

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

) IN THE COURT OF COMMON PLEAS
) FOR THE SECOND JUDICIAL CIRCUIT

KEVIN DRAKE,)

Plaintiff,)

C/A #: 07-CP-02-16R

v.)

ATLANTIC COAST PROPERTIES,)
INC.; ATLANTIC COAST HOMES,)
INC.; HOLMES TIMBER COMPANY,)
INC.; and JERRY M. HOLMES,)
INDIVIDUALLY AND IN HIS)
OFFICIAL CAPACITY AS)
PRESIDENT/CEO OF EACH NAMED)
CORPORATE ENTITY,)

Defendants.)

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SC Court of Appeals

FINAL ORDER AND JUDGMENT

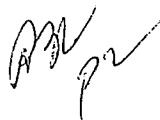
This matter came before the undersigned as Special Referee on April 15, 2009. Both parties were represented by counsel. The Court received voluminous documentary evidence, testimony in the form of depositions and affidavits and heard arguments of counsel on behalf of both the Plaintiff and the Defendants. The Court also received written submissions for judgment on behalf of both the parties. After reviewing all of the evidence before the Court, all of the testimony presented and considering the arguments of counsel in this matter, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Plaintiff initiated this action by the filing of a Summons and Complaint on January 6, 2005. Plaintiff advanced claims for breach of contract, tortious interference with contractual relations and defamation. Summons and Complaint.

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2. Defendant filed an Answer and Counterclaim asserting counterclaims against Plaintiff for unjust enrichment, breach of duty of loyalty, conversion, fraud, and the breach of covenant of good faith and fair dealing. Answer and Counterclaim.
3. Plaintiff filed an Answer to the Counterclaims denying these allegations on April 4, 2005. Answer/Reply.
4. Plaintiff was employed by Atlantic Coast Homes, a division of Atlantic Coast Properties from November 1998 through April 2004. Drake Depo; Holmes Depo.
5. Plaintiff worked as a salesman from November 1998 until December 1999, when he was promoted. Drake Depo; Holmes Depo.
6. Plaintiff was the best salesman that Holmes had. Drake Depo; Holmes Depo; McNaney Depo.
7. Plaintiff was promoted to Sales Manager in December 1999 and General Manager in August 2001. Drake Depo; Holmes Depo.
8. Atlantic Coast Homes was formed as a division of Atlantic Coast Properties in 1996 and dissolved in 2007. Defendant Holmes is the sole owner of these corporations. McNaney Depo; Holmes Depo.
9. Throughout that time period, there was numerous General Managers and none of them could make the business turn a profit. The accountant, McNaney, testifies that over the 11 years the company was in business it lost over 11 million dollars. Holmes Depo; McNaney Depo.
10. Defendant Holmes testified that in 2003 the business was actually losing less money under Plaintiff's management. Holmes Depo.
11. In February 2004, Defendant took Plaintiff to lunch and told him that he was doing a great job and offered him a substantial raise if he would agree to give up his percentage of



- the year end profit he had been promised when he accepted the job. Plaintiff did not take the raise and continued under his original agreement. Holmes Depo; Drake Depo.
12. Plaintiff was terminated with no warning two (2) months later. Defendant Holmes testifies that he terminated Plaintiff in April 2004, and the reason for the termination was making a change and cutbacks for financial reasons. Holmes Depo.
 13. At that time, Defendant Holmes did not know of anything that he was concerned about that Plaintiff was doing. Holmes Depo.
 14. Holmes told Drake that he would receive a severance package of 6 weeks pay or \$6,000.00. Holmes Depo; Drake Depo.
 15. After terminating Plaintiff, Defendant Holmes then retained Steven Smith, a former SLED investigator, now private investigator, to conduct an investigation into anything dishonest or criminal that Plaintiff may have engaged in while working for him. Defendant Holmes testifies that he does not remember what prompted him to do this. Holmes Depo; Smith Depo.
 16. Smith was retained by Atlantic Coast Properties in May 2004 to conduct the investigation and prepare a report. Smith Depo; Holmes Depo.
 17. Smith went out into the public and contacted former clients, sub-contractors and co-workers to inquire about "mishandling of company funds and assets" that Kevin Drake was involved in. Smith Depo.
 18. Smith summarizes his work in a twenty page report detailing the concerns that he uncovered - which he admits is all hearsay with no evidentiary support. Smith Depo.
 19. Smith admits that the concerns noted in his report all came from hearsay information and that he did not do anything himself to verify any of the allegations. Smith Depo.
 20. Plaintiff has objected to the admission of Smith's report to the extent the interviews

