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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

Appellate Case No. 2022-000103

Blind Acre, Inc. Respondent-Appellant,

v.

Stash Storage, Holdings, Inc., Appellant-Respondent.

FINAL BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Was there a basis in the record to support the trial judge’s punitive damage award of \$1,000,000.00 in his order of June 15, 2021?**

SUGGESTED ANSWER: Yes.

- II. Did the trial judge err in his Order of December 30, 2021, when he found, upon reconsideration pursuant to SCRCP 59(e), “that there was no basis in the record to support the \$1,000,000.00 in punitive damages award?”**

SUGGESTED ANSWER: Yes.

STATEMENT OF THE CASE

A. Procedural History

This is an appeal from the trial judge's decision to reconsider and remove an award of \$1,000,000.00 in punitive damages that had previously been awarded based on a finding of clear and convincing evidence of the Defendant's deliberate misrepresentations concerning the inducements to enter into a contract and to continue performance thereunder. (R. p. 1). Upon reconsideration pursuant to Rule 59(e) SCRPC, the trial judge simply stated, "the Court determines that there is no basis in the record to support the \$1,000,000.00 punitive damages award." (R p. 8).

This action began on July 31, 2019 with Plaintiff's filing of a Summons and Complaint against Defendant, Blind Acre, Inc. Plaintiff alleged several causes of action including breach of contract, promissory estoppel, negligent misrepresentations, fraud, violation of the Unfair Trade Practices Act "UTPA" and quantum meruit. Defendant was personally served on September 26, 2019 and failed to answer or otherwise respond. Plaintiff moved for an Order of default. The Honorable Judge Roger M. Young filed an Order of Default on March 23, 2021. Thereafter, Plaintiff moved for an order referring the case to the Master in Equity for Charleston County for a damages hearing. After proper notice, a damages hearing was held before the Honorable Mikell Scarborough, Charleston County Master in Equity on June 2, 2021.

Plaintiff presented evidence of his damages and defendant, through counsel, was present and contested the evidence at the hearing.

Having heard the evidence presented, Judge Scarborough awarded Plaintiff actual damages in the amount of \$937,589.15 and \$1,000,000.00 in punitive damages. The damage award was filed on SCRCF Form 4C on June 15, 2021 with formal order attached.

Importantly, Judge Scarborough's June 15, 2021 Order stated as follows:

On the Plaintiff's cause of action for negligent misrepresentation, I further find, by clear and convincing evidence – specifically, Plaintiff's testimony regarding deliberate misrepresentations by Defendant's agent Thomas Stevenson, on which the Plaintiff relied to its detriment – that an award of \$1,000,000.00 in punitive damages is appropriate. (R p. 1).

On June 25, 2021, Defendant moved for reconsideration of the actual and punitive damages awards pursuant to Rule 59(e) contending that “the punitive damages award is not supported by the evidence submitted and testimony given.”

On July 6, 2021, Plaintiff filed a memorandum in opposition to Defendant's motion to alter or amend the order of June 15, 2021.

On December 30, 2021, without holding a hearing on the Rule 59(e) motion to reconsider, Judge Scarborough issued an order upholding the actual damage award of \$937,589.15 but reversing the previous award of \$1,000,000.00 in punitive damages in which he had previously found warranted by clear and convincing evidence on the claim of negligent misrepresentations attributed to Stash's agent, Thomas Stevenson:

Upon consideration of the Motion without a hearing, the Court determines that there is no basis in the record to support the \$1,000,000.00 punitive damages award. (R p. 8).

Unlike the Order of June 15, 2021 stating the basis for the award of punitive damages, there was no information or clarification in the December 30, 2021 Order concerning why the significant amount of punitive damages, or even any amount of punitive damages, were no longer warranted.

B. Testimony at the June 2, 2021 Damages Hearing

At the damages hearing on June 2, 2021, Plaintiff called one witness, Scott Holtkamp, CEO of Blind Acre, Inc., as his sole witness regarding damages. Mr. Holtkamp testified that he was the CEO of Blind Acre, Inc., that he started the company back in 2008 and that he was the CEO. (R p. 35.) Mr. Holtkamp described Blind Acre, Inc. as, “a digital marketing strategy firm.” (R p. 41). He further described the work of Blind Acre as follows:

We focused on all things digital. We also did anything traditional marketing wise for companies like Stash.

What that means and what that entails is that we would do anything from building website software to websites themselves, do digital marketing lead generation and social media all the way up to search and optimization, brand identity, you name it, anything under the sun – anything marketing we did. (R p. 41-42).

