

RECEIVED

Nov 02 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-001431
Charleston County Case No. 2019-CP-10-02894

Roi Tan Enterprises LLC,

Respondent,

v.

Akim Anastopoulo and Anastopoulo Law Firm, LLC,

Appellants.

INITIAL BRIEF OF APPELLANT

s/ J.C. Nicholson, III

Eric Poulin

SC Bar No. 100209

Eric.Poulin@poulinwilley.com

J.C. Nicholson, III

SC Bar No. 70324

JC.Nicholson@poulinwilley.com

Poulin Willey Anastopoulo, LLC

32 Ann Street

Charleston, SC 29403

(803) 222-2222

TABLE OF CONTENTS

TABLE OF CONTENTS..... i
STATEMENT OF ISSUES ON APPEAL.....1
STATEMENT OF THE CASE.....1
STANDARD OF REVIEW.....2
FACTS.....3
ARGUMENT.....4
CONCLUSION.....10

TABLE OF AUTHORITIES

CASES

Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 399 S.E.2d 439
(Ct.App.1990) 6
Bateman v. Rouse, 358 S.C. 667, 596 S.E.2d 386 (Ct.App.2004) 7
Baughman v. AT&T Co., 306 S.C. 101, 410 S.E.2d 537 (1991)5
Beach Co. v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2d 863 (2002)8
Carolina First Bank v. BADD, LLC, 414 S.C. 289, 293 778 S.E.2d 106, 108 (2015)3
Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)9
Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E.2d 826 (1997)8
Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 879 S.E.2d 746 (2022)9

Davis v. Parkview Apts., 409 S.C. 266, 762 S.E.2d 535 (2014)5, 7

Deutsche Bank Nat’l Trust Co. as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates Series 2007-1 v. Estate of Houck, 440 S.C. 409, 892 S.E.2d 280 (2023)3, 8

Ex parte Bon Secours-St. Francis Xavier Hospital, Inc., 393 S.C. 590, 713 S.E.2d 624 (2011)2, 4

Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881-82 (1986)5

Father v. S.C. Dep’t of Soc. Servs., 353 S.C. 254, 578 S.E.2d 11 (2003)3

Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 511 S.E.2d 716 (Ct.App.1999)5, 6

Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997)7

McNair v. Fairfield County, 379 S.C. 462, 665 S.E.2d 830 (Ct.App.2008)6

North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., et al., 307 S.C. 533, 416 S.E.2d 637 (1992)8

Rickerson v. Karl, 412 S.C. 215, 770 S.E.2d 767 (Ct.App.2015)6, 7

Runyon v. Wright, 322 S.C. 15, 471 S.E.2d 160 (1996)3

Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct.App.1997)6

Skywaves Corp. v. Branch Banking and Trust Co., 423 S.C. 432, 814 S.E.2d 643 (Ct.App.2018)6

Wachovia Bank Nat. Ass’n. v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014)8

Zurich American Insurance Co. of Illinois v. Palmetto Contract Services, Inc., 434 SC 104,
862 S.E.2d 714 (Ct.App.2021)3, 9

STATUTES

S.C. Code Ann. § 14-3-330..... 7

OTHER AUTHORITIES

SC Rules of Civil Procedure, Rule 38 7, 9

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRED IN STRIKING DEFENDANTS' COUNTERCLAIMS AND AWARDING MONETARY SANCTIONS WHEN DEFENDANTS COMPLIED WITH THE TRIAL COURT'S ORDER ON DISCOVERY?
2. WHETHER THE TRIAL COURT ERRED IN STRIKING DEFENDANTS' JURY TRIAL DEMAND WHEN PLAINTIFF HAD INVOKED ITS RIGHT TO TRIAL BY JURY?

STATEMENT OF THE CASE

On May 31, 2019, Roi Tan Enterprises, LLC ("Plaintiff") brought a breach of contract action against Akim Anastopoulo individually alleging the breach of a lease agreement for office rental space in downtown Charleston. On January 16, 2020, Roi Tan then brought an Amended Complaint against Akim Anastopoulo and Anastopoulo Law Firm, LLC ("Defendants") and in that operative pleading demanded a jury trial. Am. Complaint p. 2. In answering the Amended Complaint, Defendants counterclaimed and demanded a jury trial as well. Answer to Am. Complaint pp. 1, 4-8.

