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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS
EDGAR W DICKSON, CIRCUIT COURT JUDGE

Appellate Case No. 2022-001070

Rosen Hagood, LLC,Respondent/Appellant,

v.

Albert T. Henson, Jr.,Appellant/Respondent,

FINAL APPELLANT BRIEF OF APPELLANT/RESPONDENT

Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON
226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com

COUNSEL FOR APPELLANT/RESPONDENT
ALBERT T. HENSON JR.

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court err in granting Rosen Hagood's Motion for Summary Judgment when there existed multiple genuine issues of material fact that precluded entry of summary judgment?
- II. Did the Trial Court err in granting Rosen Hagood's Motion for Summary Judgment when there existed a genuine issue of material fact as to whether Rosen Hagood's claim was barred by the statute of limitations for actions arising out of contract?
- III. Did the Trial Court err in granting Rosen Hagood's Motion for Summary Judgment and awarding Rosen Hagood \$158,369.96 in unpaid fees and expenses when there existed a genuine issue of material fact as to whether Mr. Blanchard breached his duty of loyalty to his employer, Mr. Henson, thus forfeiting the right to compensation pursuant to South Carolina law?

STATEMENT OF THE CASE

While this appeal is from an order issued in Circuit Court Case No. 2020-CP-18-02003, it is necessary to examine the underlying litigation in order to understand the issues that were not disclosed to the circuit court when granting summary judgment to Respondent-Appellant Rosen Hagood LLC. When viewed in the fuller context, it is apparent there are genuine issues of material fact that precluded entry of summary judgment.

As relevant here, it is sufficient to state that the disputes underlying the current dispute arose out of the Estate of Ann P. Pittillo, which was probated before the Dorchester County probate court as Case No. 1994-ES-18-00147-2. The later litigation in which Rosen Hagood was involved was a 2014 probate matter related to the Trust of Eunice I. Page, and later In re: Trust EIP Created Under the Last Will and Testament of Eunice I. Page October 14, 1992, when Richard S. Henson and Vann K. Henson filed suit in probate court against the current Appellant Respondent Albert T. Henson Jr. (“Mr. Henson”) and Julian Reid Henson. Of the original litigants, only Appellant Respondent Albert T. Henson Jr. (“Mr. Henson”) is a party to this action and this appeal.

“Ms. Pittillo was survived by three sons, [Mr. Henson] and . . . Richard S. Henson and Vann K. Henson. Her sons [were] the beneficiaries of the Trust. On January 21, 2015, [Richard S. Henson and Vann K. Henson] filed an action which, in part, requested the probate court to appoint them as successor co-trustees of the Trust or to dissolve the Trust and distribute 605 North Main to the Trust’s designated beneficiaries. Mr. Henson filed responsive pleadings, including counterclaims, and maintained that he was the owner of the Property. . .”

On May 25, 2016, Mr. Henson retained Rosen Hagood to represent him individually and in his capacity as Personal Representative of the Estate of Ann Page Henson Pittillo against claims being pursued in the Dorchester County Probate Court by Richard S. Henson and Vann K. Henson involving Mrs. Pittillo’s Estate and a Trust settled by the late Eunice I. Page, including claims

alleging Mrs. Pittillo's will was invalid and the Pittillo Trust is the rightful owner of certain real property located at 605 North Main Street, Summerville, South Carolina. (R. pp. 8-17; R. p. 18, ¶4). Daniel F. Blanchard (hereinafter "Blanchard") served as the primary attorney handling Mr. Henson's matter.

