THE STATE OF SOUTH CAROLINA

In the Supreme Court

Appellate Case No. 2021-000233

Appeal from Sumter County

R. Ferrell Cothran, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-009 (S.C. Ct. App. Jan. 13, 2021)

(Court of Appeals Case No. 2017-000998)

Paul Branco and Branco Investments, Inc.,
d/b/a Great American Cookie Co., ...Petitioners

v.

Hull Storey Retail Group, LLC and Sumter Mall, LLC, ...Respondents.

REPLY BRIEF OF PETITIONERS

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ARGUMENT IN REPLY

Petitioners Paul Branco and Branco Investments, Inc., d/b/a Great American Cookie Co. (hereafter "Branco" or "Petitioners") hereby respond to the arguments of Respondents as follows:

I. This Case Is About Whether There Was Evidence of A Contract Before the Trial Court

The evidence before the trial court demonstrates that the Asset Purchase Agreement was an existing and enforceable contract – otherwise, why did Hull-Storey originally demand a "lease assignment fee" in the amount of $70,000 upon learning of same? Why would Hull-Storey contact Brooktenn in an attempt to get it to walk away from the deal and do better? Why would Hull-Storey assert it was owed money?[1] Despite concerted effort and verbal gymnastics, this case is not about a lease, and never was.

As an initial matter, Respondents cannot distance themselves from the clear and unambiguous admissions contained in their pleadings, wherein they admit the existence of the Asset Purchase Agreement. The pleadings of the parties are excerpted below:

FOR A SECOND CAUSE OF ACTION
(Tortious Interference with a Contract)

16. The Plaintiff reiterates the foregoing allegations as if fully set forth herein.

17. Plaintiff and Brooktenn, LLC entered into a contract for the purchase of certain assets and inventory.

18. Defendant's had knowledge of the contract between Plaintiff and Brooktenn, LLC.

[1] Of course, this conduct by Hull-Storey is the same conduct that the Court of Appeals characterized as "very troubling" and indicative of "an underhanded and deceitful way to conduct business." *Branco v. Hull-Storey*, 2021-UP-009 at p. 10 (Jan. 13, 2021). Regardless, this admitted conduct by Hull Storey further supports the trial court's finding of a valid contract between BrookTenn and Branco. *See, e.g., Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 753 S.E.2d 416, 417-18 (2013) (After reviewing evidence of staffing and employment contracts involving a nurse injured while working at McLeod, the Supreme Court reversed the Court of Appeals and affirmed the Commission, finding that "the evidence, although not one-sided, preponderates in favor of an employment relationship.")

In its answer, Respondent Sumter Mall admitted Plaintiff entered into a contract with Brooktenn, LLC, as alleged in Paragraph 17 of the Complaint:

SECOND CAUSE OF ACTION
(Tortious Interference with a Contract)

R. 029

16. Defendant realleges, by reference, paragraphs 1 through 15 as if set forth fully.

17. Upon information and belief, Plaintiff or an affiliated entity, entered into a contract with Brooktenn, LLC, which was to include Plaintiff's purported leasehold interest at Sumter Mall. The contract speaks for itself.

18. It is admitted that Paul Branco informed representatives of Sumter Mall that he or a related entity had entered into an agreement with Brooktenn, LLC.

The answer filed by Hull-Storey contained identical admissions:

SECOND CAUSE OF ACTION
(Tortious Interference with a Contract)

16. Defendant realleges, by reference, paragraphs 1 through 15 as if set forth fully.

17. Upon information and belief, Plaintiff or an affiliated entity, entered into a contract with Brooktenn, LLC, which was to include Plaintiff's purported leasehold interest at Sumter Mall. The contract speaks for itself.

18. It is admitted that Paul Branco informed representatives of Sumter Mall that he or a related entity had entered into an agreement with Brooktenn, LLC.

Respondents alternatively argue that their answers are not "admissions" and rather "*state only that the purported contingent Proposal for Purchase "speaks for itself" and "merely acknowledge that Branco and Brooktenn entered into an agreement . . . without acknowledging said agreement to be valid.*" *See* Return at p. 6. On the other hand, Respondents argue that Branco "*misses the point*" because plaintiff failed to prove that the Asset Purchase agreement was "*valid and enforceable*." Resp. Br. at p. 11, fn. 3. Respectfully, Respondents mischaracterize both the record and the plain language of their answers, which admit that Branco entered into a contract with BrookTenn, LLC. Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions.

