THE SUPREME COURT OF SOUTH CAROLINA

ARO-D Enterprises, LLC, Respondent,

v.

Tiger Enterprises & Trading, Inc., Bonnie Walker and Dwight Walker, Petitioners,

Tiger Enterprises and Trading, Inc., Third-Party Plaintiff/Petitioners,

v.

Rudy A. Dixon, Frank T. Gangi, and T3 Aviation, LLC, Third-Party Defendants/Respondents.

Appellate Case No. 2024-000777

APPELLANTS' REPLY

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Respondents' Brief at page 22, states "In the instant case, there is no dispute between the so-called contracting parties that no contract was ever formed." (*Id.*) (underline emphasis added). Further in support of this declaration, Respondents' Brief states, "Dixon's sworn statement denied the existence of a contract; CEO Walker's sworn statement acknowledged that a consignment agreement was never formed; vice president Hansen's deposition testimony affirmed the same." (*Id.*). Cursory analysis of these statements reveals they are limited to the admitted fact that Dixon did not sign the Consignment Agreement when he was in South Carolina in August 2019. (R. p. 277, at ¶ 34).

With respect to "Dixon's sworn statement," the only such testimony in the record is at pp. 132 to 135, Affidavit of Rudy Dixon, dated March 5, 2020. This was Mr. Dixon's Affidavit in support of ARO-D's Motion to Appoint a Receiver, which was denied. A cursory review of Dixon's Affidavit shows he states he rejected the "consignment agreement," during "negotiations." (R. p. 133, at ¶ 6). In Paragraph 7 of his Affidavit, Dixon states, "[Tiger] would make an offer[1] to purchase the Hawker inventory from Plaintiff." (*Id.*). Neither of Paragraphs 6 or 7 of this Affidavit provide a date or even a date range. The remaining Paragraphs 8 through 16 do not address facts regarding contract formation or lack thereof. (R. pp. 133 to 135). In fact, nowhere in Dixon's Affidavit does he state, "no contract was ever formed," or words that effect. (*Id.*). The Affidavit, despite its limited purpose and the factfinder's rights to credit some, none or all of it, tells a story of his intentional business dealings with Appellant Tiger.

[1] This plan for Tiger to make an offer to ARO-D is contradicted by Dwight Walker's Affidavit at ¶ 11, wherein he states, "we made it very clear that Tiger was only interested in a Consignment Agreement arrangement, and we sent over our first proposed Consignment Agreement to Mr. Dixon." (R. p. 272).

In *Hennes v. Shaw*, 397 S.C. 391, 399, 725 S.E.2d 501, 505 (Ct. App. 2012), the Court of Appeals stated, "[t]he necessary elements of a contract are offer, acceptance, and valuable consideration." *Id.* (citing *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003)). "Valuable consideration may consist of 'some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.'" *Id.* (citing *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998)). "With certain exceptions, a contract need not be in writing to be enforceable." *Id.* (citing *Gaskins*[2] *v. Firemen's Ins. Co. of Newark, N.J.*, 206 S.C. 213, 216, 33 S.E.2d 498, 499 (1945)). "To recover for a breach of contract, the plaintiff must prove: (1) a binding contract; (2) a breach of contract; and (3) damages proximately resulting from the breach." *Id.* (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)).

Our Legislature enacted the South Carolina Uniform Electronic Transactions Act ("UETA" codified at S.C. Code Ann. § 26-6-10 *et seq*.) in 2004. Prior to that, South Carolina's version of the Statute of Frauds (S.C. Code Ann. § 32-3-10 *et seq*.) was enacted and codified in the 1932, 1942, 1952 and 1962 versions of the S.C. Code. The Statute of Frauds has not been put at issue in this action, as Dixon's emails and his actions in ratifying the statements in those emails would satisfy the requirement that "some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized." S.C. Code Ann. § 32-3-10. Still further, the UETA sets forth several categories for which it "does not apply …" *Id.* at § 30(b). The type of transaction(s) contemplated in this action

[2] In *Gaskins*, this Court stated, "If the minds of the parties have met in regard to the essential parts of the agreement, it does not matter whether the form of the contract is written or oral.").

are not excluded from application of the UETA.

As noted above, Respondents Brief continues to focus on the acknowledged fact that Rudy Dixon did not sign the Consignment Agreement he said he would sign when he came to South Carolina in person from Nigeria in August 2019. Specifically, on or about August 27, 2019. (R. p. 276-77, at ¶¶'s 33-37; and R. p. 237, lines 3 to 7).[3] On July 24, 2019, after weeks, if not months of negotiations, Dwight Walker sent Dixon an email stating, "Rudy, Please see attached Letter Agreement that outlines both our verbal, written and future consignment agreement in preparation to start selling your assets once they arrive." (R. p. 164). Attached to that email was the "Letter Agreement," which speaks for itself. (R. p. 165).

