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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse

Case No. 2020-CP-04-01202
Appellate Case No.: 2022-001527

MOATS CONSTRUCTION, INC. ……..…Appellant,

v.

CECIL R. DYAR ……..…..……Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE FACTS

Cecil A. Dyar ("Dyar") previously filed a Summons and Complaint against Moats Construction, LLC ("Moats") on November 1, 2019 to foreclose the Agreement for Sale and Purchase of Real Property ("Agreement") regarding the real property that is the subject of this action located at 300-600 West Orr Street, Anderson, South Carolina (Anderson County Tax Map Number 123-24-03-003). Service of Process by certified mail was attempted on the agent for service of process, Russell T. Moats, identified in the documents on file with the Secretary of State for the State of South Carolina. Service was declined by Moats. Thereafter, personal service of said Summons and Complaint was attempted on several occasions by a retained authorized process server at that same address. On the last attempt, the process server reported that when service was attempted, Moats pulled a weapon (gun) on the process server, put the gun to his head and refused to accept service. The Sheriff's Office was then contacted to serve Moats without success.

Before service by the Sheriff's Department on Moats could be obtained, Moats filed and served the present action on Dyar. The allegations contained in the lawsuit filed by Dyar on November 1, 2019 are identical to the allegations set forth in the Answer and Counterclaim filed by Dyar on June 23, 2020 to the Moats' Complaint. In the original Complaint and in the Answer and Counterclaim, Dyar asserted his entitlement to the balance owed under the Agreement as of July 5, 2015, plus interest, costs and expenses, including attorney's fees. Moats failed to respond to that Counterclaim which, as addressed below, entitled Dyar to summary judgment as to the Counterclaim, as a matter

of law. The total amount owed by Moats to Dyar as of April 1, 2021 was $216,047.42, plus attorney's fees of $32,407.11 (15%) for a total due of $248,454.53.

Moats' deposition was taken on January 8, 2021 by counsel for Dyar. Moats had every opportunity to testify as to any and all issues, claims, defenses, etc., that he alleges in this action. Also, Moats was examined by his attorney in that deposition which presented him the same opportunity.

Based on Moats' failure to file a Reply to the Counterclaim, Dyar filed an Affidavit of Default and Motion for Judgment on the Pleadings or, in the alternative, Motion for Summary Judgment on February 15, 2021. Dyar filed his Memorandum in Support of his said Motion on April 1, 2021. Moats, thereafter, filed a Motion for Enlargement of Time to Reply to the Counterclaim. The Answer and Counterclaim were filed and served on June 23, 2020. Therefore, Moats' Motion for Enlargement of Time was not filed until eight (8) months later on February 22, 2021 with no legal excuses asserted for the delay.

A hearing was held on April 13, 2021 regarding Dyars' Motion for Judgment on the Pleadings, or in the alternative, Motion for Summary Judgment. At that hearing, Moats was again given the opportunity to address each and every issue in this case, including the asserted "legal" claims he contends should have been tried first before a jury as well as the "damages" claims/issues he is now contending were not properly addressed. Based upon the pleadings, testimony and exhibits presented at that hearing, the Court issued its Form 4 Order which held that Dyar was entitled to Summary Judgment against Moats, that Moats was in default for failure to reply to a compulsory counterclaim, without good cause having been shown for said failure, and that Dyar was entitled to foreclosure

of the subject property. The Court also concluded that Moats did not contest that foreclosure is the appropriate remedy in this case but that a damages hearing should be held to determine the appropriate amount of damages due Dyar. At the Court's direction, a formal Order was prepared by counsel for Dyar and signed by the Court on June 10, 2021. Subsequently, Moats filed his Motions to Reconsider and Amend Judgment which were subsequently denied by the Court.

Counsel for Dyar thereafter made numerous attempts to schedule a damages hearing pursuant to the Court's Order. During this same time period, counsel for Moats filed a Motion to Be Relieved as Counsel on February 4, 2022 and Motion for a Continuance on February 8, 2022. Dyar filed his Response to said Motions on February 8, 2022 and stated therein as follows:

> This Court filed its Form 4 Order on May 4, 2021 following a hearing on Defendant's Motion for Summary Judgment against the Plaintiff…. Thereafter, at the Court's direction, a Formal Order was prepared by Defendant's counsel, was signed by the Court and was filed in the Office of the Clerk of Court on June 10, 2021….
>
> Since the filing of the Orders, defense counsel has attempted to schedule on numerous occasions a damages hearing before the Court pursuant to the Court's direction in the Formal Order pursuant to Rule 55(b)(2) of the South Carolina Rules of Civil Procedure. Numerous impediments have arisen regarding the Defendant's attempt to schedule a damages hearing. During the interim time period, the Plaintiff, through his attorney, <u>has had the opportunity to schedule whatever depositions he wanted to take and, in fact, the deposition of the Defendant (Dyar) was taken by the Plaintiff's (Moats) attorney on November 23, 2021</u>. This is the only deposition that Plaintiff's counsel sought to take prior to the damages hearing. (Emphasis added).