"[T]he general rule [is] that the parties to an action are judicially concluded and bound by such unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible." *Johnson v. Alexander*, 413 S.C. 196, 775 S.E.2d 697, 700 (2015) (*citing Elrod v. All,* 243 S.C. 425, 134 S.E.2d 410 (1964)).

To argue after the fact that their answers "*merely acknowledge*" that the agreement exists, but then deny the existence of same, is to contort the English language in unnatural ways. "[The Court] must also interpret language used in its natural and ordinary sense, except with technical language or where the context requires another meaning." *Blakeley v. Rabon,* 266 S.C. 68, 221 S.E.2d 767 (1976). In *Collins Entertainment v. Coats*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003), the trial court found that the defendant, American Bingo, interfered with Collins Entertainment's contract and the evidence before the trial court was that the defendant had

admitted the existence of the contract at issue in its answer.[2] Rejecting the defendant's attempts to perform an "end-run" around its admission, the Court of Appeals found sufficient evidence to support a claim for intentional interference with contractual relations, even if the contracts between Collins Entertainment and the Coats entities contained certain inconsistencies as it related to the exact names of the entities thereto.

Furthermore, simply because a contract contains a contingency that was unmet before the expiration of the term of the contract does not invalidate the contract or foreclose interference with same; if that were the case, then options contracts or agreements that include performance of certain events in the future, would essentially be rendered void *ab initio*. Accordingly, the trial court correctly found that the preponderance of the evidence demonstrated the existence of a contract sufficient to support a claim for tortious interference with contractual relations. *See Boddie-Noell Properties v. 42 Magnolia Partnership*, 352 S.C. 437, 574 S.E.2d 726 (2002) ("[W]hen a contract contains a provision or option giving the right of cancellation and the contract is canceled in pursuance of the right given, such cancellation does not extinguish liabilities that have already accrued under the contract, and this is so regardless of whether the liability is that of the party who exercised the option to cancel the agreement or is the liability of the party against whom the cancellation is made.") *See also Fort Hill Federal Savings & Loan Ass'n v. South Carolina Farm Bureau Insurance*, 281 S.C. 532, 316 S.E.2d 684 (Ct. App. 1984) (simply because check for premium payment bounced does not render the contract void as to loss payee under the contract); *See also Marlboro Cotton Mills v. Moore*, 115 S.C. 99, 104 S.E. 305 (1920) (existence and terms of contract which provided for the future delivery of cotton was not a

[2] The answer at issue in *Coats* contained the following admission: "This Defendant admits purchasing the businesses known as Ponderosa Bingo and Shipwatch Bingo from Coats Rental Agreement and Wayne Coats individually."

mere speculation and directed verdict was improper where circumstances surrounding the making of the contract was properly for the fact-finder).

A. The Cases Cited by Respondents are Unpersuasive and Inapposite

Respondents devote significant time to their argument that there was a "condition precedent" in the asset purchase contract which was never satisfied and, accordingly, there was no enforceable contract with which to interfere. *See* Resp. Br. at pp. 13-17. This argument is without merit, as Respondents are asserting a position that does not belong to them (as they were strangers to the asset purchase contract). This conclusion is actually supported by the cases cited by Respondents – specifically, *Worley v. Yarborough Ford* and *McGill v. Moore*. Neither of those cases involve allegations of a third-party interfering with a contract during the term of the contract; instead, they involved a contract dispute between the actual signatories to the contract (which is not the case here). Similarly, the case of *Alexander's Land Co. LLC v. MMK Corp.* is unpersuasive, given that it involved a buyer seeking specific performance of a contract for the purchase of real property (and its failure to satisfy a condition precedent related to same) - no claim for interference with contractual relations was before the court.[3] Finally, the case of *Dutch Fork Dev. Group v. SEL Properties* is likewise not relevant to the case at bar. *Dutch Fork* held that the managing agent of an LLC which was a party to a contract cannot, absent evidence of exceeding his managerial authority, be held individually liable in tort for interference with such contract.

[3] Similarly, Respondents' citation to the unpublished 4th Circuit case of *BCD LLC v. BMW Mfg. Co.* is likewise misplaced, as the BMW case involved an "agreement to agree" which, by its very terms, was an agreement to enter into negotiations to reach an agreement (and was, in fact, subsequently expressly terminated by the parties in a later agreement).