included constitute hearsay. Plaintiff's Submissions for Judgment.

21. Smith testified that the information about Plaintiff Drake was taken to SLED and the Aiken County Sheriffs Department to see if they would prosecute Drake. Smith Depo.
22. Both entities declined to prosecute Plaintiff Drake stating that there was not enough evidence and that they would need Defendant Holmes to conduct an audit to determine if anything had been taken or utilized improperly by Drake. Smith Depo.
23. Defendant Holmes declined to do any audit. Holmes Depo; Smith Depo.
24. In May 2004, Defendant Holmes had his attorneys send Plaintiff Drake a letter telling him that the company was withholding his severance package until they were able to determine any losses attributable to Drake. Holmes Depo; Drake Depo.
25. Plaintiff Drake took a polygraph examination administered by a former SLED polygrapher in an attempt to clear his name of these allegations and passed with no deception indicated. Gallimore Affidavit.
26. After his termination, Plaintiff had a family to support and continued to try to earn a living by renovating and selling houses. Drake Depo.
27. Plaintiff Drake talked to his contact, Rick Harwood, at Clayton Homes - a manufacturer of modular homes. Drake Depo; Drake Affidavits; Harwood Affidavit.
28. Plaintiff Drake wanted to purchase the Colony Bay line of homes that Clayton manufactures, which was an entirely different line of homes than those carried by Holmes or Atlantic Coast Properties. Harwood Affidavit.
29. Plaintiff Drake completed the paperwork with Clayton to order these this line. Drake Affidavits.
30. Plaintiff Drake entered into a contract to provide a Colony Bay modular home manufactured by Clayton to The Marzol family in Lexington, South Carolina, on April

- 29, 2004. The contract was for a sales price of \$152,000.00 including the house, foundation, set-up, completion and a two-car garage. Drake Depo; Drake Affidavits.
31. The invoice price of the Colony Bay home from Clayton was \$68,000.00 plus set-up and completion costs of \$39,000.00. The profit on the Marzol deal was to be \$45,000.00. Drake Affidavits.
32. Drake entered to a contract to provide a Colony Bay modular home manufactured by Clayton to The Neal family in Aiken, South Carolina, on May 25, 2004. The contract was for a sales price of \$ 174,740.00 including the lot clearing, house, foundation, two-car garage, driveway, well, septic system, landscaping, set-up and completion. Drake Depo; Drake Affidavits.
33. The invoice price of the Colony Bay home from Clayton was \$70,000.00 plus set-up and completion costs of \$55,200.00. The profit to Drake on the Neal deal was to be \$49,540.00. Drake Affidavits.
34. Plaintiff Drake poured the footers for the homes and had the foundations in place for the homes to be delivered from Clayton. Drake Depo; Drake Affidavits.
35. Rick Harwood, from Clayton Homes, called Plaintiff Drake and told him that he was sick about it, but that he could not sell him the homes he had ordered because Defendant Jerry Holmes told him that if he sold anything to Kevin Drake that Clayton would never sell another home to Defendant Holmes or any company he was affiliated with. Drake Depo; Drake Affidavits; Harwood Affidavit.
36. After talking to Plaintiff Drake about Drake ordering the homes he was selling to Marzol and Neal, Harwood called Defendant Holmes just to let him know that he was going to be selling to Drake. Harwood Affidavit.
37. Harwood did not anticipate any problem because the homes Plaintiff Drake ordered were

