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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Case No. 2019-CP-46-02090
Appellate Case No. 2023-001398

Sherry Killian Duncan, …….…… Appellant,

v.

Gurdip S. Gill a/k/a Gary Gurdip
a/k/a Gary Gurdip Gill, ……Respondent.

REPLY BRIEF OF APPELLANT

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APPELLANT'S REPLY TO RESPONDENT'S COUNTERSTATEMENT OF THE CASE

The Appellant reasserts the Statement of the Case and Statement of Facts set forth in Appellant's Initial Brief.

The Respondents would have this Court consider not the evidence before the trial court, but his own artful interpretation of previous pleadings and statements clearly contrary to the record. First, the Respondent asserts that, contrary to the evidence presented at trial, Appellant was only "hired to paint." This was in opposite the testimony of Appellant. **(Tr. pp. 75 – 78; p. 267 ℙ 21-25; P. 268 ℙ 1-12 P. 270 ℙ 17-25; P. 271 ℙ 1-4; P. 281 ℙ 22-24; P. 284 ℙ 23-25; P. 285 ℙ 1-11)**. The Respondent asserts that Appellant was paid and reimbursed by Respondent. This, again, was contrary to the testimony at trial. **(Tr. pp. 74 ℙ 19-24 p. 179 ℙ 9-16; p. 183 ℙ 25; p. 184 ℙ 1).** The Respondent asserts that he had "total control" over the project and that Appellant needed "approval for everything." This, again, was contrary to the testimony at trial. **(Tr. pp. 79 ℙ 12-23; p. 91 ℙ 13-22; p. 93 ℙ13-20; p. 94 ℙ 18-25; p. 95 ℙ 1-2; p. 95 ℙ 6-25; P. 96 ℙ 1-11; p. 97 ℙ 23-25; p. 98 ℙ 1-25; p. 99 ℙ 1-2; p. 153 ℙ 13-17; p. 171 ℙ 10-19).** The Respondent asserts that "nothing was in writing to substantiate [Appellant's] claims. A review of the citation Respondent relies upon and the surrounding testimony refutes this claim. **(Tr. pp. 189-192).** Instead, Appellant testified on cross that there were several texts concerning draws concerning the partnership agreement and texts concerning the Respondent demanding a settlement agreement be drafted. **Id.** Finally, the Respondent relies upon claims that "no evidence" supporting a "meeting of the minds" was presented. Strangely, Respondent admits the opposite to be true. Respondent's Brief states: "The Appellant presented no evidence of any joint venture ***outside of her own assertions***." (Respondent's Initial Brief P. 6)(emphasis added). By his own admission, testimonial evidence was presented.

Contrary to unsupported or directly refuted assertions of Respondent ample evidence supporting the Appellants claims were presented at trial. In November of 2018, Appellant and Respondent entered into a partnership agreement. The terms of the agreement were that she was to provide her time and talent to the partnership in the flipping of a Property. As part of the partnership agreement, the Respondent was to (a) contribute half of the funds for the purchase of the Property and all of the funds for the purchase of the materials that the Appellant used in the improvements of the Property and (b) in light of Appellant foregoing other projects and employment and living off of her savings, make payments to Appellant for monthly draws of $2,400 against the future disbursement from the sale of the Property when her personal savings ran out.

Appellant made significant contributions to the partnership including her use of her time in making improvements to the Property, her talent in making managerial decisions as it related to the aesthetics of the Property, and her talent with regards to facilitating the remaining improvements needed to the Property. The parties agreed that when the Property was sold, the Appellant was to receive half of the net profits less any draws. Similarly, Appellant managed and oversaw the work and contractors at the property.

Ultimately, the Property was purchased for $93,000, extensively improved, and later sold for $280,000. Instead of receiving the agreed upon $2,400 in monthly draws, the Respondent, in breach of the agreement only gave Appellant a $2,000 draw in April 2019 and a $1,100 draw in May of 2019. After demands for payment, Respondent refused and withheld her access to the Property, including changing the locks.

REPLY TO RESPONDENT'S ARGUMENT

The Respondent's erroneous arguments can be summed up as follows: (1) this Court

should strongly consider the pleadings of this action that have been amended rather than the evidence presented at trial; (2) testimony of a party should not be enough to overcome a directed verdict; (3) the Appellant is required to provide evidence supporting any possible set-off for a calculation of damages not to be considered speculative; (4) the ruling concerning the Rule 408 evidence was so erroneous a new objection needed to be made; and (5) the record is too replete with the trial court's misunderstanding of the rule against hearsay that asking the Respondent to argue in the trial court's favor would be too onerous.