Discovery ensued and during the pendency of the case, Plaintiff filed a Motion to Compel based on information gathered during a 30(b)(6) deposition of Defendants. A hearing was held on the Motion to Compel and an Order granting the motion was entered on October 28, 2022. In that Order the Court gave Defendants fourteen days (14) to provide the additional documentation and the Plaintiff then had ten days (10) to evaluate the document production. Oct. 28, 2022 Order p. 3. Defendants complied with the deadline and provided the documents on November 13, 2022. Fifty-one (51) days later on January 3, 2023, Plaintiff requested additional document production from the Defendants based on its review of the November production. Plaintiff subsequently filed a Rule to Show Cause motion and a motion to strike Defendants' jury trial

demand on February 7, 2023. Both parties filed memorandums with the Court before the Court hearing held on May 30, 2023. The Court heard oral argument on both motions and ultimately ruled on the Rule to Show Cause that Defendants had fifteen days (15) from the date of the hearing to produce specific information regarding damages alleged in their counterclaims. Transcript, p. 8, lines 4-10. The Court took the jury trial issue under advisement. Transcript, p. 13, lines 11-17. Defendants complied with the additional document production on June 14, 2023. The Court then issued a written Order on August 15, 2023, that acknowledged the Defendants complied with the Court's ordered deadline, but it then went ahead and struck Defendants' counterclaims and *sua sponte* awarded sanctions in the amount of \$2500.00. The Court also ruled at that time that Defendants' demand for a jury trial was also stricken. Aug. 15, 2023 Order.

Defendants filed a Motion to Alter or Amend the Court's August Order and both parties submitted memorandums on the reconsideration motion¹ and the Court issued its ruling denying Defendants' Motion to Alter or Amend on September 1, 2023. Defendant filed their Notice of Appeal shortly thereafter on September 8, 2023.

STANDARD OF REVIEW

Rule to Show Cause

“When reviewing judge's order of sanctions, the appellate court takes its own view of the facts. [W]here the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions under an abuse of discretion standard. An abuse of discretion may be found if the trial court's conclusions lack reasonable factual support.” *Ex parte Bon Secours-St. Francis Xavier Hospital, Inc.*, 393 S.C. 590, 597, 713

¹ The parties disagree as to the timeliness of Defendants' filing of their Motion to Alter or Amend but the Court issued its ruling without addressing any of the arguments raised by either party. The difference between the parties being one day. Additionally, S.C. Code Ann. § 14-3-330 provides an appeal as of right in this case.

S.E.2d 624, 628 (2011); *quoting Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 260-61, 578 S.E.2d 11, 14 (2003) and *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996).

Jury Trial Demand

“Whether a party is entitled to a jury trial is a question of law” which means the Court may review the lower court’s decision de novo. *See Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 293 778 S.E.2d 106, 108 (2015); *abrogated on other grounds by Deutsche Bank National Trust Company as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates Series 2007-1 v. Estate of Houck*, 440 S.C. 409, 892 S.E.2d 280 (2023); *see also Zurich American Insurance Co. of Illinois v. Palmetto Contract Svcs., Inc.*, 434 S.C. 104, 109, 862 S.E.2d 714, 716 (Ct. App. 2021).

FACTS

This case arises out of dispute over a commercial lease agreement. The parties began negotiating for office space located in the Cigar Factory building in downtown Charleston. Upon the advertising of the space, the office itself was unfinished with no drywall, no floor coverings, no HVAC, and no electrical outlets. As part of the negotiations over the space, Plaintiff represented to Defendants that it would upfit the space to Defendants’ specifications. Defendants relied on Plaintiff’s representations in agreeing to occupy the space. During the time Defendants occupied the space, the parties went back and forth over the cost of necessary upfits, the bidding process for contractors to perform the work, and the cost of upfits. Answer to Am. Complaint, pp. 5-6. Ultimately, the parties could not agree on the issues related to the space and Defendants vacated the space and this suit commenced as a result. The Plaintiff’s claim is for breach of contract and Defendants have counterclaimed for breach of contract, civil conspiracy, and fraudulent misrepresentation. In the course of discovery, certain damages claimed by Defendants

in their counterclaims became the subject of Plaintiff's Motion to Compel which started the applicable chain of events for this appeal. Specifically, the documentary evidence for Defendants' damages stemming from their counterclaims are the documents which are at the center of the Plaintiff's Rule to Show Cause motion.

Argument

Rule to Show Cause

The trial court abused its discretion in striking Defendants' counterclaims and awarding sanctions considering Defendants complied with the Court's Order on discovery and the Court even acknowledges as such in its August 15, 2023 Order. Aug. 15, 2023 Order, p. 1. As such, Defendants did not engage in any behavior that is violative of any Court Order, including the oral May 2023 Order and the written August 2023 Order. As such, there is no evidentiary support for an award of sanctions much less the severe sanctions imposed in this case such as striking Defendants' counterclaims in their entirety and *sua sponte* awarding monetary sanctions.