In other words, Moats chose <u>not</u> to take any <u>other</u> depositions, including the deposition of the expert witness retained by Dyar who had issued a written report on April 1, 2021 which was furnished to Moats' attorney.

A damages hearing was finally held on February 24, 2022 resulting in a Form 4 Order by the Court. In that Order, the Court determined that Dyar was entitled to Judgment against Moats in the amount of $250,614.04. The Court further ruled that Moats had failed to present any evidence or establish any right(s) to a set-off for any amount although he was given an opportunity to present evidence of any such issue(s) at the damages hearing. The Court directed counsel for Dyar to prepare a formal Order.

The Court issued its Formal Order dated July 21, 2022 based upon the damages hearing held on February 24, 2022 in which the Court carefully reviewed the evidence received from the parties on all issues and ruled for Dyar, as follows:

> At the damages hearing, Dyar presented the testimony of Joshua Pruet-Lange, a registered tax preparer with the Internal Revenue Service and a bookkeeper since 2016 employed by Electric City Tax and Bookkeeping, formerly Shiflett Bookkeeping and Tax. Mr. Pruet-Lange examined the records of payments made under the Agreement by Moats to Dyar and testified that, in his opinion, the balance owed as of February 1, 2022 is $222,415.95. Moats presented no expert testimony at the hearings regarding the amount owed under the Agreement nor any evidence at the hearings pertaining to any offsets/improvements, if any, to which he claims he is entitled or the value thereof. Further, Moats has failed to present at the hearings any testimony as to any equity he is entitled to and/or to receive the benefit for, other than "sweat equity."

Thereafter, Moats' Motion to Reconsider was denied by the Court's Order dated July 21, 2022.

Moats then filed a Motion to Alter or Amend the Order granting Dyar's Motion for Damages and Judgment of Foreclosure and Sale to which Dyar responded. In that response, Dyar asserted:

> At the conclusion of the hearing, Moats' attorney called his client as a witness and he testified, under oath, <u>without any basis and in contrast to previous attorney/accountants who, at various times in this case, had calculated amounts due under the Agreement</u>, that he did not owe Dyar a dime under the Agreement. In other words, he did not agree with the calculations determining the amount

owed under the Agreement as determined by any "experts" hired by him or by Dyar. (Emphasis added).

The Court denied Moats' Motion to Alter/Amend and stated in the Formal Order prepared by the Court:

> The Court held its initial hearing on April 13, 2021, in which the Defendant moved for Summary Judgement. At all times, the Plaintiff did not contest the Defendant's right to foreclosure. There was a disagreement between the parties as to the correct amount owed by the Plaintiff on the subject property. The Court ordered that a damages hearing be held so that evidence could be submitted for the Court to consider regarding the issue of the amount owed to the Defendant.
>
> A damages hearing was held on February 24, 2022, with proper notice to the parties. The Plaintiff appeared along with his previous attorney, who moved to be relieved as counsel. The Court directed that the Plaintiff's counsel remain counsel of record until the damages hearing was completed. The Court took testimony, including that of the Plaintiff, and concluded that the Defendant was entitled to a judgement in the amount of **$250,614.04.**
>
> The Plaintiff retained new counsel, and moved that a new damages hearing be held or that the amount of the judgement be modified. Numerous exhibits were entered into the record by the Plaintiff to show discrepancies in the amounts as set by the Defendant's expert witness. The Defendant argues that this motion is improper, since the Plaintiff had ample opportunity to challenge the amount sought by the Defendant at the damages hearing and failed to do so.
>
> The Court carefully considered the exhibits presented by the parties, the transcripts of the hearing, arguments of counsel, and applicable law. Accordingly, the Court concludes that Plaintiff's motion for reconsideration pursuant to Rule 59(e), SCRCP be denied as there was no misunderstanding or failure to fully consider all arguments and issues at the damages hearing. *Elam v. S.C. Dep't of Transp*., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). The Court notes that, at this motion for reconsideration, Plaintiff's counsel provided the materials in an organized and understandable manner. The Court may have arrived at a different conclusion regarding the judgement amount had these materials been presented at the damages hearing. However, it appears that none of these calculations were new, or based on information that was not in the Plaintiff's possession at the time of the damages hearing. The Court notes that the Plaintiff had retained an expert at some point in the litigation, although the Plaintiff testified that he disagreed with the expert's calculations. Plaintiff's counsel at the time informed the Court that the expert was not called to testify at the damages hearing because he "had not yet been paid."