Subsequent to the Letter Agreement being sent on July 24, 2019, Dixon referred to Appellant Tiger as his "client"[4] in an email on August 5, 2019. (R. p. 168). As set forth in Appellant's Initial Brief, for example, at pp. 5-6, the reference to Tiger by Dixon as his "client" was not made to a random person in idle conversation, but was to Respondent Gangi in response to Gangi's efforts to purchase or otherwise acquire certain or all of the Hawker 400 parts from Dixon / ARO-D. As noted in Appellant's Brief at page 11, "The [trial court] orders also did not analyze or consider the existence or extent of the 'client' relationship Dixon referred to in his Aug. 5, 2019 email to Respondent Gangi." (*Id.*). On page 2 of 8 of the trial court order granting

[3] Transcript of Hearing, Mar. 9, 2021, counsel to Dixon / ARO-D stating to lower court, "He returned in August of 2019, went to their office and their warehouse, asked them to make an offer on the parts. He was unhappy with the offer. Asked for his parts to be released to him. They refused, and this case ensued." (*Id.*).

[4] Certainly, when Dixon tells Gangi he must deal with Tiger his client to obtain airplane parts in August 2019 (R. p. 168), such a reference was evidence of "some right, interest, profit or benefit accruing to [Tiger] or some forbearance, detriment, loss or responsibility given, suffered or undertaken by [ARO-D].'" See e.g., *Prestwick*, 503 S.E.2d at 186.

summary judgment in favor of Respondents T3 Aviation, Inc. and Frank T. Gangi, it is stated, "[a]s the Court understands the situation, whatever arrangement the parties were previously operating under had ended by September 2019, … " (R. p. 12). The order itself refers to an "arrangement," without acknowledging that arrangement could be found to have been a contract as between ARO-D and Appellant Tiger.

As set forth in *Skydive Myrtle Beach v. Horry Cty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019), in analyzing a motion to dismiss under Rule 12, "[i]n rare cases, however, a trial court may deny a motion to amend if the amendment would be clearly futile." *Id.* In *Skydive*, this Court noted, "the circuit court did not conduct an analysis to determine whether any amendment would be futile." *Id.* The *Skydive* opinion continued, "[t]he court of appeals, however—without articulating any such analysis—found the 'amendment would be futile.'" *Id.* In this Court's final, in *Skydive*, it was stated, "[e]ven on the limited record before us, as we will explain, it is clear to us that allowing Skydive to amend its complaint would not be 'clearly futile.'" *Id.*

The exact same principles are in play with respect to the summary judgment granted here. As noted above and again here, in Appellant's Brief at page 11, "The [trial court] orders also did not analyze or consider the existence or extent of the 'client' relationship Dixon referred to in his Aug. 5, 2019 email to Respondent Gangi." (*Id.*). For this reason alone, the summary judgment granted on the non-existence of the Consignment Agreement was a limited finding, and could not preclude a factfinder from finding, consistent with Dixon's own words and actions, that an agreement existed between ARO-D and Appellant Tiger.

For Respondents Gangi and T3 Aviation, Inc. to assert this record cannot support the existence of a binding agreement between Appellant and ARO-D, suggests that Respondents

Gangi and T3 Aviation must know how Dixon would explain what he meant when he made these statements in the record, despite his deposition never being taken. However, no amount of fast-talking could remove from the factfinder the fact that Dixon made these statements about Appellants to Respondents regarding the Hawker 400 airplane parts. Certainly, such a factfinder could conclude that the Letter Agreement was an accurate representation of the parties' agreement until such time as Dixon, as per his counsel, was not satisfied with Appellants' offer to purchase the parts, as set forth in footnote 3 above and in the record at page 237.

Even the Court of Appeals opinion at p. 5 acknowledges limitations in its affirming the 'finding' of the lower court, stating, "we affirm the circuit court's finding that no written agreement existed giving possessory rights in the property to Appellants." (*Id.*) (underline emphasis added). Respondents Brief references this affirmance of the lower court's orders as dispositive of this appeal. (*Id.* at 13).[5] Bonnie Walker's email to Dixon dated Sept. 18, 2019, is consistent with Tiger not having possessory rights. (R. pp. 175-178). Specifically, at page 177, stating, *inter alia,* "[o]nce you acknowledge receipt of the invoice and wire Tiger the money we will release the balance of the material." (R. p. 177). This position is entirely consistent with the Letter Agreement, which states, *inter alia*, "this program cannot be terminated as there are monies owed Tiger for the action it has taken." (R. p. 165).

With respect to the UTPA claim, Appellant can acknowledge this claim was plead on information and belief, however, specific discovery, such as the depositions of Dixon and / or

[5] Stating, "If it is the case that TET has conceded the holding of Item No. 4 of the Court of Appeals' opinion, then the issue of whether an agreement existed between TET and ARO-D regarding the Hawker Inventory has been put to rest." (*Id.*).

Gangi could lead to evidence[6] in support of the required elements of that claim. Accordingly, summary judgment on that claim was also premature.

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests the opinion of the Court of Appeals affirming the trial court be reversed, and the matters set forth above be remanded to enable the parties an opportunity to conduct adequate discovery.

Respectfully submitted,

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[6] In its analysis of the UTPA claim, the trial court order at p. 5, states, "[Tiger] has not rebutted these deficiencies." (R. p. 14). Tiger has yet to notice and take a deposition in this matter, despite its efforts to do so.