

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J. Michael Baxley

Case No. 2007-CP-10-4658

Charleston Scottish Rite Center Historical & Educational
Foundation, Inc. Appellants

v.

CentiMark Corporation. Respondent

PETITION FOR REHEARING

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TABLE OF AUTHORITIES

Cases:

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STATEMENT OF THE CASE

This litigation was commenced in 2007 when Appellant filed a Complaint alleging that the re-roofing services it purchased in 1996, from Respondent, were defective. The Complaint asserted six (6) separate causes of action, namely: Breach of the Implied Warranty of Workmanlike Service (Count I); Negligence (Count II); Unfair Trade Practices (Count III); Breach of Contract (Count IV); Breach of the Implied Warranty of Merchantability (Count V); and Negligence Per Se (Count VI). (R. p. 7-11) Respondent replied with an Answer denying the allegations and asserting various affirmative defenses, (R. p. 17-19) including, *inter alia*, the contractual disclaimer of all of the Appellant's causes of action established by the terms of the 1996 written purchase agreement entered into between the parties. (R. p. 286-289) The agreement provided that a written warranty was included in the contract terms and a written warranty was issued upon completion of the roofing project. (R. p. 71). Respondent asserted that, while the Limited Warranty provided various remedies to Appellant, it disclaimed the six specific causes of action propounded by Appellant.

Respondent filed a Motion for Summary Judgment (R. p. 298-300) which was granted by the Honorable J. Michael Baxley. Appellant filed a Motion to Reconsider, which was denied, and then filed its Notice of Appeal to this Court. After argument this Court reversed Judge Baxley's order in its April 18, 2012 Opinion wherein the Court held, *inter alia*, "As to Scottish Rite's argument that genuine issues of material fact remained in dispute, we find the trial court erred in granting summary judgment because there was a genuine issue of material fact as to whether the limited warranty was part of the contract."

STATEMENT OF ISSUES ON PETITION FOR REHEARING

1. APPELLANT HAS NOT PROVIDED ANY WITNESS WHO WILL DISPUTE THE FACT THAT THE WARRANTY WAS A PART OF THE CONTRACT

ARGUMENT

Respondent's Motion for Summary Judgment relied solely upon the testimony and evidence produced by Appellant, thus, the record is clear that there is no fact in dispute. Respondent believes that a new factual element, introduced during the appellate oral argument, may have affected the Court's perspective in this matter. During argument Appellant stated to the Court that the most critical document in this case, the Binder, (R. 243 – R. 285) contained "Bates Stamping" which Appellant's counsel did not recognize. The intended implication was to refute the admissions of Appellant's own witnesses that they had possession of the Binder and actually produced it to Respondent during discovery. This was a critical fact since it confirmed that Appellant had knowledge and possession of the warranty prior to entering into the contract with Respondent, i.e., the warranty was part of the contract. The attempt to insert a new "fact" should be rejected as the "fact" is not only disputed by Appellant's own witnesses but is not a part of the record. It was not even raised in Appellant's Brief. Without this non-record "fact" there is no material fact in dispute. It is merely a red herring since Appellant has no witnesses who can deny that it was provided with a copy of the warranty prior to entering into the subject contract with Respondent. A brief review of the history of this matter is illustrative.

Respondent CentiMark submitted a bid package, to Appellant Scottish Rite, wherein CentiMark offered to re-roof Scottish Rite's building. The bid package was presented in a

standard CentiMark “Project Binder”¹ which is a three-ring, spiral binder consisting of approximately 40 pages of detailed information advising potential customers of CentiMark’s capabilities and services (the Project Binder”). (R. p. 243-289) The Project Binder contained a three (3) page outline of proposed re-roofing services dated May 21, 1996 (the “Proposal”) and a one (1) page document entitled “Non-Prorated Limited Roof Warranty” (the “Limited Warranty”) marked SAMPLE (R. p. 285). These 4 pages are the focus of this litigation.