The trial court's sanctions order did not describe any conduct that violated any rule, nor did it engage in any findings of fact to explain the basis for the sanction imposed as required. *See Ex parte Bon Secours*, 393 S.C. at 597. As argued in its briefing on the Rule to Show Cause issue, the Defendants simply had a good faith disagreement with Plaintiff over the interpretation of the terms of the October 28, 2022 Order, specifically as it related to the timeliness of Plaintiff's review of Defendants' production. Defendants' Memo in Opp., p. 3. As the trial court admits, Defendants did indeed comply with its August 15, 2023 Order on document production which only further perplexes the factual basis for its imposition of sanctions. In short,

Defendants are at a loss as to what they are alleged to have done wrong in order to have their counterclaims stricken entirely and fined.

As noted by the SC Supreme Court, a party has two choices when faced with an order directing a party to participate in discovery: 1) comply with the discovery order and waive any right to challenge it on appeal; or 2) refuse to comply with the order and appeal after he is held in contempt for his failure to comply. *See Davis v. Parkview Apartments, et al.*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014); *relying on Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881-82 (1986). In this case, Defendants complied with the oral ruling of the trial court and yet were still held in contempt and sanctioned as though they did not comply. The sanctions awarded by the trial court, the striking of all of Defendants' counterclaims and the monetary award are tantamount to granting a judgment by default or dismissal which requires the Plaintiff to show bad faith, willful disobedience or gross indifference to its rights to justify the sanction. *See Davis*, 409 S.C.at 282-83, 762 S.E.2d at 544; *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198-99, 511 S.E.2d 716, 718-19 (Ct.App.1999) (*citing Baughman v. AT&T Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991)). Defendants have not acted in bad faith simply because of their interpretation of the October 28, 2022 Order was different than the interpretation by Plaintiff. Defendants have not willfully disobeyed any Order in this case but rather they have complied with all Orders regarding discovery in this matter. Plaintiff has not shown any gross indifference to its rights to justify the sanction as they were given the documents within the timeline ordered by this Court.

The Court, in deciding the severity of sanctions, should weigh specific factors. The Court should "weigh the precise nature of the discovery, the discovery posture of the case, willfulness,

and the degree of prejudice.” *Skywaves Corp. v. Branch Banking and Trust Co.*, 423 S.C. 432, 456-57, 814 S.E.2d 643, 656-57 (Ct.App.2018); *see also McNair v. Fairfield County*, 379 S.C. 462, 467, 665 S.E.2d 830, 832-33 (Ct.App.2008) (*quoting Griffin*, 334 S.C. at 199, 511 S.E.2d at 719 (Ct.App.1999)); *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997). The Court’s August 15, 2023 Order imposing sanctions did not weigh any of the above factors in deciding the severity of sanctions. However, even if it had, the Court would not be able to assign any weight to the wilfulness factor or the degree of prejudice factor as Defendants complied with the Court’s 15-day directive and the Plaintiff cannot show any prejudice as it has the documents it requested. Additionally, the nature of the discovery is evidence of Defendants’ damages for their counterclaims which was known to Plaintiff via deposition testimony already and now through documentary evidence and thus provides no significant weight. The discovery posture is also unavailing as the case was still in the pre-trial discovery process.

The Court’s decision to impose the severe sanction of dismissal of all of Defendants’ counterclaims and a *sua sponte* monetary fine are all harsh medicine not warranted by the circumstances of this case. “[T]he sanction imposed should be reasonable, and the [c]ourt should not go beyond the necessities of the situation to foreclose a decision on the merits of a case.” *Rickerson v. Karl*, 412 S.C. 215, 221, 770 S.E.2d 767, 770-71 (Ct.App.2015) (*quoting Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct.App.1990)). As noted above, Defendants complied with discovery and should not be sanctioned at all but *assuming arguendo* sanctions are warranted, the sanctions awarded here are too severe under the circumstances. The *Rickerson* opinion of the Court of Appeals provides an excellent analysis of various cases decided by it and the S.C. Supreme Court regarding comparing the severity of an

imposed sanction with discovery behavior by litigants. The theme that is common through all of them is the litigants refused in one way or another to comply with discovery at all or destroyed discoverable evidence and usually the non-compliance was done after several orders from the various trial courts warning about such behavior. *See Rickerson*, 412 at 221-222, 770 at 771-72 (internal citations omitted).

Thus, the Court's conclusion on awarding sanctions in this case was without reasonable factual support, results in prejudice to Defendants, and therefore amounts to an abuse of discretion. *See Davis v. Parkview Apts.*, 409 S.C. 266, 283, 762 S.E.2d 535, 543 (2014). Therefore, Defendants request this Court reverse the trial court's August 15, 2023 Order, remove all sanctions imposed against them and remand this case to allow it to proceed on its merits before a properly empaneled jury.

