

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis, Circuit Court Judge

Circuit Court Case No. 2020-CP-22-00373
Appellate Case No. 2023-001829

Jones Nissan, Inc.,

Respondent,

v.

THAG, LLC; Nissan of Sumter, LLC; Terry L. Holmes; and Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Defendants,

Of which THAG, LLC and Nissan of Sumter, LLC are the Appellants.

FINAL BRIEF OF APPELLANT

August 13, 2024

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Circuit Court erred in granting summary judgment in favor of Jones Nissan and against THAG and Nissan of Sumter in the amount of \$389,555.98, without any set-off for the settlement amount of \$125,000.00 paid to Jones Nissan by former Co-Defendant and alleged joint obligor Merrill Lynch?
2. Whether the Circuit Court erred in granting summary judgment in favor of Jones Nissan and against THAG and Nissan of Sumter in the amount of \$389,555.98, where THAG and Nissan of Sumter came forward with affidavit testimony that Jones Nissan breached the contract at issue by over-charging Nissan of Sumter for lot rent, offering insufficient space for Nissan of Sumter to display its inventory, and owning and operating a competing auto dealership next door to Nissan of Sumter?
3. Whether the Circuit Court erred in granting summary judgment in favor of Jones Nissan and against THAG and Nissan of Sumter in the amount of \$389,555.98, where discovery was still open and Jones Nissan had failed to respond to THAG and Nissan of Sumter's Interrogatories and Requests for Production, resulting in a Motion to Compel which was pending at the time the Summary Judgment was granted?

STATEMENT OF THE CASE

Jones Nissan filed the instant lawsuit against THAG, Nissan of Sumter, and Terry Holmes alleging the breach of a sale and financing agreement for an automobile dealership in Sumter, South Carolina. Jones Nissan amended its Complaint to add claims against Merrill Lynch that it failed to honor a collateral agreement and allowed those funds to be diverted. Jones Nissan later settled its claims against Merrill Lynch for \$125,000. While discovery was still open, and after Defendants had served Jones Nissan with Interrogatories and Requests for Production, Jones Nissan filed a Motion for Partial Summary Judgment. At the time of the hearing on July 13, 2023, Jones Nissan had not answered written discovery and Defendants had filed a Motion to Compel those responses. Judge Curtis granted the Motion for Summary Judgment in part, ruling that Jones Nissan was entitled to judgment as a matter of law against THAG and Nissan of Sumter on its breach of contract and conversion claims in the amount of \$389,555.98, and that Defendants' counterclaims based on misrepresentation of the value of the dealership, charging exorbitant rent, and violation of the non-compete clause would be dismissed. Judge Curtis held that genuine issues of material fact prevented judgment on the remaining claims and counterclaims. On September 29, 2023, Defendants filed a timely Motion for Reconsideration and asked Judge Curtis to allow further discovery on the contents and effect of the settlement with Merrill Lynch, and whether that would entitle THAG and Nissan of Sumter to an offset of the Judgment in the amount of \$125,000. Judge Curtis filed an Order addressing these concerns and clarifying that she was not making a ruling on the offset. This appeal followed on November 22, 2023.

STANDARD OF REVIEW

The Court of Appeals reviews the lower court's grant of a motion for summary judgment *de novo*. Since summary judgment is an extreme remedy, and deprives a party of its right to trial, the remedy should be cautiously invoked. A motion for summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. SCRCP 56(c); Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991); Baird v. City of Charleston, 333 S.C. 519, 511 S.E.2d 69 (1999). In making this determination the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corrs., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). See also The Kitchen Planners, LLC v. Samuel E. Friedman, S.C. Op. no. 28173 (Aug. 23, 2023) (clarifying that the “mere scintilla” standard does not apply, but rather the “genuine issue of material fact” as stated in the Rule).

FACTS

In 2016, Nissan Motor Company approached THAG, LLC and asked it to look into purchasing the Jones Nissan dealership in Sumter because it was under-performing by Nissan's standards (R. p. 470, page 13, lines 11-15). Thus, at Nissan Motor Company's direction, THAG, LLC began discussions with Jones Nissan about purchasing this dealership (R. p. 470, page 15, lines 2-14).

Jones Nissan agreed to sell its dealership to THAG, LLC for \$2.25 million and the parties entered into an Asset Purchase Agreement in July 2016. This agreement was subsequently amended several times over the following months and assigned by THAG to Nissan of Sumter, LLC. Nissan Motor Company valued the dealership at \$1.6 million and agreed to extend financing for the sale to this amount only. Jones Nissan offered to finance the remaining \$650,000 of the purchase price upon execution of a promissory note from THAG, LLC (See generally R. pp. 21-36).