Mr. Henson made monthly payments toward his bills from Rosen Hagood, pursuant to their fee agreement, until March 2, 2017, due to concerns that Blanchard was not properly representing his interests in the probate matter. (R. p. 19, ¶¶7-8). During the representation, Blanchard revealed to Mr. Henson that the opposing counsel in the matter and Blanchard's boss were close friends. (R. pp. 49-57). Blanchard informed Mr. Henson on two separate occasions that the partners at his firm, Rosen Hagood, did not want Blanchard to continue working on Mr. Henson's matter. *Id.* Blanchard also advised Mr. Henson that he would need to make more payments or Blanchard would quit working on the case. *Id.* As a result, Mr. Henson had serious concerns about Blanchard's loyalty and his ability to best serve Mr. Henson's interests. *Id.* It was at that point that Mr. Henson stopped making payments to Rosen Hagood and began searching for another attorney. *Id.*

Despite advising Mr. Henson that he was withdrawing from the representation, Blanchard continued representing Mr. Henson from March 2, 2017 (the date of Mr. Henson's last payment) until November 25, 2019, when he was relieved as Mr. Henson's counsel. (R. pp. 8-17).

The instant action was initiated on December 16, 2020 when Rosen Hagood LLC filed suit against Mr. Henson seeking recovery under four causes of action: breach of contract, "money had and received," constructive trust and declaratory judgment (seeking a security interest in [Mr. Henson's] in the real property of the Trust IEP located at 605 North Main Street, Summerville,

South Carolina by virtue of the terms of the above trust. (R. pp. 8-17). Mr. Henson appeared pro se and opposed the relief sought by Rosen Hagood.

Rosen Hagood moved for summary judgment on April 7, 2022. (R. pp. 23-48). The motion did not state on which cause of action summary judgment was sought, nor did it request prejudgment interest or attorney's fees. *Id.* In support of the motion, Rosen Hagood referenced the pleadings in the case, as well as "Affidavit of Plaintiff – Exhibit 1. . . Deposition testimony of the Defendant – Exhibit 2 and Defendant's Admission as to the genuineness of the representation letter – Exhibit 3." *Id.*

Mr. Henson filed opposition to the motion, and included as exhibits his own affidavit, his deposition, a bill from Duggan Wynn Law Firm and an email from Brian Duffy. (R. pp. 49-57).

A hearing was held on the Motion for Summary Judgment on June 2, 2022. (R. p. 3). The trial judge granted summary judgment in favor of Rosen Hagood without stating on which cause of action the judgment was granted. *Id.* The trial judge found "no reference to [Mr. Henson] being responsible for interest accrued on unpaid fees" and "deny[ed] Plaintiff's Request for \$57,083.46 in accrued interest." *Id.* The trial judge also denied Rosen Hagood's prayer for attorney fees. Lastly, the trial judge found Rosen Hagood was not entitled to recover for attorney fees the firm billed for work done after the firm was relieved as counsel for Mr. Rosen on November 25, 2019. The trial judge, relying on "Exhibit B of Plaintiff's Motion"¹ granted judgment against Mr. Henson in the amount of \$158,369.96. . ." *Id.*

Mr. Henson filed a notice of appeal on August 3, 2022.

¹ The trial judge's reference was actually to Exhibit B of Exhibit 1 to the motion for summary judgment, *i.e.*, the affidavit of Daniel F. Blanchard III. Mr. Blanchard's affidavit was Exhibit 1 to the motion, and the ledger to which the trial judge referenced was Exhibit B to Mr. Blanchard's affidavit. The ledger reflects an outstanding balance of \$158,369.96 due on November 16, 2019, with another \$3,302.50 billed after Rosen Hagood was relieved as counsel to Mr. Henson. (R. p. 24; R. p. 30).

ARGUMENTS

I. The Trial Court erred by granting Rosen Hagood’s Motion for Summary Judgment when there existed multiple genuine issues of material fact that precluded entry of summary judgment.

(1) Standard of Review

“Summary judgment is proper only when it is clear that ‘there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Koester v. Carolina Rental Center, Inc.*, 313 S.C. 490, 443 S.E.2d 392 (S.C. 1994) (quoting Rule 56(c), SCRPC). “Summary judgment is not appropriate whe[n] further inquiry into the facts of the case is desirable to clarify the application of the law.” *Carolina Chloride, Inc. v. S.C. Dep’t of Transp.*, 391 S.C. 429, 434, 706 S.E.2d 501, 504 (2011). “In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.” *Id.* “Summary judgment is a drastic remedy to be invoked cautiously and must be denied if [the non-moving party] demonstrates a scintilla of evidence in support of [his] claims.” *Gibson v. Epting*, 426, 827 S.E.2d 178 (S.C. App. 2019).