Mr. Holtkamp then testified about the nature of the contract that was signed between Blind Acre, Inc. and Stash Storage, Inc. on August 1, 2018. He identified the contract that was attached and filed along with the Summons and Complaint as being a true and accurate copy of the contract between Blind Acre, Inc. and Stash Storage, Inc. (R p. 43). He testified that the contract called for a minimum amount of \$25,000.00 in payments per month for 36 months and that that this amount was a sum certain that was a material inducement for Blind Acre, Inc. to sign and agree to terms under this contract with Stash Storage, Inc. (R p. 43-44).

Mr. Holtkamp testified that the contract required Blind Acre, Inc. to perform significant work:

[W]e were hired to become the agency of record, and we did everything for Stash from the strategy of implementing visual and marketing efforts to coming up with a strategy of how to go to market with new product lines, brand new strategies into how they should actually facilitate and grow within different markets. We did research development, everything you can

think of on a competitive hub, we created everything that was submitted to you. Then we grew into helping within the brand of Envy (phonetic) as well as into the digital market, and implementation for anything social, anything overheaded, paper clipped, anything you can think of within the digital space, we did for them. (R p. 44-47).

At the time of the contract, Mr. Holtkamp explained that he had approximately 18 employees with multiple contractors who worked all over the country. (R p. 46). Mr. Holtkamp testified that he brought his top talent from within the company to work on the Stash team to fulfill Stash's needs and that he toned down other areas of business to focus on the needs of Stash, including hiring more people to work with the team dedicated to Stash. (R p. 46-47). As an example, Mr. Holtkamp testified that, "[w]e slowed our pipeline on or SIC business development side because of what we were growing with Stash." (R p. 47).

Mr. Holtkamp testified that he sent Stash 27 invoices for work over and above the base level of \$25,000.00 per month according to the terms of the contract for the months including August 1, 2018 through June 15, 2019 and that this work totaled \$237,589.15. (R p. 48). Mr. Holtkamp further testified about the work related to these invoices:

So it's anything from third party logistics working with companies like Google, Facebook, delivering papers – what we call ad spend, and actually delivering campaigns through those platforms. We would get paid on our service outside of anything that was outside of the \$25,000. There was a percentage that was associated with that. What that spend was, we would get a percentage of that spend. On the other side, there were times where I actually paid some of the bills directly to Facebook or Google on our credit card to get reimbursed.

I also purchased domains. What domains are URLs that go through GoDaddy that they approved to purchase directly for them, and that is on the invoice as well. (R p. 15).

Mr. Holtkamp testified that he received a first payment of \$25,000.00 on August 31, 2018 on his first invoice that was due on August 1, 2018. And he further testified that

he continued to send Stash invoices but did not receive a second payment of \$25,000.00 until January 18, 2019. By the time of the second payment, Mr. Holtkamp testified that he was owed \$100,000.00 representing the minimum portion base per month in addition to the amount invoiced over the minimum. (R p. 50).

Despite Stash being severely in arrears, Mr. Holtkamp testified that Blind Acre continued to work and fulfill the terms of Blind Acre's contractual obligations. (R p. 51). Mr. Holtkamp testified that Blind Acre continued to work because Thomas Stevenson, CEO of Stash, repeatedly led him to believe that payment would be imminently forthcoming. Mr. Holtkamp explained:

Q. And did you continue to work and fulfill the terms of your contractual obligations during that time?

A: I did.

Q. Why?

A. Based on multiple reasons: One, we were told multiple times that money was coming in from investors and not to worry about it. There were also other times where we would talk about stopping and at the end of the day he would talk me back into it.

Q. When you say he –

A. Tom Stevenson.

Q. Who is Tom Stevenson?

A. Tom Stevenson used to be the owner of or cofounder of Stash Storage.

Q. Is Tom Stevenson the one who signed the contract on behalf of Stash?

A. He is.

Q. And so on their promise that they would pay you and get right with you, you continued to provide them with the contractual services?

A. That's correct. Yes.

(R p. 51, L.5 – R p. 52, L.1).

Mr. Holtkamp testified that Tom Stevenson made misrepresentations to him so that Blind Acre would agree to sign the contract for services and to continue to perform those services for a period of time after Stash had fallen behind on its obligation to pay for those services. Mr. Holtkamp testified as follows:

Q. All right. Now, in terms of this inducement – there's been a default rendered against Stash. We alleged fraud, and we said that they induced you into signing this contract on the promise that they were capitalized, had money to pay, would pay; is that correct?

A: Yes.