- not the same line of houses that Defendant Holmes or Atlantic Coast Properties was selling. Harwood Affidavit.
38. Defendant Holmes purchased more than one million dollars a year from Harwood at Clayton. Harwood Affidavit.
39. Harwood was specifically told by Defendant Jerry Holmes that if he sold anything to Kevin Drake that he (Harwood) and Clayton would never sell another home to Defendant Holmes or any company he is affiliated with. Harwood Affidavit.
40. Harwood could not afford to lose Defendant Holmes' business and had to call Plaintiff Drake and tell him that he could not sell the houses to him. Harwood Affidavit; Drake Depo; Drake Affidavits.
41. There were plenty of other competitors around the state that sold Clayton Homes. Drake Affidavits.
42. Importantly, Defendant Holmes testifies that he cannot remember if he had this conversation about Drake with Rick Harwood at Clayton Homes. Holmes Depo.
43. At that point, with the foundations in place for the specific homes that had been ordered, Plaintiff Drake was forced to go forward with stick-building these houses instead of placing the modular units from Clayton. Drake Depo; Drake Affidavits.
44. According to Plaintiff Drake, the cost of the site built construction for Marzol was \$148,720.00 with a \$152,000.00 contract price. Leaving a profit for Plaintiff Drake of only \$3,280.00. The inability to provide the Clayton Colony Bay modular home to the Marzols reduced Drake's profit from \$45,000.00 to \$3,280.00. A loss to Drake of \$41,720.00. Drake Depo; Drake Affidavits.
45. According to Plaintiff Drake, the cost of the site built construction for Neal was \$165,700.00 with a \$174,740.00 contract price. Leaving a profit for Drake of only

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\$9,040.00. The inability to provide the Clayton Colony Bay modular home to the Neals reduced Drake's profit from \$49,540.00 to \$9,040.00. A loss to Drake of \$40,500.00.

Drake Depo; Drake Affidavits.

46. In December 2004, Defendant Holmes had his attorneys send Plaintiff a letter telling him that if Plaintiff did not pay them \$50,000.00 that they would go to the "authorities" which Defendant Holmes testifies means police. Holmes Depo; Drake Depo.

47. This lawsuit was initiated by Plaintiff on January 6, 2005. Drake Depo; Complaint.

48. Even after filing suit in the matter, Plaintiff was informed by a client, Oletha R. Minto, M.D., whose home he was renovating, that she had been told about his dishonesty with clients and dissatisfied customers by the office manager at True South Communities.

Drake Depo; Minto Affidavit; Auvenshine Affidavit.

49. True South Communities is the marketing arm of Atlantic Coast Properties. It is a subsidiary. Holmes Depo; Minto Affidavit; Auvenshine Affidavit.

50. The office manager then went on to suggest numerous other builders that they would recommend that she use rather than Kevin Drake. Minto Affidavit; Drake Depo; Auvenshine Affidavit.

51. The office manager for True South, Sheila Auvenshine, verifies Dr. Minto's account and further relates that from the time she went to work with Defendant Holmes in April 2006, it was communicated to her by management that Plaintiff Kevin Drake was terminated for stealing from Atlantic Coast. Auvenshine Affidavit.

CONCLUSIONS OF LAW

Plaintiff's Claims

1. Plaintiff seeks recovery of his promised severance package of six weeks pay or \$6,000.00 pursuant to the oral agreement of the parties at Plaintiff's termination. The agreement

to provide the severance need not be in writing to be enforceable. However, Defendant later sends Plaintiff a letter in which he references that he is withholding the severance for any offsets he determines may be owed him by Plaintiff.