> The Court concludes that it will be improper to set aside the judgement and order a new hearing and/or modify the amount of the judgement simply because the Plaintiff has done a much better job now of preparing the evidence/records in his possession than he did at the time of the damages hearing.

Moats then filed his Notice of Appeal on October 26, 2022. Moats thereafter filed a Consent Order and Satisfaction of Judgment on November 23, 2022 which states that "the Judgment in this action be shown as satisfied." (Emphasis added).

STANDARD OF REVIEW

1. Right to Appeal

Moats voluntarily paid the amount of the Judgment and filed a Satisfaction of Judgment. Therefore, he is barred from pursuing this appeal. *Reedy River Power Co., v. City of Laurens, et al,* 109 S.C. 240, 96 S.E. 2d 116 (1918); *Kelm v. Hess,* 8 Ohio App. 3d 448 (1983).

2. Summary Judgment

In reviewing the granting of a summary judgment motion, the Appellate Court applies the same standard that governs the trial court under Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.,* 383 S.C. 11, 14, n.2, 677 S.E. 2d 612, 614 n. 2 (Ct. App. 2009). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose,* 350 S.C. 488, 567 S.E. 2d 857 (2002); *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E. 2d 830 (Ct. App. 2002). A court should grant summary judgment when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. *Etheredge v. Richland School Dist. One,* 341 S.C. 307, 311, 534 S.E. 2d 275, 277 (2000). "The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to

make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing & Regulation,* 337 S.C. 476, 485, 523 S.E. 2d 795, 800 (Ct. App. 1999). "In such a situation, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Baughman v. American Tel. & Tel. Co.,* 306 S.C. 101, 116, 410 S.E. 2d 537, 546 (1991)."

ARGUMENT

I. Moats is barred from pursuing his appeal because he voluntarily paid the amount of the Judgment and filed a Satisfaction of Judgment.

A. After the issuance of the Court's final Order (October 4, 2022) and Notice of Sale, Moats prepared and filed a Consent Order and Satisfaction of Judgment stating that "…the Judgment in this action be shown as satisfied." (Order dated November 23, 2022). Thereafter, the public sale, for which notification to the public had been given as required, was cancelled, title was transferred to Bry Tye Moats Construction Company, LLC and full payment of the amount of the judgment was sent to and received by Dyar. In other words, the litigation between the Plaintiff-Appellant and the Defendant-Respondent was ended and the Judgment in favor of Dyar against Moats has been paid and satisfied. Therefore, there is nothing in this case for this Court to consider and this case is over. *Reedy River Power Co. v. City of Laurens, et al.* 109 S.C. 240, 96 S.E. 116 (1918).

Further, pursuant to S.C. Code Ann., §18-9-170, Moats had the option to either post a bond to stay the execution of this Judgment and appeal the decision of the Lower Court to the South Carolina Supreme Court or satisfy the Judgment. Moats chose to avoid, for whatever reason, the lesser expense associated with obtaining such a bond and voluntarily

paid the full amount of the Judgment. Moats had a choice, post a bond and stay the execution of the judgment or pay the judgment. He voluntarily chose the latter. Accordingly, there is nothing in this case for the Court to consider. *Reedy River Power Co. v. City of Laurens, et al.* 109 S.C. 240, 96 S.E. 116 (1918); *Kelm v. Hess,* 8 Ohio App. 3d 448, 457 N.E. 2d 911 (1983).

B. Appellant states in the Affidavit of Russell Moats that was attached to Appellant's Return to Respondent's Motion to Dismiss as follows:

> "5. Upon entry of the circuit court's Order Granting Defendant's Motion for Damages and Judgment of Foreclosure and Sale, I undertook the process of investigating the process for obtaining a bond. During my research, I learned about the potential costs of a bond secured by real estate and costs for a bond secured by cash. I was informed by one bond provider that a bond in the amount of the court's judgment would have to be secured by cash." (emphasis added).