From the outset of the purchase, there were problems. Knowing that Nissan of Sumter would have no choice but to use the Jones Nissan lot while it waited for the new dealership facility to be constructed, Jones Nissan charged Nissan of Sumter an exorbitant amount of rent to use the Jones Nissan lot. Jones Nissan demanded \$27,500 in monthly rent, when the market rent value

for the lot was \$9,186 per month (R. p. 474, ¶ 6). After 24 months, Jones Nissan raised the rent to \$32,000 per month. Id. Whereas Jones Nissan had promised that a 1.5 acre lot would be made available along with a building on the premises, it delivered only a 0.25 acre lot and no building, which was insufficient space for Nissan of Sumter to display its inventory (R. p. 474, ¶¶ 7-9). Of particular concern, Jones Nissan continued to own and operate a competing car dealership next door to Nissan of Sumter, which was in violation of the asset purchase agreement (R. p. 474, ¶ 10).

Notwithstanding these concerns, and what Nissan of Sumter alleges were breaches of the parties' agreements, Nissan of Sumter continued to make regular payments to Jones Nissan under the promissory note, until around June 2019 when the cumulative effect of Jones Nissan's breaches frustrated the Nissan of Sumter business and rendered any further performance impossible (R. p. 474, ¶ 4). Nissan of Sumter's floor plan loan was called and it was forced to turn over the dealership to new ownership in exchange for no consideration (R. p. 473, page 205, lines 9-19). This lawsuit followed.

All of the key issues in this case are disputed because THAG and Nissan of Sumter maintain that Jones Nissan's failure to perform under the contract excuses any non-performance on their part. During his deposition, Terry Holmes denied that he owes the \$360,000 in outstanding principal that is claimed by Jones Nissan (R. p. 470, page 16, lines 6-17). Mr. Holmes denied that he owed interest on this amount or attorney's fees (R. p. 471-472, page 28 line 12 – page 29 line 12). Mr. Holmes denied that Nissan of Sumter breached the Asset Purchase Agreement or the Promissory Note (R. p. 472, page 29 line 13 – page 30 line 25).

With no scheduling order limiting the period for discovery, the parties had been actively engaged in propounding and answering discovery until this appeal was filed. Defendants responded to three (3) separate sets of written discovery propounded by Jones Nissan. Jones Nissan took the depositions of Defendant Terry Holmes and the attorney who assisted Nissan of

Sumter with its purchase of the dealership, Greg Weathers. On April 26, 2023, Defendants submitted Interrogatories and Requests for Production to Plaintiff. Jones Nissan failed to respond, and following a Rule 11 letter and no response, Defendants filed a Motion to Compel those discovery responses on July 10, 2023 (R. pp. 131-139).

On July 13, 2023, Judge Curtis heard the Plaintiff's Motion for Summary Judgment. During oral arguments, counsel for Plaintiff recognized the facts as set forth in the Terry Holmes affidavit, but encouraged the Court to look at it skeptically as just "smoke and mirrors" designed to avoid summary judgment (R. p. 504, line 24 – p. 505, line 9). Counsel for Plaintiff admitted that the Plaintiff had reached a settlement with Merrill Lynch and had received \$125,000 in exchange for dismissing it as a defendant, but argued that this amount should not apply as a set-off (R. p. 520, lines 16-20). Finally, Plaintiff's counsel took the position that the case was about 3 years old, had been up for trial, and therefore the parties had been afforded sufficient time to conduct any necessary discovery (R. p. 519, line 24 – p. 520, line 15).

ARGUMENTS

The trial court's grant of partial summary judgment in favor of Plaintiff and against THAG and Nissan of Sumter should be reversed for three primary reasons: (1) The admitted settlement of \$125,000.00 with Merrill Lynch should have been applied as an off-set of the Judgment; (2) Terry Holmes' affidavit testimony stating the factual bases for a breach of contract by Jones Nissan was effectively ignored, when in fact it established genuine issues of material fact for the jury to consider; and (3) The summary judgment was at best pre-mature because the parties had not finished discovery and Jones Nissan had not responded to the Plaintiff's written requests, necessitating a Motion to Compel.

- 1. The Trial Court Erred in Declining to Apply a Set-Off of \$125,000.00 to the Judgment for the Settlement Proceeds Paid by Merrill Lynch**

"[T]here can be only one satisfaction for an injury or wrong." Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998). "The right to setoff has existed at common law in South Carolina for over 100 years." Riley v. Ford Motor Co., 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015). When the settlement is for the same injury, the non-settling defendant's right to a setoff arises by operation of law. Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271–72 (Ct.App. 1999). Under this circumstance, "[s]ection 15–38–50 grants the court no discretion...in applying a set-off." 335 S.C. at 113, 515 S.E.2d at 272 (quoted with approval by Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct.App. 2012).

S.C. Code § 15-38-50 provides in relevant part, "When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater."