Had the Trial Court properly adhered to and applied the summary judgment standard when considering the pleadings, exhibits, affidavits, depositions, and arguments presented during the hearing by both parties, the Court would have found that there existed multiple genuine issues of material fact that precluded the entry of summary judgment. The specific genuine issues of material fact are addressed in turn below.

II. The Trial Court erred by granting Rosen Hagood’s Motion for Summary Judgment when there existed a genuine issue of material fact as to whether Rosen Hagood’s claim was barred by the statute of limitations for actions arising out of contract.

The Trial Court improperly granted Rosen Hagood’s Motion for Summary Judgment when there existed a genuine issue of material fact as to whether Rosen Hagood’s claim was barred by the statute of limitations for actions arising out of contract.

Pursuant to S.C. Code Ann. § 15-3-530(1), the statute of limitations for actions upon a contract is three (3) years. “A cause of action for breach of contract must be filed within three years after the date the breach was or should have been discovered.” *Maher v. Tietex Corp.*, 500 S.E.2d 204, 331 S.C. 371 (S.C. App. 1998). “Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach or could or should have discovered the breach through the exercise of reasonable diligence.” *Id.*

The last payment Mr. Henson made to Rosen Hagood was on March 2, 2017. (R. p. 19, ¶8; R. p. 50, ¶4). By its own admission, Rosen Hagood acknowledges that Mr. Henson’s last payment to the firm was on March 2, 2017, and that no other payment was made between that date and November 25, 2019, when the probate court relieved Rosen Hagood as counsel for Mr. Henson. (R. p. 25, ¶4 & R. p. 30)

This indicates that if a breach did occur, Rosen Hagood knew or should have known of the alleged breach as early as March 2, 2017. Therefore, the statute of limitations began to run on the date of the alleged breach, March 2, 2017. However, instead of moving to be relieved as counsel or filing suit against Mr. Henson, Blanchard and Rosen Hagood continued representing Mr. Henson and accruing fees for two more years before moving to be relieved and waited an additional year before filing a lawsuit for breach of contract on December 16, 2020. Rosen Hagood initiated

this lawsuit three years and nine months after it discovered or should have discovered the alleged breach. Accordingly, Rosen Hagood's breach of contract claim was barred by the statute of limitations.

Mr. Henson properly raised the issue regarding the statute of limitations as a defense in his Answer to Rosen Hagood's Complaint. (R. p. 21, ¶28). Counsel for Rosen Hagood even acknowledged on the record during the Motion for Summary Judgment that Mr. Henson raised the issue of its breach of contract claim being barred statute of limitations. (R. p. 71). Under the summary judgment standard, Mr. Henson is only required to demonstrate a scintilla of evidence in support of his claims in order to withstand a motion for summary judgment, which he did in this case. It is clear from the pleadings and the record that Rosen Hagood knew or should have known of the alleged breach of contract as early as March 2017, and that Rosen Hagood's lawsuit for breach of contract was not filed until December 16, 2020, clearly outside of the statute of limitations. Whether Rosen Hagood's breach of contract claim was barred by the statute of limitations constituted a genuine issue of material fact, and the Trial Court erred by granting summary judgment.

III. The Trial Court erred in granting Rosen Hagood's Motion for Summary Judgment and awarding Rosen Hagood \$158,369.96 in unpaid fees and expenses when there existed a genuine issue of material fact as to whether Mr. Blanchard breached his duty of loyalty to his employer, Mr. Henson, thus forfeiting the right to compensation pursuant to South Carolina law.

The Trial Court improperly granted Rosen Hagood's Motion for Summary Judgment when there existed a genuine issue of material fact as to whether Blanchard breached his duty of loyalty to his employer, Mr. Henson, thus forfeiting the right to compensation pursuant to South Carolina law.

