THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

Case No.: 2012-CP-46-02286

Charles Sonnenberg, Festival Corp., Phillip Pulley and Robert Foster. . . . . Plaintiffs,

Of whom Phillip Pulley and Robert Forster are the Appellants,

v.

D&T Imports South Carolina, Inc., a Nevada Corporation, d/b/a Area 51 Fireworks, and York County, a political subdivision of the State of South Carolina, ... Defendants,

Of whom D&T Imports South Carolina, Inc., a Nevada Corporation, d/b/a Area 51 Fireworks is the Respondent.

Appellant Phillip Pulley and Robert Foster's Initial Reply Brief

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Appellants believe that they have adequately set forth their position and legal arguments in Appellants' principal brief. However, Appellants take this opportunity to briefly reply regarding D&T's principal argument. Appellants do not believe the issue before this court is nearly as "simple" as D&T would like it to be.

REPLY

D&T continues to advocate an erroneous standard by which the trial court should have considered D&T's motion for damages for "wrongful" injunction.

In its responsive brief, D&T points out that many federal jurisdictions, and some state jurisdictions, hold an injunction is "wrongful if it is subsequently dissolved or the enjoined party thereafter prevails on the merits." Respondent's Brief at 4. However, the standard D&T advocates is not nearly as uniform as D&T would have this court believe. Nor is South Carolina one of the jurisdictions that "automatically" awards damages where an injunction is issued, then dissolved. Regrettably, however, that is the standard by which the trial judge assessed the alleged "wrongfulness" of Appellants' injunction.

As the United States District Court for the District of Maryland discussed in Network International, L.C. v. Worldcom Technologies, Inc., there are several variant standards by which courts determine whether a party has been "wrongfully" enjoined. *See generally* 133 F. Supp. 2d 713, 717 – 718 (D. Md. 2001). Some jurisdictions employ an "error in issuance" standard, "whereby a defendant will be deemed wrongfully enjoined, regardless of whether plaintiff prevails on the merits, if the plaintiff failed to satisfy a standard for injunctive relief or if there was some defect in the issuance of the injunction." Id. at 717 (citing Northeast Airlines v. Nationwide Charters and Conventions, Inc., 413 F.2d 335, 338 (1st Cir. 1989)). Still other courts employ an "automatic damages" standard, holding "that if the court ultimately denies a request

for a permanent injunction, the preliminarily enjoined party will be automatically entitled to damages."[1] Id. (citing Atomic Oil Co. of Oklahoma v. Bardahl Oil Co., 419 F.2d 1097 (10th Cir. 1969), *cert. denied*, 397 U.S. 1063 (1970) and Buddy Systems, Inc. v. Exer-Genie, Inc., 545 F.2d 1164 (9th Cir. 1976)). "[A]t the opposite end of the spectrum from the 'automatic damages' standard is a third standard, referred to as the 'malicious prosecution' standard, so termed because it recognized damages for a wrongfully issued injunction only if the suit was maliciously prosecuted." Id. (citing Greenwood County v. Duke Power Co., 107 F.2d 484, 487 (4th Cir. 1939)).

"Far more prevalent than the first three standards, however, is the 'judicial discretion' rule, which . . . ultimately leaves it to the court, as a matter of discretion, to determine whether and to what extent damages are due. Under this standard the court is not bound to award damages without considering the equities of the case, and recovery against the bond is not automatic even upon a showing of actual damage." Network International, 13 F. Supp. 2d at 718. South Carolina appears to fall within the so-called "judicial discretion" camp. Coosaw Mining Co. v. Carolina Mining Co., 75 F. 860 (C.C.S.C. 1896). Nothing in Rule 65 changes that fact.

Had this case been decided in another jurisdiction, perhaps D&T would be entitled to the automatic finding of "wrongfulness" it sought and was awarded by the trial court. However, this case was litigated in South Carolina, not in one of the jurisdictions cited in Respondent's brief. Under South Carolina law, D&T was not automatically entitled to an award of damages when Appellant's injunction was dissolved. Therefore, it was error for the trial court to apply an "automatic" entitlement standard when deciding D&T's motion.

[1] D&T advocates, and the trial court applied, an "automatic" standard in this case.

D&T did not present any evidence in support of its motion by which the trial court could have determined, in its discretion, that D&T was wrongfully enjoined. In fact, D&T's counsel disavowed any attempt (or need) to argue that the equities favored a finding of "wrongfulness."[2] Transcript of 11/1/2012 hrg., at 35. D&T argued, and the trial court applied, the wrong legal standard.

CONCLUSION

Even under Rule 65, the dissolution of a preliminary injunction does not automatically entitle an enjoined party to damages. Instead, courts asked to make a finding of wrongful enjoinder must exercise judicial discretion, considering equitable factors such as a plaintiff's good faith in seeking injunctive relief, its candor with the tribunal, and its legitimate interest to preserve the status quo. In this case, the trial court refused to exercise any discretion, failed to consider any equitable factors, and treated its decision as a "winner take all" game of chance. For the reasons set forth in Appellant's Brief and this Reply Brief, the Court of Appeals should reverse the trial court's finding that D&T was wrongfully enjoined and vacate the trial court's award of damages.

[2] Perhaps recognizing its own error, D&T now attempts to color Appellants' conduct as "malicious" or "bad faith." *See* Respondent's Brief at 4. Given its representations to the court below, D&T should be judicially estopped from arguing that the record supports a finding of bad faith or malice.

July 29, 2013

Respectfully Submitted,

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4852-1537-0004, v. 1

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Of whom D&T Imports South Carolina, Inc., a Nevada Corporation, d/b/a Area 51 Fireworks is the Respondent.

CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens Ballou & Carroll, LLC certifies that the Appellant's INITIAL REPLY BRIEF was served upon other counsel of record by depositing same in the United States Mail, with sufficient postage affixed and addressed as follows:

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The is the 29th day of July, 2013

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July 29, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: *Charles Sonnenberg, Festival Corp., Phillip Pulley and Robert Foster vs. D&T Imports South Carolina, Inc., et al*
C/A No.: 2012-CP-46-02286
Appellate Case No.: 2013-000604

Dear Ms. Kitchings:

Enclosed for filing in the above-named matter are the original and one copy of Appellants' Initial Reply Brief, including Proof of Service.

Please file the original documents and return clocked copies of each to me in the envelope that I have provided.

By copy of this letter, I am forwarding copies of the Initial Reply Brief and Proof of Service to counsel for the Respondents.

Please call me if you have any questions or concerns. Thank you for your assistance in this matter.

Sincerely,

L. Melia Sweatt
Paralegal

/lms
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