“A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct.” Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). “For a contract to arise there must be an agreement between two or more parties. There must be an offer, there must be an acceptance, and there must be a meeting of the minds of the parties involved.” Rushing v. McKinney, 370 S.C. 280, 633 S.E.2d 917 (Ct. App. 2006). There must also be consideration to form a binding contract. The promise here to provide the severance package is not supported by any legal consideration, as is required. As a result, even though Defendant promised Plaintiff this severance package, the promise is gratuitous and does not rise to the level of an enforceable contract. Defendant is entitled to judgment on Plaintiff’s breach of contract claim.

2. Plaintiff has alleged that Defendant tortiously interfered with his contractual relations and caused him damage after his termination. To be successful in a tortious interference with contractual relations claim, Plaintiff need only show that (1) there was a contract, which can be implied, (2) the wrongdoer’s knowledge of the relationship, (3) the wrongdoer’s intentional procurement of the breach, (4) absence of justification, and (5) damages resulting therefrom. Eldeco v. Charleston County School District, 372 S.C. 470 (2007); Collins Entertainment v. Coats, 355 S.C., 125 (Ct. App. 2003); Crandall v. Navistar, 302 S.C. 265, 395 S.E.2d 179 (1990).

Plaintiff has established through undisputed testimony that Defendant Holmes intentionally and tortiously interfered with his contractual relations and, as a result, his ability to earn a living. The Affidavit of Rick Harwood on this issue is clear. There was no legal

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justification for Defendant Holmes to threaten Harwood with the loss of over one million dollars in business if Clayton sold anything to Drake. Clayton Homes are sold by vendors all over the state. Defendant Holmes had no legal right or justification to interfere with Plaintiff Drake's relationship with this vendor or with his purchasers. Defendant Holmes acted intentionally to prevent Plaintiff Drake from being able to purchase homes from this vendor and Plaintiff Drake suffered real and tangible losses because of this interference. Defendant Holmes testified that he does not remember if he told Clayton Homes/Harwood that if they sold to Drake he would pull all his business from them or not. Plaintiff should recover for this intentional interference. Plaintiff has testified that his losses related to this interference total \$82,220.00. Plaintiff is entitled to judgment in this amount for the tortious interference with contractual relations cause of action.

3. Plaintiff has alleged defamation at the hands of the Defendant. Defamation is actionable per se when the Defendants' defamatory statements charge the Plaintiff with one of five (5) types of acts or characteristics: 1) commission of a crime of moral turpitude; 2) contraction of a loathsome disease; 3) adultery; 4) unchastity; or 5) unfitness in ones business or profession. Goodwin v. Kennedy, 347 S.C. 30, 552 S.E. 2d, 319 (Ct of App. 2001). Generally, in Defamation actions which are actionable per se, general damages are presumed and need not be proven by the Plaintiff. Id.

The elements of defamation in general are: (1) a false and defamatory statement by the Defendant concerning the Plaintiff; (2) unprivileged publication by the Defendant to a third party; (3) fault on the Defendant's part in publishing this statement; and (4) actionability of the statement irrespective of special harm, i.e. it's defamatory per se. See: Michael G. Sullivan, Elements of Civil Causes of Action, 65-79 (2000).

Additionally, defamation need not be accomplished in a direct manner. An insinuation



may be defamatory. A mere insinuation is as actionable as a positive assertion if it is false and malicious and its meaning is plain. Murry v. Holnam, Inc., 344 S.C. 129, 542 S.E. 2d, 743 (Ct. of App. 2001).

The testimony in this case is replete with references to the fact that Plaintiff Drake was defamed by Defendants. Initially in 2004, by the insinuations created by the 'criminal' investigation that Smith conducts on behalf of Defendant Holmes going through the public arena questioning clients, co-workers and sub-contractors about Plaintiff Drake's alleged misconduct clearly created the impression that Plaintiff Drake has acted improperly in his business dealings at the very least and at the worst that Plaintiff Drake is a criminal. The Affidavit of Sheila Auvenshine testifies to the fact that this defamation continued throughout her employment with Defendants from 2006 through 2008. Further, the communications about Plaintiff Drake's alleged dishonesty and unfitness to work in his business was communicated by Defendants to Drake's customer, Dr. Minto, in April 2008. Plaintiff is entitled to recover for this injury and damages for the injury are presumed.