“The general rule is that an employee is not entitled to any compensation for services performed during the period he engaged in activities constituting a breach of his duty of loyalty even though part of those services may have been properly performed.” *Futch v. McAllister Towing of Georgetown*, 355 S.C. 598, 518 S.E.2d 591 (S.C.1999) (quoting *Jet Courier Service*, 771 P.2d at 499-500).

Here, Blanchard’s actions demonstrated a clear breach of his duty of loyalty to Mr. Henson. It began when Blanchard informed Mr. Henson that opposing counsel in the probate matter and Blanchard’s boss were “best friends.” (R. pp. 49-57; R. p. 61, #20). At that point, Mr. Henson had serious concerns about Blanchard’s loyalty to him and his ability to best represent his interests, as he felt that the relationship between Blanchard’s boss and opposing counsel was impacting Blanchard’s decisions. (R. pp. 49-57). Blanchard then advised Mr. Henson on two separate occasions that the partners of Rosen Hagood did not want Blanchard to continue working on Mr. Henson’s matter, and that he was withdrawing from the case. Based on Blanchard’s representations to Mr. Henson, Mr. Henson began searching for new counsel.² (R. p. 61, #18; R. p. 40).

While Blanchard continued representing Mr. Henson despite advising him that he had quit and that his firm did not want him to continue representing Mr. Henson, Blanchard and Rosen Hagood were not entitled to compensation during the period where Blanchard engaged in activities constituting a breach of his duty of loyalty to Mr. Henson. Mr. Henson stopped paying Rosen Hagood after March 2, 2017, once Blanchard informed him of the relationship between opposing counsel and Blanchard’s boss. (R. p. 61, #20). Over the next year, Mr. Henson undertook efforts to retain new counsel due to his concerns about Blanchard’s loyalty and his understanding that

² While Mr. Henson admits that he did not terminate Rosen Hagood or Blanchard as his counsel, that was solely due to Blanchard’s representations to Mr. Henson that he was withdrawing from the case. This occurred at least a year before Blanchard actually moved to be relieved as Mr. Henson’s counsel.

Blanchard had stopped working on his case. *Id.* at pp. 18-20. Blanchard did not stop working on the case, and while he may have properly performed his services as Mr. Henson's attorney, he was ultimately not entitled to compensation due to breaching his duty of loyalty owed to Mr. Henson.

During the hearing on the Motion for Summary Judgment, Mr. Henson made statements to the Trial Court regarding multiple instances where Blanchard failed to uphold his duty of loyalty to Mr. Henson and where Henson confronted Blanchard about whether the decisions he was making in the case were in Mr. Henson's best interest. (R. pp. 74-77). Mr. Henson also submitted an affidavit to the Trial Court prior to the hearing attesting to Blanchard's representations to him and Mr. Henson's efforts to obtain new counsel which were ultimately thwarted by Blanchard. (R. pp. 49-57).

Pursuant to the summary judgment standard, Mr. Henson, again, demonstrated the requisite scintilla of evidence to support his claim that Rosen Hagood was not entitled to compensation due to Blanchard's breach of his duty of loyalty to Henson, thus precluding an entry of summary judgment.

CONCLUSION

For the reasons set forth above, this Court should reverse the Trial Court's Order granting Rosen Hagood's Motion for Summary Judgment and awarding Rosen Hagood \$158,369.96 in unpaid fees and expenses or, alternatively, remand this matter to the Circuit Court for a new trial.

Respectfully submitted,

s/ Desa Ballard
Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON

226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com

COUNSEL FOR APPELLANT/RESPONDENT
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CERTIFICATE OF COUNSEL

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

Respectfully submitted,

s/ Haley Hubbard

Desa Ballard (S.C. Bar No. 498)

Harvey M. Watson III (S.C. Bar No. 74053)

Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON

226 State Street

West Columbia, South Carolina 29169

Telephone 803.796.9299

Facsimile 803.796.1066

desab@desaballard.com

harvey@desaballard.com

haley@desaballard.com

COUNSEL FOR APPELLANT/RESPONDENT

ALBERT T. HENSON JR.

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