Jury Trial Demand

The trial court's order granting Plaintiff's motion to strike Defendants' jury trial demand should be overturned. The trial court did not provide any factual support or legal analysis for its decision to strike Defendants' jury trial request.

"The South Carolina Constitution preserves the right of trial by jury only in those cases in which parties would have been entitled to it at the time of the adoption of the Constitution." *Bateman v. Rouse*, 358 S.C. 667, 673, 596 S.E.2d 386, 389 (Ct.App.2004) *relying upon Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). *See also* Rule 38(a), SCRCP ("The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be

waived.”). This matter is for the recovery of money pursuant to an alleged breach of contract and Defendants’ counterclaims for fraudulent misrepresentation, breach of contract, and civil conspiracy all involve issues of fact to be determined by a jury. As noted above, Plaintiff has voluntarily chosen to not waive its demand for a jury trial and Defendants followed the same course in demanding a jury trial on the counterclaims. Additionally, the counterclaims made in this case arise out of the same transaction as those of the Plaintiff. *See Wachovia Bank Nat. Ass’n. v. Blackburn*, 407 S.C. 321, 329, 755 S.E.2d 437, 442 (2014); *abrogated by Deutsche Bank National Trust Company as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates Series 2007-1 v. Estate of Houck*, 440 S.C. 409, 892 S.E.2d 280 (2023) (changing the compulsory/permissive analysis for counterclaims only for cases commenced on or after the effective date of the opinion).

Waivers of the right to trial by jury are to be strictly construed. *See Wachovia*, 407 S.C. at 332; see also *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 566 S.E.2d 863 (2002) & *North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., et al.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992).

The lease agreement does contain a waiver of the right to a jury trial in Article 25.10 of the lease. However, Article 25.10 provides that both parties to the lease waive their right to a jury trial, including counterclaims. Lease Agreement, p. 30. However, due to the nature of Defendants’ counterclaims being compulsory whether the analysis is under *Wachovia* or under *Deutsche Bank*, the waiver provided under the lease agreement is unenforceable because Defendants would not be allowed to bring a separate action later for those claims. *See Beach*

Co., 351 S.C. at 62-3, *relying on Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997).

As noted above, the Plaintiff's operative pleading in this case demands a jury trial. It is axiomatic in South Carolina that the Plaintiff is the master of his pleadings and is the one who controls whether a jury trial is requested in his complaint. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987); *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022). As waivers are strictly construed, the lower court erred in not finding the incongruity in the outcome of allowing the Plaintiff to waive its own lease terms when it suits it but enforcing the same lease term as against the Defendants.

The loss of the right to a jury trial prejudices the Defendants as it prevents them from availing themselves of a sacred right and has a negative effect on the presentation of the merits of the case. See also S.C. Code Ann. § 14-3-330. The trial court provided no legal analysis or factual support for its decision in denying Defendants of this important right especially in light of the fact that Plaintiff voluntarily demanded a jury trial in its Amended Complaint.

Additionally, pursuant to Rule 38(d) of the South Carolina Rules of Civil Procedure: A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties, except where an opposing party is in default under Rule 55(a). This rule requires consent of the parties. Obviously, Defendants do not consent to the withdrawal of Plaintiff's jury trial demand. The contractual provisions do not know retroactively operate to take away a right to a jury trial now that Plaintiff has voluntarily waived the contractual provision by demanding a jury trial. Also, the "decision whether to order jury trial under rule governing trial by jury as of

right is not discretionary with circuit court.” *Zurich American Insurance Co. of Illinois v. Palmetto Contract Services, Inc.*, 434 SC 104, 109, 862 S.E.2d 714, 716 (Ct.App.2021).

Such action by the trial court amounts to an error of law, prejudicing the rights of Defendants and therefore should be reversed by this Court.

CONCLUSION

For the foregoing reasons, and for any other reason that may be evident from the record, the trial court’s decision awarding sanctions and striking Defendants’ jury trial demand should be reversed, and the case should be remanded for trial.

Respectfully submitted,

November 2, 2023

s/ J.C. Nicholson, III

Eric Poulin

SC Bar No. 100209

Eric.Poulin@poulinwilley.com

J.C. Nicholson, III

SC Bar No. 70324

JC.Nicholson@poulinwilley.com

Poulin Willey Anastopoulo, LLC

32 Ann Street

Charleston, SC 29403

(803) 222-2222

Attorneys for Appellant