It is interesting to note that nowhere in the Affidavit does it state that Moats did not have the financial ability to pay for a bond either secured by real estate or cash. In *Kelm v. Hess,* 457 N.E. 2d 911, the Court stated "since appellant was in a financial position to pay the judgment, she undoubtfully would have been able to give an adequate appeal bond." Further, he makes no statement/allegation wherein he alleges that his ultimate decision was based upon his concern that, if the Judgment was reversed or modified, he would be unable to obtain complete restitution. The reason is obvious. He had no such concerns. Moats, by his own admissions, actions and testimony, had the financial ability to pay the Judgment in full, which he did, or post a bond, which he didn't do, and makes no assertions as to any restitution issues/concerns in his Affidavit (Appellant's Exhibit 4). Therefore, Moats voluntarily failed to post a bond and voluntarily chose to pay the Judgment without any expressions of concern as to his ability to obtain restitution if he

was successful on appeal. Stated another way, Moats had the opportunity to post a bond and stay this action, thus preserving his right to appeal and, depending on the result of that appeal, claim a right to restitution. However, Moats voluntarily chose another course of action and is bound by that choice. *Kelm v. Hess,* 457 N.E. 2d 911.

Further, while argued in his brief by his attorney, there was absolutely no evidence presented in his Affidavit that Moats was ever concerned about the issue of restitution and is now the owner of the real property since he paid the Judgment in full. In addition, it is very interesting that the only authorities from South Carolina that Appellant cites in his Brief dealing with the issue of restitution are cases dealing with workers compensation claims as opposed to claims in an action for a judgment of foreclosure directing the sale of real property. Further, there is absolutely no evidence presented in his Affidavit that restitution could not be enforced if the Appellant was successful on appeal.

Appellant's Affidavit gives no details as to the extent of his investigation into the bond issues, comparative costs of a bond secured by real estate as opposed to cash, nor the number of bond providers (other than one) with whom he discussed the need for a cash bond; and, not once did he mention that his decision was based upon any hardship(s) - financial/restitution, etc. - of any kind.

The Appellant also contends that there was never an agreement between the parties to end this litigation. However, the relevant question on this point is whether there was ever an Agreement to pay the Judgment in full and allow the Appellant to proceed with his appeal? The answer to that question is an emphatic "NO." (See Appellant's Exhibit 5). Appellant had a right to satisfy the Judgment – that was his choice. He does

not have the right to imply that this satisfaction was a part of any "agreement" to allow him to proceed with his appeal after doing so. No such agreement exists!

Finally, there are no issues separate and apart from the Judgment of Foreclosure. The Lower Court heard all issues in this case, as the Court Orders reflect. When the Judgment was paid, this litigation, and all issues contained therein, ended and there is nothing further to consider on appeal.

There is no longer in existence a "Final Judgment" necessary to create a "Right to Appeal" as referenced in Rule 201(a), South Carolina Rules of Civil Procedure. The Final Judgment has been satisfied!

II. Moats has no factual or legal basis for any of his claims/defenses in this case.

Moats has known that he owed Dyar an amount of money under the Agreement since January 5, 2018. However, he testified, under oath, that he owed nothing under that Agreement. That is a false statement. The record clearly established that Moats retained an attorney in late 2017 to, among other things, calculate the amount owed to Dyar under the Agreement at that time. The attorney, in his letter to Moats dated January 5, 2018 stated that, as of January 31, 2017, Moats owed Dyar $83,38.98. That calculation included principal, interest, carrying costs, property taxes and insurance pursuant to the Agreement as of that date, but it did not include attorney's fees of fifteen (15%) percent of the then balance due. No such payment or any other payments were thereafter made to Dyar by Moats between December 31, 2017 and his payment to satisfy the judgment in November, 2022. Moats made no attempt at his deposition, the Summary Judgment hearing or the damages hearing to present any evidence in support of his "legal claims",

alleged offsets/credits, or his alleged claim for failure to properly handle an insurance claim.

Dyar was clearly entitled to judgment by default, as determined by the Court, leaving only the issue to damages. Dyar's damages in the amount of $250,614.04 were clearly established at the damages hearing. Moats had every opportunity, both at the hearing on the Motion for Summary Judgment and at the damages hearing, to challenge the amount owed and to present any evidence he had regarding any "legal issues" and/or issues that could impact the determination of "damages" and he chose not to either present that evidence or present sufficient evidence regarding these issues as the Court determined.