After delivery of the Project Binder to Scottish Rite it had the unfettered opportunity to review the Project Binder, and its contents, for approximately two months, from May 22, 1996 to July 16, 1996, when it then called in CentiMark’s representative, Brian Diederich, to present the Project Binder to the thirteen (13) members of Plaintiff’s “advisory conference” committee. (R. p. 295; Brief in Support of Motion for Summary Judgment, Ex. J) As Judge Baxley noted on page two of his August 10, 2010 Order Granting Summary Judgment, this committee was aided in its review by “... an attorney and a construction contractor, before it signed the contract for the roofing project.” The minutes of the advisory conference meeting of July 16, 1996 (the “Minutes”) (R. p. 295) indicate that Mr. Diederich made a presentation to the committee, displayed samples of roofing materials and “fielded questions from the group” (R. p. 295). Scottish Rite confirmed in writing that it accepted the Proposal and the accompanying 15 year warranty coverage provided by the Limited Warranty. (R. p. 296; Brief in Support of Motion for Summary Judgment, Ex. K) Scottish Rite also acknowledged, in writing, receipt of the Job Completion Form and actually made a note on the document indicating that it had reviewed the Limited Warranty which was issued on September 17, 1996. (R. p. 292)

The Limited Warranty covering this project was issued upon completion of the roofing project. While Scottish Rite makes much of this fact it does so without acknowledging that the

¹ Scottish Rite sometimes refers to the Project Binder as a “brochure”. The documents are one and the same.

process and timing is appropriate and has no impact on the validity of the Limited Warranty. As noted above, the exact terms of the Limited Warranty were delivered to Scottish Rite in May 1996 with the Project Binder. The Project Binder, and its contents, were reviewed by dozens of people including Scottish Rite's attorney and a construction contractor. After this thorough review, and, thus, being fully informed of every term and condition of the warranty that it was purchasing, Scottish Rite authorized CentiMark to proceed with the project.

Once a roofing project is completed an original, dated and signed Limited Warranty is delivered to the customer with a final invoice. This post-project issuance is both reasonable and logical because the warranty must contain specific information that is not available until after the work is finished. Prior to completion there is nothing to warrant (since the new roof does not exist) and there is no warranty commencement date (since warranty coverage begins on the date of completion). Upon completion of the work CentiMark enters the appropriate information onto the document, has a senior corporate officer execute the document, and then delivers it to the customer. This was accomplished, Scottish Rite received the Limited Warranty, paid for the services in full, and continually sought, and received, warranty services when repairs were needed.

Some repairs were considered warranty items and were repaired free of charge, pursuant to the terms of the Limited Warranty, while others were non-warranty. CentiMark invoiced Scottish Rite for the non-warranty repairs and Scottish Rite paid for these services. Non-warranty repairs were caused by events such as lightning strikes, (R. p. 293). Regardless, CentiMark always responded whether for warranty or non-warranty items. Although Scottish Rite alleged in its complaint, at ¶ 7, (R. p. 7) that CentiMark failed to respond to alleged

defects/problems with the roof, its designated representative (W. Martin)² refuted this allegation and swore at his deposition that CentiMark always responded. (R. p. 310-311; W. Martin Depo II, 11-13-09, p. 37-38)

Thus, it is apparent that Scottish Rite was fully aware of the terms, conditions and limitations of warranty coverage and availed itself of the warranty benefits.

The testimony of Appellant's own witnesses further confirms its receipt and knowledge of the Project Binder and, most importantly, its possession of the Binder. It admits that its corporate officers saw the Binder: “. . . Mr. Martin and Mr. Wooden testified that they saw the brochure.” Scottish Rite then continues in its Brief to admit that the July 16, 1996 minutes of its Advisory Committee “. . . show that the brochure was presented to the members of the Advisory Committee at that time.” (Appellant's Brief p. 5)

The record reveals the fact that Scottish Rite actually produced the Project Binder to CentiMark in response to a discovery request, thus proving that it had possession of the Project Binder before litigation even began. Subsequent to this disclosure, during the deposition of its Secretary, Richard Wooden, Mr. Wooden was shown the Project Binder and he agreed that “We got some kind of brochure. It was on a spiral thing, and – and it just says, “This is what we'll do”. (R. p. 156-157) Plaintiff's designated representative, William F. Martin was also deposed and he agreed that Scottish Rite had the Project Binder. (R. p. 319) Mr. Martin further testified that (a) the Limited Warranty was a “selling point” for Scottish Rite (R. p. 318; p. 69, lines 12-14); (b) the Project Binder was in Scottish Rite's roofing project files (R. p. 310 and 319), (c) Scottish Rite acknowledged that it had the Project Binder because it produced it to CentiMark in discovery (R. p. 319); and, (d) Scottish Rite could not deny that the sample warranty was in the

² Mr. Martin has been a member of Scottish Rite since 1976, became Administrative Assistant in 2003 and then General Secretary in 2005. (R. p. 192)

Project Binder and in its possession. (R. p. 319) The Project Binder, produced by Scottish Rite from its own files, contained the sample Limited Warranty. (R. p. 282; Brief in Support of Motion for Summary Judgment, Ex. A)

Thus, Scottish Rite agreed that it not only received the Project Binder, which contained the Proposal and the one-page sample Limited Warranty, before accepting the Contract, but also swore under oath that the information was presented to its appointed Advisory Committee at which time CentiMark's representative "fielded questions from the group." (R. p. 295) and that it was a "selling point" (R. p. 305, lines 10-20).