Respectfully, these erroneous arguments should be disregarded, and the decision of the trial court overturned. The evidence presented to the Court and jury provided ample evidence raising issues of fact for the jury to decide whether the Respondent breached a contract with the Appellant, such breach was accompanied by fraudulent acts, a constructive trust was created with regard to the Property, and whether Appellant was entitled to damages under the betterment statute.

I. The Later Amended Pleadings of Appellant are Irrelevant to the Evidence This Court is to Consider on Appeal.

The Respondent erroneously goes to great lengths to have this Court apply its review to later amended pleadings. As Respondent rightly points out, the pleadings discussed at length in his Initial Brief were all properly amended. Rule 15(a) provides that when a party asks to amend his pleading, "leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. "This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005) (citing *Jarrell v. Seaboard Sys. R.R., Inc.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987)). The South Carolina Supreme Court, noting Rule 15(a) is substantially the same as the Federal Rule," routinely considers decisions

based upon the Federal 15. "As a general rule, an amended pleading ordinarily supersedes the original and renders it of no legal effect." *Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001); see also 6 Charles Alan Wright et al., Federal Practice and Procedure § 1476 (3d ed. 2017) ("A pleading that has been amended under Rule 15(a) supersedes the pleading it modifies and remains in effect throughout the action unless it subsequently is modified. Once an amended pleading is interposed, the original pleading no longer performs any function in the case […]). The Respondent's numerous baseless assertions and conclusions drawn from the later amended pleadings should, respectfully, rightly be ignored.

II. Testimony of an Interested Party Still Serves as Evidence.

Contrary to the erroneous assertion of the Respondent, testimony of the Appellant at trial is not considered "no evidence" for purposes of a directed verdict, regardless of the self-serving nature of the testimony. "When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (2000). The trial court must deny a directed verdict motion when the evidence yields more than one inference or its inference is in doubt. *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999). The evidence presented to the Court and jury provided ample evidence raising issues of fact for the jury to decide whether the Respondent breached a contract with the Appellant, such breach was accompanied by fraudulent acts, a constructive trust was created with regard to the Property, and whether Appellant was entitled to damages under the betterment statute. Therefore, the Court erred in directing a verdict for the Respondent. The Respondent is unable to refute the testimony that was presented at trial by simply stating it is "no evidence." Respondent may not agree with the testimony or find it

persuasive, but such a finding is not appropriate for a motion for directed verdict. The Trial Court had more than enough evidence to support an inference that a partnership was formed between the parties, Respondent fraudulently breached that agreement and Appellant was entitled to the requested relief. Thus, the directed verdict should be overturned.

III. Ample Evidence of Damages were Presented

Contrary to the erroneous assertion of Respondent, the Appellant is not required to provide evidence supporting any possible set-off for a calculation of damages not to be considered speculative. The purpose of an award of damages for breach of contract is "to give compensation, that is, to put the Appellant in as good a position as he would have been in had the contract been performed." *Drews Co. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 209, 371 S.E.2d 532, 533 (1988) (citing 11 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 1338 (3d ed. 1968)). The proper measure of that compensation, then, "is the loss actually suffered by the [Appellant] as the result of the breach." *Id.* (citing *S.C. Fin. Corp. v. W. Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960)). Here, the Appellant explicitly testified and presented documented evidence concerning the promise for a split in profits resulting from the agreement and the Respondent's failure to pay those profits to Appellant. Thus, adequate evidence of damages were presented.

As argued in her Initial Brief, the standard for proving lost profits complies with the general rule for recovery of damages, which mandates that the fact finder determine the amount of damages with reasonable certainty from the evidence. *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (1996). The amount of damages cannot be left to conjecture, guess, or speculation; however, mathematical certainty is not required. *Id. . ; see Yadkin Brick Co. v. Materials Recovery Co., L.P.*, 339 S.C. 640, 646, 529 S.E.2d 764, 767 (2000) ("The amount of

damages need not be proved with mathematical certainty. The evidence, however, should be such that a court or jury can reasonably determine an appropriate amount."); *Minter*, 322 S.C. at 528, 473 S.E.2d at 70 ("While proof of mathematical certainty is not required, the amount of damages cannot be left to conjecture, guess, or speculation

Here, Appellant not only testified regarding the original purchase price and later sales price of the Property, but the very deeds evidencing these transactions were presented. Not only did the evidence prevent a jury from needing to conjecture, guess, or speculate; it provided with a mathematical certainty not required. Thus, ample evidence was presented as to the direct harm suffered by Appellant. The argument raised by Respondent is nothing more than an attempt to raise an inference that such evidence is incomplete and Respondent would be entitled to some set-off. It is not the Appellant's responsibility to prove any alleged defense of Respondent, nor is the consideration that some defense **may** exist grounds for directed verdict.