Based upon the Plaintiff's own testimony, he has no legally sufficient basis for any of his claims/defenses in this case. Moats retained two (2) "expert witnesses" who both determined that, under any circumstances, he owed Dyar money (Swent letter dated January 5, 2018 and report prepared by Travis Lively dated August 26, 2021). Moats disagreed with those reports and, therefore, made no attempt to introduce those documents into evidence or call either as a witness in this case. Further, Moats is clearly in default and the only issue is "how much." That question was answered by the uncontroverted testimony of Joshua Pruiett-Lange, expert witness who testified on behalf of Dyar. (See Affidavit of Joshua Pruiett-Lange).

Moats asserted that he was entitled to credits designated by him as "legal issues" for "improvements" made, "sweat equity" and the cost of a "new roof" which is not even in place. However, by the express terms of the Agreement, Moats was not entitled to any such "credits." Even if Moats made such improvements or engaged in any "sweat equity",

for which he offered no proof, the Agreement does not provide for any such credits. The Agreement provides, in Paragraph #10, that the "Risk of Loss" is "upon the Purchaser…." The Agreement further provides in Paragraph #18, that "the Purchaser acknowledges that Purchaser has made an inspection of the Premises and accepts the same AS IS, WITH ALL FAULT." Moats remained in possession of the Premises from January 21, 2011 to November 7, 2022. Regarding the insurance premiums, Dyar testified that he paid those premiums on the building for six (6) years so that he could be sure that the building was insured. He also testified that a storm came through one year and the insurance investigator/adjuster confirmed the extent of the damage and wrote him a check for $32,000.00 which Dyar gave to Moats. Moats did not challenge that testimony in any way.

Moats also asserted that, despite having his deposition taken and given the right to testify at both the summary judgment hearing and the damages hearing, he was denied the opportunity to assert a "legal" claim that he refers to as the "failure to pursue an uninsured claim" arising out of hurricane damage to the building roof in 2017. This apparently refers to the above claim dealing with the cost of a new roof set forth above. While acknowledging this Agreement required Moats to keep casualty insurance on the property throughout the term of the Agreement, Moats states that the provision was "modified" but presented no evidence to support any such modification. As a point of fact, the modification/Addendum/Amendment applies only to the extension of the date of the Agreement. Further, he alleged that this "legal" claim was based upon an alleged modification to the Agreement whereby Dyar assumed the responsibility for keeping the property insured and Moats agreed to pay the policy premium to Dyar, i.e. reimbursed

Dyar for that payment. However, what we know, based upon the actual evidence in this case, is that Moats made no payments to Dyar for anything from December 31, 2017 until the Satisfaction of Judgment. In fact, it was Dyar who presented Moats with the insurance check in the amount of $32,000.00.

At the conclusion of the damages hearing, Moats' attorney called his client as a witness and he testified, under oath, without any basis and in contrast to previous attorney/accountants who, at various times in this case, had calculated amounts due under the Agreement, that he did not owe Dyar a dime. In other words, he did not agree with the calculations determining the amount owed under the Agreement as determined by his own experts but presented no proof in support of his statement.

Based upon the above, it is clear that a damages hearing was held by this Court on February 24, 2022; that Dyar presented unchallenged testimony as to the amounts due under the Agreement in question; that Moats, in the process, was given every opportunity to testify on his own behalf during his deposition, at the summary judgment hearing and at the damages hearing and present evidence in support of his testimony on any and all issues in this case, including both liability and damages, and assert any and all claims he had against Dyar but he chose not to do so! He even failed to pay his own witnesses who he had retained to issue reports on the issue of damages or to pay those witnesses to testify at trial regarding their opinion. As stated in its Order, the Court concluded that Moats is not entitled to any relief whatsoever.

In the alternative, the results as to the liability of Moats to Dyar would have been the same whether these "legal" claims had been tried before a jury as they would have been dismissed by the Court at the directed verdict stage based upon evidence, or lack thereof,

that he presented. A jury must base its verdict on evidence. The failure of Moats to present evidence in any trial, jury or non-jury, would have resulted in the same outcome as a matter of law!

CONCLUSION

Based upon the above reasoning and authorities, the Respondent respectfully asks this Court to rule in favor of the Respondent on all issues and dismiss this appeal.

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