Importantly, no Scottish Rite witness ever claimed that they did not have the Project Binder prior to accepting the contract. No Scottish Rite witness ever claimed that the Limited Warranty was not a part of the contract. Thus it is undisputed that Scottish Rite had the Project Binder prior to accepting the contract and that the warranty was a part of the contract. As a legal matter, whether Scottish Rite saw the Project Binder in May or June or early July is not dispositive of the issue. The issue is: Did Scottish Rite have knowledge of the Project Binder, and its contents, prior to entering into the Contract with CentiMark? As Scottish Rite has admitted, its 13 member Advisory Committee, with the assistance of its attorney and a construction contractor, not only reviewed the Project Binder but extensively questioned the CentiMark representative who presented the Project Binder. Several days later the Advisory Committee submitted the project details to its entire membership who then voted to accept CentiMark's offer and authorized CentiMark to proceed with the construction project. The dispositive fact is not the exact date when Scottish Rite became aware of the terms and conditions of the Project Binder, and the one-page sample Limited Warranty contained therein, but whether it was aware of those terms before executing the contract. As Judge Baxley

concluded, the limited warranty "... was clearly part of the contract between the parties." He then noted that "A sophisticated purchaser in a bargained for contract cannot now claim that the warranty was unilateral, unconscionable, or otherwise inapplicable." (R. p. 3; Order of August 10, 2010 Granting Summary Judgment, p. 2)

In order to counter the facts supplied solely by its own witnesses, Appellant introduced the new "fact", during oral argument, that the document used throughout discovery, and identified by its own witnesses as the controlling document, was not the controlling document because it had "Bates Stamping" that Appellant's counsel did not recognize. Appellant failed to direct the Court's attention to any portion of the record that could support this new allegation. A review of the record indicates that it is without foundation.

The undisputed facts, contained in the record, indicate that Appellant had in its possession, from 1996 through the discovery period, the Binder and its contents which included the Limited Warranty. Clearly the Warranty was a part of the contract. Appellant's witnesses did not dispute this fact, thus, there is no disputed issue of material fact. The new argument regarding the Bates Stamping is not a part of the record and should not be considered by the Court. In the absence of considering this non-record "fact" there are no material facts in dispute since the Appellant's witnesses agreed that they had possession of the Binder.

Scottish Rite bears the burden of proof to produce evidence disputing the facts advanced by the moving party. As noted in South Carolina Electric and Gas Company v. Combustion Engineering, Inc., 283 S.C. 182, 188-189; 322 S.E.2d 453,457 (1984) the Court of Appeals of South Carolina noted that:

Circuit Court Rule 44(d) provides in part as follows:

When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Where, then, a party makes no factual showing in opposition to a motion for summary judgment, the court **must** grant summary judgment to the moving party if, under the facts presented, the latter is entitled to summary judgment as a matter of law. *Arrants v. Rankin*, 268 S.C. 567, 235 S.E. (2d) 135 (1977); *Garrett v. Reese*, 262 S.C. 327, 204 S.E. (2d) 432 (1972). (emphasis supplied)

CONCLUSION

In conclusion, CentiMark relied upon the uncontroverted deposition testimony of Scottish Rite's designated representative, William F. Martin, II, its other witnesses and documentary evidence. As such, no genuine issue of material fact exists and Scottish Rite has not presented any "material" facts in dispute. CentiMark Corporation, respectfully requests this Honorable Court reconsider its Opinion and affirm the judgment and order issued by Judge Baxley thus dismissing Scottish Rite's complaint with prejudice.

Aiken, Bridges, Elliott, Tyler & Saleeby, P. A.

By: 

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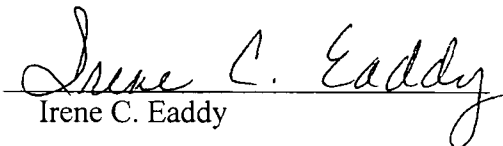
v.

Centimark Corporation Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has on this date served a copy of attached and foregoing Respondent's **Petition for Rehearing** on all parties by depositing same in the United States Mail with sufficient postage attached, addressed as follows:

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April 30, 2012