IV. The Trial Court erred in admitting Rule 408 evidence.

Prior to trial, Appellant moved *in limine* to bar Respondent from introducing certain Rule 408 discussions between Appellant and Respondent. The trial court erroneously overruled the objection, holding such evidence was not covered under Rule 408 because it was specifically being presented not only to establish the parties were attempting to put into writing a compromise of the agreement, but what the terms of the settlement may have been and that it was negotiated prior to actual litigation being brought. Specifically, the trial court ruled:

> "I'll allow it in. It appears what was presented to the Court was during the course of the relationship, that what was presented to the Court, that that particular contract was an attempt to create a contract, which is certainly one of the issues in the case. Whether there's a contract (indiscernible) or not, certainly 408 generally anticipating that litigation has begun and certainly 408 prohibits offers of compromise and settlement after litigation has started. That's not the facts of this particular case in that particular document, so I'll allow the defense to refer to it in their opening."

(Tr. pp. 37 ¶¶ 19-25 through P. 38 ¶¶ 1-5). This ruling stands in direct contrast to the South Carolina rules of evidence, was prejudicial to the Appellant, and should result in Appellant being granted a new trial.

A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review. See State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). An exception to this rule is when the motion in limine is made "immediately prior to the introduction of the evidence in question." State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). The South Carolina Supreme Court expanded this exception in *State v. Wiles*, holding that even when the evidence does not immediately follow the motion in limine, if the trial court clearly indicates its ruling is final, rather than preliminary, the issue is preserved for appellate review. 383 S.C. 151, 157, 679 S.E.2d 172, 175 (2009). In *Wiles*, the trial court had commented to the jury about the evidence that was the subject of the motion in limine before any evidence was admitted. Id.

The order on the motion in limine made it perfectly clear to counsel for the parties that the evidence presented in the motion in limine would need to differ from that presented at trial in order for the trial court to change its mind. The motion was ruled upon directly before the witness was asked to testify. The exception to the rule is provided for exactly the set of facts before this Court. Counsel argues the exact facts supporting the application of Rule 408 and the trial court ruled such facts do not cause him to believe Rule 408 was applicable. The witness immediately goes on the stand and is asked on cross about the settlement document. The issue was preserved.

V. The Trial Court erred in excluding witness testimony it deemed hearsay.

The trial court erroneously applied its own hearsay rule in sustaining counsel for the Appellants objections concerning what it ruled was hearsay testimony. On multiple occasions, when presenting her case in chief, the Appellant sought to testify concerning conversations with the Respondent and statements the Respondent made to her. On many of these occasions, counsel for the Respondent objected on the grounds that such testimony was hearsay. The court erroneously sustained these objections, effectively precluding the admission of relevant evidence that could further establish the necessary facts in support of Appellant's claims against the Respondent. The trial court's rulings were not only grossly erroneous, but ultimately prejudicial, as the trial court ignored the rest of the mountain of evidence supporting Appellant's claims when granting the directed verdict.

Respondent asks for direct citations to these objections and rulings. They are as follows: P. 75 ⁋⁋ 13-20; P. 195 ⁋⁋ 2-20; P. 196 ⁋⁋ 11-22.

CONCLUSION

The Court erred when it (1) directed verdict for the Respondent; (2) allowed inadmissible evidence of settlement discussions; and (3) precluded evidence exempt from the rule of hearsay. The evidence presented to the Court and jury provided ample evidence raising issues of fact for the jury to decide whether the Respondent breached a contract with the Appellant, such breach was accompanied by fraudulent acts, a constructive trust was created with regard to the Property, and whether Appellant was entitled to damages under the betterment statute. The erroneous rulings regarding evidence were prejudicial. Thus, this Court should, respectfully, overturn the ruling of the Trial Court and grant the Appellant a new trial.

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PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief on the Respondents by email on June 7, 2024, addressed to their attorney of record as follows:

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