. 2d 128, 130 (2003). Respondent-Appellant would have this Court ignore the "above costs" part; ignore that contract damages are payments due net of costs; and ignore that after February of 2019, Respondent-Appellant incurred no costs. The ultimate problem is that Respondent-Appellant demands not the amount that "would have been realized had the contract been performed," (*id.*) but the amount it would have realized had the contract been performed by Appellant-Respondent, while Respondent-Appellant's performance was excused beyond February of 2019. To uphold the contract damages award beyond February of 2019 would result in a windfall untenable under South Carolina law.

2. Respondent-Appellant's "flat fee" argument ignores the fact that it in effect mitigated its damages by discontinuing services beyond February 2019.

Though this is not technically a mitigation of damages case, consideration of the doctrine is useful in evaluating Respondent-Appellant's position. By February of 2019, Appellant-Respondent was in chronic noncompliance with its payment obligations under the contract; according to Mr. Holtkamp, Appellant-Respondent had delivered services for seven months—August 2018 through February 2019—but had been paid only for two of those months. (Hearing Transcript, p. 27-29.) As a result, in February of 2019, Respondent-Appellant "stopped working with [Appellant-Respondent]" on the grounds of "lack of payment." (*Id.* at 27:4–7.) Simply put, faced with Appellant-Respondent's chronic non-performance under the contract, Respondent-

Appellant responded by refusing to render further performance of its own. Or, as Mr. Holtkamp put it, Respondent-Appellant "mitigated that loss." (Hearing Transcript, 27:24–25.)

The reason this is not a mitigation of damages case—and why Appellant-Respondent does not rely upon that doctrine—is that Respondent-Appellant, by refusing further services to a party who obviously could not pay for them, in fact took the measures reasonably required to prevent the avoidable accumulation of unnecessary and excessive damages. *See, generally, U.S. Rubber Co. v. White Tire Co.*, 231 S.C. 84, 97 S.E. 2d 403 (1956) (discussing application of plaintiff's obligation to mitigate contract damages). Faced with a customer immediately and chronically in arrears, Respondent-Appellant might have continued, for three years, to deliver the services that entitled it to $25,000 per month in fees, confident that it could then claim, later in court, that under the contract it was entitled to $750,000 plus late fees and interest. Had it chosen that path, however, Respondent-Appellant would have opened itself up to a strong mitigation of damages defense.[1]

So, it is paradoxical—in an unequitable, "having its cake and eating it, too" sort of way—for Respondent-Appellant, having prudently mitigated its damages by refusing performance six months into the contract, to ask the Court to award it fees for thirty months of services it never delivered. It asks the Court to give its imprimatur to an outcome akin to a double recovery: Respondent-Appellant would enjoy the benefits of having withheld its own performance, while simultaneously receiving the benefits of the other party's full performance.

CONCLUSION

This Court should reverse the Master-in-Equity's award of actual damages and affirm its denial of punitive damages.

[1] On similar lines, that Respondent-Appellant so promptly discontinued performance supports the trial court's refusal to award punitive damages, the claim for which was premised upon Respondent-Appellant's being wrongfully induced into unpaid performance. (Hearing Transcript, p. 16-18.) As it happened, Respondent-Appellant was induced to perform, without pay, for less than four months.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on **September 1, 2022** a true and correct copy of the **APPELLANT-RESPONDENT STASH STORAGE HOLDINGS, INC.'S REPLY BRIEF** were served via email (see attached) on all counsel of record as follows:

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Blind Acre, Inc. v. Stash Storage Holdings, Inc. - Appellate Case No. 2022-000103

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Attached for service upon you please find Appellant-Respondent's Reply Brief and Proof of Service.

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2 attachments

22.09.01 Stash REPLY to Blind Acre Response Brief.pdf
185K

22.09.01 PROOF OF SERVICE- Reply Brief.pdf
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