Under South Carolina law, "an agreement between two or more persons upon sufficient consideration to either do or not do a particular act is a contract." *McPeters v. Yeargin Const. Co.*, 290 S.C. 327, 331, 350 S.E.2d 208, 210–11 (Ct. App. 1986) "Mutual promises . . . . constitute a good consideration." *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480, 490 (Ct. App. 2013) (quoting *Evatt v. Campbell*, 234 S.C. 1, 106 S.E.2d 447(1959)); *See also Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 247 S.E.2d 434 (1978) (holding that in order for a contract to be binding, "there must be a mutual manifestation of assent" between the parties as to the terms of the contract"). There is ample evidence in the record to support the trial court's finding that Branco entered into a contract with Brooktenn and the court's ruling that a valid contract for the sale of assets was formed was correct. (R. p. 359).

A. There is evidence in the record that any alleged contingency was satisfied.

There is also evidence that any contingency regarding Brooktenn obtaining a lease was satisfied. In the Asset Purchase Agreement, drafted by two non-lawyers, Brooktenn agreed to purchase Branco's equipment in Sumter. (R. p. 359). This document also noted that Brooktenn would "get[]" a satisfactory lease from Hull Storey. *Id.* In spite of Respondents' argument that this never occurred, the trial court, after careful review of the testimony and evidence at trial, correctly found that "Hull Storey approved Brooktenn's lease application . . . ." (R. p. 2). In fact, Stewart Applebaum, the owner of Brooktenn, specifically testified regarding the lease approval at trial:

> A: . . . We already had approval of the lease. They already told us that we had a lease.
> . . .
>
> Q: But you were approved for the lease, and then after the approval came the claim for the 20,000-dollars?
>
> A: That's correct.

Q: All right. At no time during your conversations with the defendant about your lease application did they mention to you a lease assignment fee?

A: Never.

(R. p. 155, lines 4-5, 13-20).

Mr. Applebaum further explained that as far as he was concerned, there was never a discussion about taking an assignment of Branco's lease because he already had a lease with Hull Storey:

Q: Did they tell you at that time it was about a lease assignment, that you were taking Paul's lease?

A: First of all, they knew I wasn't taking Paul's lease because I had a new lease. We already had discussed it and that was in place.

(R. p. 157, lines 14-18). It is entirely logical that the Court found this testimony credible, as Applebaum was the only witness to testify who had no pecuniary interest – personally or through his company – in the outcome of the trial.[4] This testimony was further bolstered by texts to Branco directly which explained the lease had been approved. (R. pp. 360-362). Further, as noted by the trial court, it was only after Hull Storey approved the lease – and thus satisfied any applicable conditions in the Asset Purchase Agreement – that it wrongly demanded funds from Brooktenn to which it was not entitled, effectively killing Branco's contract with Applebaum. (R. pp. 2-3; pp. 54-69).

[4] Under South Carolina law, great deference is accorded to the trial court where matters of credibility are involved. *See, e.g., Klutts Resort Realty v. Down Round Dev. Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977) ("when reviewing challenged findings of fact, this Court cannot ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position . . . to evaluate their credibility"); *See also Aiken County DSS v. Wilcox*, 304 S.C. 90, 403 S.E.2d 142 (Ct. App. 1991) (noting the appellate court lacks the opportunity for direct observation of witnesses).

Evidence of the existence of a valid contract is further demonstrated by Hull-Storey's admission, in its briefing before the Court of Appeals, acknowledging that Hull-Storey's demand for a lump sum payment was the result of its "legitimate" – but "mistaken" – view of a contractual right to a lease assignment payment, based upon its "perception" that the asset purchase agreement was an "end run" to attempt to avoid having to pay a lease assignment payment. Appel. Br. at p. 17.

Respondents spend much of their argument in what amounts to a misdirection, claiming that because there was no signed lease in the record, the Statute of Frauds therefore precludes enforcement of the actual contract at issue. In addition to this argument being unpreserved, it also misrepresents the plain nature of the contract at issue here. The Asset Purchase Agreement simply does not run afoul of the Statute of Frauds under any plain reading of the Statute.[5] Branco is not seeking damages for the breach of a lease between Brooktenn and Hull Storey, nor is Branco seeking damages for tortious interference with a lease agreement. Branco is seeking damages for the tortious interference with the Asset Purchase Agreement between him and Brooktenn which, for the reasons discussed herein and as outlined in the trial court's well-supported opinion, constituted a valid contract.

B. Regardless of any supposed contingent language, the record is clear that Branco and Brooktenn manifested mutual assent and formed a contract.