Q. That was not the case, was it?

A. Absolutely not the case.

Q. They did not pay?

A. No.

Q. Not the full amount?

A. No.

Q. If they had not promised you that they would pay you, would you have gotten out of this thing earlier than you did?

A. Yes.

Q. Would you have ever gotten into this thing if you knew --

A. I wouldn't have signed the agreement with them.

(R p. 62, L. 13 – R p. 63, L. 8).

Mr. Holtkamp testified that he suffered significant financial loss as a result of the misrepresentations that induced him to sign the contract to provide services

for Blind Acre and to continue performing those services while being told that payment was imminently at hand. He testified that because of the misrepresentations, he became unable to pay his employees, he lost employees, the business of Blind Acre essentially shut down, he could no longer afford to send his children to private school, he was forced to sell his home and move, and he incurred significant debt and tax obligations. (R p. 63-64).

ARGUMENT

I. STANDARD OF REVIEW

Under South Carolina law, the trial judge has considerable discretion regarding the amount of damages, both actual and punitive. *Collins Entm't Corp v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct.App.2003); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 538 S.E.2d 15 (Ct.App.2000). Therefore, review on appeal is limited to the correction of errors of law. *Kuznik v. Bees Ferry Assocs.*, 342 S.C. at 611, 538 S.E.2d at 32; *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). "Our task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damage award." *Austin v. Specialty Transp. Services*, 594 S.E.2d 867, 358 S.C. 298 (Ct.App.2004) citing *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 314 S.E.2d 19 (Ct.App,1984).

A trial judge's decision not to award punitive damages has been reviewed under an abuse of discretion standard in consideration of the totality of the evidence. *Kuznik v. Bees Ferry Assocs.*, 342 S.C. at 612, 538 S.E.2d at 33. (Holding "Master did not abuse his discretion in declining to award punitive damages.") (Id. At 612). An abuse of discretion occurs when the judge entering the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App.1997)

II. THE RECORD CONTAINS A BASIS FOR AN AWARD OF PUNITIVE DAMAGES

In his December 30, 2021 Order, the trial judge removed his previous punitive damage award of \$1,000,000.00 and stated that, “there is no basis in the record” to support the award. (R p. 8). The Order did not state that the judge was simply using his discretion to reconsider the award, but rather held that there was “no basis in the record,” which, in effect, means that his previous award was in error. However, there was no explanation concerning what the judge believed no longer amounted to the basis for a punitive damages award.

The previous award of punitive damages contained in the June 15, 2021 Order stated the basis for the punitive damages award, and specifically held the following: “On the Plaintiff’s cause of action for negligent misrepresentation, I further find, by clear and convincing evidence – specifically, Plaintiff’s testimony regarding deliberate misrepresentations by Defendant’s agent Thomas Stevenson, on which the Plaintiff relied to its detriment – that an award of \$1,000,000.00 in punitive damages is appropriate.” (R p. 1).

If the judge had addressed the facts concerning the basis or lack thereof for the punitive damages award in his December 30, 2021 Order and as a result reconsidered the award of punitive damages finding that the award was no longer appropriate, that would be one thing. In that scenario, on appeal, a reviewing court would likely uphold the judge’s decision because a judge has wide latitude and discretion to determine actual and punitive damages. *Collins Entm’t Corp v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct.App.2003); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 538 S.E.2d 15 (Ct.App.2000). That is not the case here. The trial judge’s order of December 30, 2021 provided no factual basis for why he changed his mind. We are left to speculate. This appeal

does not concern an appeal of the trial judge's discretion. This appeal concerns the trial judge's ruling that there was "no basis in the record to support the \$1,000,000.00 punitive damages award." (R p. 1).

To justify an award of punitive damages, a plaintiff must demonstrate that a defendant's conduct was willful, wanton or undertaken in reckless disregard of the plaintiff's rights." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. at 611, 538 S.E.2d at 32 citing *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 468 S.E.2d 633 (1996).

The plaintiff plead as a third cause of action, negligent misrepresentation with an accompanying plea for punitive damages. (See Complaint of July 31, 2019). On account of the defendant's failure to answer or otherwise respond, the facts of the complaint were deemed admitted by Order of Default, Rule 55 SCRPC. (See Order of Default, March 23, 2021). Among the allegations contained in the complaint, were the following:

32. That Defendant made false representations to Plaintiff.
33. That Defendant had a pecuniary interest in making the statements.
34. That Defendant had a duty of care to see that it communicated truthful information to the Plaintiff.
35. That Defendant breached that duty by failing to exercise due care.
36. That Plaintiff justifiably relied on Defendant's representations.
37. That Plaintiff suffered a pecuniary loss as the proximate result of his reliance upon Defendant's representations.

A Plaintiff must prove the following in an action for negligent misrepresentation:

(1)The defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680-681 (Ct.App.2001).