In this case, the elements of Section 15-38-50 are met. Plaintiff's counsel confirmed to the Court that a settlement had been reached with Merrill Lynch for the amount of \$125,000. Plaintiff alleges the same "injury" against both THAG/Nissan of Sumter and Merrill Lynch. In its Amended Complaint, Plaintiff contended that THAG and Nissan of Sumter converted the funds that were kept in the Merrill Lynch collateral account, and Plaintiff further contended that Merrill Lynch was negligent in allowing these same funds to be transferred out of the account. The statute is applicable to "tortfeasors:" Plaintiff asserted torts against both THAG/Nissan of Sumter (conversion and civil theft) and against Merrill Lynch (negligence). Finally, in its prayer for relief, the Plaintiff asked for a "joint and several" judgment against all Defendants and for "punitive damages" which are exclusively awarded for tortious conduct. By its own admission, the Plaintiff

contends that the Defendants are joint tortfeasors and so Section 15-38-50 automatically applies to set-off any judgment by the amount of a settlement obtained from a co-Defendant.

2. The Trial Court Erred in Entering Summary Judgment Against THAG and Nissan of Sumter Where Terry Holmes Produced Affidavit Testimony that Jones Nissan Breached the Contract

As the plaintiff, Jones Nissan bears the burden of proof as to each and every element of its claims against each one of the Defendants. Thus, in order to prevail on its motion for summary judgment, Jones Nissan must demonstrate that there is no set of facts which, if presented by Defendants and accepted by the finder of fact, along with all reasonable inferences in Defendants' favor, would absolve or excuse the Defendants from liability, either in whole or in part.

In this case, THAG and Nissan of Sumter presented sufficient factual issues which preclude summary judgment against them. According to Terry Holmes, the Defendants breached their obligations under the Asset Purchase Agreement and Promissory Note by over-charging Nissan of Sumter for lot rent, offering insufficient space for Nissan of Sumter to display its inventory, and owning and operating a competing auto dealership next door to Nissan of Sumter. These breaches were significant enough to cause the financial ruin of the Defendants within 2 years and their subsequent inability to make further payments to Jones Nissan. Presented with this evidence, the finder of fact could reasonably conclude that Jones Nissan breached the contract and thus the Defendants' performance was excused.

Plaintiff argues that Mr. Holmes' testimony should be viewed skeptically and as "smoke and mirrors" to avoid summary judgment, but this mischaracterizes the Court's role. It is not for the trial judge to determine credibility, or whether a witness has been impeached by an absence of similar statements in the past. Instead, it is the prerogative of the finder of fact to ascertain the believability of a witness. Plaintiff's criticisms of Mr. Holmes' testimony go to its weight, and not its admissibility. Taken in the light most favorable to the non-movant, Mr. Holmes' testimony

establishes genuine issues of material fact concerning Jones Nissan's non-performance under the contract.

3. The Trial Court Erred in Entering Summary Judgment While Discovery Was Still Open, Jones Nissan Had Failed to Answer Discovery, and a Motion to Compel Was Pending

Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact. Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009).

In this case, the Defendants submitted discovery requests to Plaintiff on April 26, 2023. Plaintiff filed its motion for summary judgment on May 12, 2023. On June 23, 2023, counsel for Defendants sent a Rule 11 communication asking Plaintiff to respond to its discovery within ten (10) days so that he would not have to file a motion to compel. Unfortunately, no responses were received and Defendants filed a Motion to Compel Discovery on July 10, 2023. Written discovery responses were finally received on September 13, 2023, the day before the Motion to Compel was to be heard, but after the trial court had already made a decision on the Motion for Summary Judgment.¹

The discovery requests at issue were central to the Plaintiff's case, for example:

Interrogatory No. 4: Set forth an itemized statement of all damages.

Interrogatory No. 6: For each person known to the party or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of

¹ Judge Curtis conveyed her decision to the parties via e-mail on August 16, 2023, and her formal Order followed on September 19, 2023.

the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

Interrogatory No. 9: Please list the amount and date of all payments made by Defendants to Plaintiff and include any other credit(s) which Plaintiff agrees Defendants are entitled to.


Interrogatory No. 11: Please list the amount of any settlement(s) concerning Plaintiff's claims which have been paid by a party other than Defendants, including but not limited to Merrill Lynch.

Plaintiff argues that Defendants had plenty of time to conduct discovery. However, at the time that Defendants submitted written discovery requests, no motion for summary judgment was pending and both parties were participating in discovery, including a deposition taken by Plaintiff as recently as June 22, 2023 – just 3 weeks prior to its motion for summary judgment being heard. Unfortunately, the Defendants did not have the same opportunity to complete necessary discovery prior to the motion for summary judgment being decided.

CONCLUSION

For the foregoing reasons, the trial court's decision to grant summary judgment in favor of Plaintiff as to its claims for breach of contract and conversion in the amount of \$389,555.98 against THAG and Nissan of Sumter, and to dismiss Defendants' counterclaims as they relate to misrepresentation of the value of the dealership, charging exorbitant rent, and violation of the non-compete clause, should be reversed.

August 13, 2024



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