In the event this Court were to accept Respondents' argument that there was some unmet future condition relating to the Asset Purchase Agreement, there is still sufficient evidence to affirm the trial court's ruling that the Asset Purchase Agreement was a valid contract. In *McPeters v. Yeargin*

[5] As explained in Petitioners' prior briefing, Branco contends that the Statute of Frauds argument is unpreserved; regardless, there is no argument that the Asset Purchase Agreement – the actual contract in fact at issue in the case - fails under the Statute of Frauds.

Const. Co., 290 S.C. 327, 350 S.E.2d 208 (Ct. App. 1986), the appellant construction company met with employees, including the respondent, to discuss ways to increase productivity. At the trial of the case, witnesses testified that the following general agreement was reached: if the employees, including respondent, agreed to finish the job on time so as to allow the employer to receive a profit, then the employer would agree to pay those employees a bonus of six months pay. *Id.* at 327, 350 S.E.2d at 210. Various officials from the appellant employer testified that the company "did not have a specific bonus policy and the payment of any bonuses was strictly discretionary with the company and subject to the final approval of its chairman." *Id.* At trial, the jury returned a verdict in favor of the respondent employee, and appellant employer appealed. *Id.* In affirming the verdict and finding evidence of a valid contract, this Court held that there was valid consideration by way of the appellant employer's promise and the respondent employee's undertaking the responsibility to work harder. *McPeters*, 290 S.C. at 331, 350 S.E.2d at 211. Alternatively, the Court noted that there was evidence to reject appellant's contention that the bonuses were some discretionary future act that never occurred. *Id.*

Like the situation in *McPeters*, Branco promised to sell his equipment while Brooktenn agreed to undertake the responsibility of securing a lease (in addition to paying Branco $70,000 for the equipment). Further, there was also sufficient evidence, by way of Hull Storey's lease approval, for the trial court to reject Respondents' contention that the subsequent lease procurement was some sort of unsatisfied discretionary future act. Like the situation in *McPeters*, there was instead evidence that the acquisition of a lease went to the performance of an act required by the contract, and did not strike a blow to the contract's formation. There is certainly evidence that Branco and Brooktenn exchanged, at a minimum, mutual promises. *See Baugh,* 402 S.C. at 19, 738 S.E.2d at 490 (explaining that mutual promises constitute good consideration). *See also*

Champion v. Whaley, 280 S.C. 116, 122, 311 S.E.2d 404, 408 (Ct. App. 1984) ("The fact that no duty of performance can arise until the happening of a condition does not make the existence of the contract depend upon its happening . . . .").

At trial, Mr. Applebaum himself explained the memorialization of his agreement with Branco:

> Q: Okay. Yes, sir. And eventually you and Mr. Branco reached an agreement?
>
> A: Yes.
>
> Q: And you all memorialized that to writing; is that correct?
>
> A: I'm sorry?
>
> Q: You memorialized that to writing?
>
> A: That's true.
>
> . . .
>
> Q: Is that the deal that you and Mr. Branco had about asset purchases?
>
> A: Yes, sir.
>
> Q: You were going to buy the assets from the Florence location that he had and the Sumter location that he had, correct?
>
> A: Correct.
>
> Q: All right. Exactly what were you buying pursuant to that agreement that you're holding in your hand there?
>
> A: We're buying the equipment. We're buying, you know, the store basically, all the assets that were inside the store.
>
> (R. p. 150, lines 1-8, p. 150, line 19 - p. 151, line 6).

Certainly, Branco and Brooktenn manifested a mutual intent to be bound by the Asset Purchase Agreement, as evidenced by the testimony in the case and the fact that Brooktenn did

everything in its power to fulfill its promise to secure a lease with Hull Storey. (R. pp. 91-92; pp. 150-151; pp. 154-157; p. 359). For these reasons, the trial court did not err in ruling that Branco and Brooktenn had a valid contract and this Court should reverse the Court of Appeals.

II. The issue of capacity and form of judgment was never raised below but, regardless, the trial court correctly entered judgment in this case.