Negligent misrepresentation is a tort and it is an action in negligence. *Gruber v. Santee Frozen Foods Inc.*, 309 S.C. 13, 419 S.E.2d 795, 799 (Ct.App.1992). “In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant’s conduct was willful, wanton or in reckless disregard of the plaintiff’s rights.” *Sea Island Food v. Yaschik Development*, 433 S.C. 278, 289, 857 S.E.2d 902. (Citing *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct.App.2011). “The test by which a tort is to be characterized as reckless, [willful] or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff’s rights.” *Sea Island Food v. Yaschik Development*, 433 S.C. 278, 289, 857 S.E.2d 902. (Citing *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct.App.2011). (quoting *Rogers v. Florence Printing Co.*, 233 S.C. 567, 577-78, 106 S.E.2d 258, 263 (1958).

To clarify, this appeal concerns whether the June 15, 2021 award of punitive damages is supported by a basis in the record of clear and convincing evidence of defendant’s reckless, willful or wanton conduct on a cause of action that would support an award of punitive damages. This appeal does not concern the question of whether the punitive damage award violates due process because the defendant never requested a constitutional review of the damage award and never argued that the punitive damage award violated due process. “If there is a claim that an award of punitive damages violates due process, an appellate court examines the trial court’s constitutional review de novo.” *Sea Island Food v. Yaschik Development*, 433 S.C. 278, 289, 857 S.E.2d 902. (Citing *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570 583, 686 S.E.2d 176, 183 (2009).

In his order of June 15, 2021, the trial judge correctly found that the evidence in the record, namely the testimony of Scott Holtkamp, showed by clear and convincing evidence “deliberate misrepresentations by Defendant’s agent Thomas Stevenson, on which the Plaintiff relied to its detriment.” (R p. 1). As found in the record, these misrepresentations were significant and deliberate.

Mr. Stevenson induced Mr. Holtkamp to sign a contract that required a minimum payment of \$25,000.00 per month by representing to Mr. Holtkamp that Stash was properly capitalized and able to pay for performance under the contract.

Q. All right. Now, in terms of this inducement – there’s been a default rendered against Stash. We alleged fraud, and we said that they induced you into signing this contract on the promise that they were capitalized, had money to pay, would pay; is that correct?

A: Yes.

Q. That was not the case, was it?

A. Absolutely not the case.

Q. They did not pay?

A. No.

Q. Not the full amount?

A. No.

Q. If they had not promised you that they would pay you, would you have gotten out of this thing earlier than you did?

A. Yes.

Q. Would you have ever gotten into this thing if you knew --

A. I wouldn’t have signed the agreement with them.

(R p. 62, L. 13 – R p. 63, L. 8).

Mr. Holtkamp testified that Blind Acre continued to work on the contract with Stash after Stash fell significantly in arrears by failing to make payments after August 2018. Mr.

Holtkamp testified as follows:

Q. And did you continue to work and fulfill the terms of your contractual obligations during that time?

A: I did.

Q. Why?

A. Based on multiple reasons: One, we were told multiple times that money was coming in from investors and not to worry about it. There were also other times where we would talk about stopping and at the end of the day he would talk me back into it.

Q. When you say he –

A. Tom Stevenson.

Q. Who is Tom Stevenson?

A. Tom Stevenson used to be the owner of or cofounder of Stash Storage.

Q. Is Tom Stevenson the one who signed the contract on behalf of Stash?

A. He is.

Q. And so on their promise that they would pay you and get right with you, you continued to provide them with the contractual services?

A. That's correct. Yes.

(R p. 51, L.5 – R p. 52, L.1).

Essentially, Mr. Holtkamp was on the horns of a dilemma: he could cut his losses and stop his performance under the contract, or he could continue to fulfill his obligations under the contract and hope that Tom Stevenson was telling him the truth. The evidence contained in the record shows by clear and convincing evidence that Tom Stevenson's

representations concerning Stash’s ability to pay both at the time of the formation of the contract and during the period of performance were reckless, willful, wanton and deliberate and the record before the Court contains a sufficient basis to affirm the award of \$1,000,000.00 in punitive damages as awarded in the trial judge’s Order of June 15, 2021.

III. CONCLUSION

The record contains a basis for the award of punitive damages as reflected in the Order of June 15, 2021. The trial judge committed error when, in his Order of December 30, 2021, he found that the record contained “no basis” for an award of punitive damages.

Respectfully Submitted,

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Blind Acre, Inc. Respondent,

v.

Stash Storage, Holdings, Inc. Appellant.

CERTIFICATE OF COUNSEL

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

Respectfully Submitted,

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