4. Plaintiff seeks the award of punitive damages against these Defendants for their intentional misconduct after the termination of his employment in interfering with his ability to support his family through their tortious interference with his contractual relations and then defaming him from the time of his termination in 2004 through 2008.

"The purpose of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future. Punitive damages also serve to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." Collins Entertainment v. Coats, 355 S.C., 125 (Ct. App. 2003).

In Gamble v. Stevenson, the Supreme Court set forth what is to be considered by the

Court: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant from like conduct; (6) whether the award is reasonably related to the harm; (7) defendant's ability to pay; and (8) other factors deemed appropriate. 305 S.C. 104, 406 S.E.2d 350 (1991).

All of these elements are addressed in the evidence before the Court. There is ample evidence of culpability, lengthy duration of the conduct, and Defendants' awareness that it was going on before the Court. Further, there is also evidence of the ability to pay. Defendant Holmes is the sole owner of the party corporations and all earnings from those companies are reflected in his personal tax returns. Holmes' personal return for 2004 is provided as a part of his accountant's testimony. Defendant Holmes' adjusted gross income after deductions is approximately 1.9 million dollars. Plaintiff has proven by clear and convincing evidence that punitive damages are appropriate in this case and supported by the evidence and the conduct of the Defendants.

5. Plaintiff also seeks pre-judgment interest on the awards herein. Plaintiff is entitled to pre-judgment interest on the award for the tortious interference with contractual relations judgment.

- **Defendant's Counterclaims**

1. Defendant has asserted counterclaims against Plaintiff for unjust enrichment, breach of duty of loyalty, conversion, fraud, and the breach of covenant of good faith and fair dealing.

Plaintiff filed an Answer denying these allegations.

2. Defendant has offered no evidence of damage related to any of these causes of action and, in argument to the Court when the matter was heard, Defendant's counsel conceded there was no evidence of damage. The testimony of Defendant Jerry Holmes was clear that he was not aware of any evidence to support any of these allegations and has no idea what, if any, damage he

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suffered that is attributable to Plaintiff Kevin Drake.

There is no evidence before the Court which would support a verdict on anyone of the counterclaims that Defendant has filed. As a result, Judgment for the Plaintiff is appropriate on all counterclaims.

IT IS ORDERED THAT

1. Judgment for Defendant be entered as to Plaintiff's breach of contract claim.
2. Judgment in the amount of \$82,220.00 be entered for Plaintiff as to Plaintiff's tortious interference with contractual relations claim, which Plaintiff has proven by a preponderance of the evidence.
3. Judgment in the amount of \$15,000.00 be entered for Plaintiff as to Plaintiff's defamation *per se* claim, which Plaintiff has proven by a preponderance of the evidence.
4. Plaintiff recover \$2,500.00 in punitive damages, which Plaintiff has proven by clear and convincing evidence.
5. Plaintiff recover zero (0) in pre-judgment interest; and
6. Judgment for Plaintiff be entered as to Defendants' counterclaims.
7. The parties agree that Defendant Holmes Timber Company, Inc., should be dismissed.
8. That any other claims originally presented herein, other than those specifically addressed in this Order, are hereby dismissed as having been abandoned by the parties.

IT IS SO ORDERED THAT judgment be entered for the Plaintiff against these Defendants in the total sum of \$97,220.00 actual damages and \$2,500.00 punitive damages, this 14 day of June, 2013.



Richard B. Ness, Special Referee
Second Judicial Circuit
Court of Common Pleas

~~Circuit Court Judge~~

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

*Form 4
Duke v. Atlantic Coast*