The issue of capacity and the form of the judgment was never raised to the trial court in any form. Respondents' claim that Branco Investments, Inc. somehow lacked requisite capacity is meritless and not found anywhere in the record. *See* Resp. Br. at pp. 25-27. In fact, the sole evidentiary basis for this assertion is an out-of-record citation to the South Carolina Secretary of State's website.[6] There is a dearth of information in the record as to why the Secretary of State's website might have shown this information, what that notation actually meant in this case, and what processes were employed in arriving at that designation.[7]

A review of the record plainly shows that (1) Branco Investments, Inc., through Paul Branco, conducted business with Brooktenn and (2) Branco Investments, Inc. had full corporate status when virtually all legal proceedings relevant to this matter occurred and certainly during trialines For all of the reasons explained herein, the Court should reject this argument; reverse the Court of Appeals; and reinstate the entry of judgment below. As this Court is well aware, South

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[6] Branco would note that in addition to this issue being unpreserved, Respondents reference numerous documents that were not included in the Designation of Matter on Appeal or in the Record. *See, e.g.*, R. pp. 101-103 (Index to Record on Appeal). Further, Respondents never requested that the Court of Appeals, much less the trial court, take judicial notice of these documents or other sources. *See* Resp. Br. at pp. 26-27 (providing links to Secretary of State website pages); *See also* Rule 210 (c), SCACR ("The Record shall not . . . include matter which was not presented to the lower court or tribunal.").

[7] For example, the Secretary of State must mail written notice to the affected corporation before dissolution, among other technical requirements. *See* S.C. Code Ann. § 33-14-210(a). Respondents present no evidence of the Secretary of State's compliance with these requirements.

Carolina courts have routinely rejected hyper-technical corporate identity arguments in the service of process context:

> A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, as is the case here, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

McCall v. IKON, 363 S.C. 646, 652–53, 611 S.E.2d 315, 318 (Ct. App. 2005) (quoting *Griffin v. Capital Cash*, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992)); *see also Long v. Carolina Baking Co.*, 193 S.C. 225, 239, 8 S.E.2d 326, 332 (1939) ("If a corporation has acquired a name by usage, an adjudication against it by the name so acquired is valid and binding."). Regardless of its status, the fact that Branco Investments, Inc. was attempting to sell off equipment and other assets (a transaction thwarted by Respondents) is evidence that the company was, at minimum, liquidating business assets. Under South Carolina law, this sort of activity is expressly permitted even for dissolved corporations. *See* S.C. Code Ann. § 33-14-210(d); *See also Vasey v. Colton Builders, LLC*, 2016-UP-305 (S.C. Ct. App. June 22, 2016) (affirming arbitration award in favor of LLC that had been administratively dissolved by the Secretary of State where there was no evidence the award was procured by fraud or other undue means, especially in light of the fact there was no evidence the builder was aware of the dissolution and the LLC was subsequently reinstated).[8] Furthermore, if the Court were to set aside the preservation issues, the only substantive argument remaining for Respondents would simply result in the trial court engaging

[8] Petitioners are aware that citation to unpublished opinions is disfavored under the South Carolina Appellate Court Rules but believes this opinion may be beneficial to the Court's consideration of this argument.

in the needless and ministerial task of adding another party to the judgment.[9] For these reasons, the Court should reject this latest attempt to distract from the sole issue before the Court – whether any evidence exists to support the trial court's findings.

CONCLUSION

The Court of Appeals exceeded its limited scope of review in this matter, substituting its *view* of the evidence and overlooking the *existence* of such evidence. This Court should reverse the Court of Appeals and reinstate the judgment for all the reasons contained in the record.

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August 15, 2022

[9] It is worth noting that were the Court decide to add a party to the judgment, it would not change Respondents' obligation to pay post-judgment interest. "Post-judgment interest is in the nature of a penalty. . . . If, after appeal, a further *determination by the trial court* is necessary in order to *fix the amount of an award*, the award will not draw interest until the determination is made." *Babb v. Rothrock*, 310 S.C. 350, 354, 426 S.E.2d 789, 792 (1993). In *Vance v. Jacobs*, 294 S.C. 377, 379, 364 S.E.2d 755, 756 (Ct. App. 1988), the plaintiff obtained a jury verdict, and the trial judge entered a JNOV. The appellate court reversed the JNOV, and "remanded for entry of judgment on the verdict." *Id.* The appellate court ruled that interest ran from the date of the original judgment. *Id.*; *see also Edens v. S. Carolina Farm Bureau Mut. Ins. Co.*, 288 S.C. 435, 436, 343 S.E.2d 49, 50 (Ct. App. 1986). Thus, the direction to add a party or replace a party would require no further "determination" from the trial court, and certainly would not be necessary to fix the amount.

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PROOF OF SERVICE

The undersigned hereby certifies that on August 15, 2022, she caused to be delivered ten (10) bound copies and one (1) unbound copy of the *Reply Brief of Petitioners* to the South Carolina Supreme Court at 1231 Gervais Street, Columbia, South Carolina and further that she served counsel for Respondents with a copy of the *Reply Brief of Petitioners* via electronic mail to the following:

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