

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	CASE NO. 2020-CP-40-01934
)	
STIVERS BROTHERS)	
AUTOMOTIVE, INC.,)	
)	
Plaintiff,)	ORDER GRANTING PLAINTIFF'S
)	MOTION FOR SUMMARY
v.)	JUDGMENT ON THE MEASURE OF
)	DAMAGES AND DENYING
W. WARNER PEACOCK)	DEFENDANTS' MOTION TO SEAL
and PEACOCK AUTMOTIVE, LLC,)	CERTAIN FINANCIAL INFORMATION
)	
Defendants.)	
_____)	

INTRODUCTION

This matter came before me at a term of Richland CPNJ court on May 23, 2023, for a virtual hearing via Cisco Webex. The case involves Defendants’ alleged breach of contract in failing to consummate the purchase of two Columbia-area automobile dealerships. Four motions were pending before the Court for decision in this highly contested case, as follows:

1. Plaintiff’s motion to compel discovery related to communications between Defendants and a third-party that eventually purchased Defendant Peacock Automotive, LLC’s South Carolina dealerships;
2. Plaintiff’s motion for partial summary judgment on a declaratory judgment action to determine how damages will be quantified in the underlying case, and more specifically that damages must be determined at the time of the breach and not subject to subsequent economic events;
3. Defendants’ motions to seal financial information about the price of an allegedly similarly situated transaction when Defendant Peacock Automotive, LLC sold one of its South Carolina dealerships: and,
4. Defendants’ motion for partial summary judgment asking the Court to find Plaintiff had no damages in the alleged breach because it actually profited from Defendants’ actions in allegedly breaching the contract.

At the hearing attorney J. Michael Baxley, Esq. appeared on behalf of the Plaintiff and Bradford N. Martin, Esq. appeared on behalf of the Defendants.

RECEIVED
Jan 09 2025
SC Court of Appeals

Two of the motions were decided at the time of the hearing and the decision announced from the bench, this Order restates those already-made decisions. After carefully considering the memoranda and arguments of counsel, the Court GRANTED the Plaintiff's motion to compel (subparagraph 1 above) because under the broad language of Rule 26(b), SCRPC, as to the permitted scope of discovery, the Court finds this requested information is relevant to the issue of Defendants' intentions in the transactions that gave rise to this litigation. The Court ordered the Defendants to respond in full to the Plaintiff's Second Set of Interrogatories and Third Request to Produce, including but not limited to, the requests for records, communications, and other documents related to the sale of all of Defendant Peacock Automotive, LLC's South Carolina assets. The Court ordered the Defendants to comply with its ruling within sixty (60) days of May 23, 2023.

Further, Defendants' motion for partial summary judgment on the issue of damages (subparagraph 4 above) was DENIED at the time of the hearing. Plaintiff's counsel raised the issue that the motion was barred by Rule 43(1), SCRPC, having already been heard, but the Court rejected that argument and agreed to hear the motion. After carefully considering the memoranda and arguments of counsel, this Court found there exist genuine issues of material fact regarding the Plaintiff's recoverable damages, and on that basis, denied Defendants' motion.

At the conclusion of the hearing, the Court advised counsel that two motions would be taken under advisement (subparagraphs 2 and 3 above). After further consideration and review of the facts, prevailing law, and arguments of counsel, the Court hereby GRANTS Plaintiff's motion for partial summary judgment on the issue of damages and DENIES Defendants' motion to seal certain financial information. The remainder of this Order focuses upon those two issues.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

As stated in the opening of this Order, this litigation arises out of Defendant Peacock Automotive, LLC's alleged breach of two asset purchase agreements ("APAs"), one for the purchase of the Plaintiff's Chevrolet dealership and the other for the Plaintiff's Hyundai/Genesis dealership, both located in Richland County. Each APA provided for the payment of THREE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$3,500,000.00) for a total of SEVEN MILLION DOLLARS (\$7,000,000.00), in addition to the purchase price of certain new motor vehicle, certain service loaners, all fixed assets, certain parts and accessories, and certain other assets.

The APAs were executed by the Plaintiff and Defendant Peacock Automotive, LLC on January 7, 2020 (the "effective date"). Each APA required Defendant Peacock Automotive, LLC to enter into an assignment of the lease with the owner of the real property upon which the dealerships operated. Each APA required Defendant Peacock Automotive, LLC to submit applications to the manufacturers and obtain approvals no later than 105 days after the effective date in order for the transactions to close. In correspondence dated March 27, 2020, Defendant Peacock Automotive, LLC informed the Plaintiff of its decision to terminate the APAs.

The Plaintiff filed a motion for partial summary judgment and a memorandum in support on March 21, 2023. The Plaintiff asserted that the Court should find, as a matter of law, that the appropriate measure of damages associated with the alleged breach of the APAs is the "market measure" of damages, or the difference between the contract price and the fair market value of the assets listed in the APAs at the time of the breach.¹

¹ This "market measure" of damages "allows the breach victim to recover the market value of the very performance he should have had less the contract price...[w]hen the tables are turned and the buyer commits a total breach, the

The “market measure” of damages has been applied in breach of contract actions involving the sale of commercial goods in South Carolina for over a century. Huguenot Mills v. George F. Jempson & Co., 68 S.C. 363, 47 S.E. 687 (1904)(“Where the exact time for delivery is to be afterward fixed by the purchasers, the measure of damages is the difference between the contract price and the fair market value as the date of refusal to receive; for such refusal necessarily implies a refusal to fix a time and there is then a complete breach of the contract); Swift & Co v. Goldberg, 121 S.C. 190, 113 S.E. 358 (1922)(“In order to ascertain the measure of damages, because the law has a measure in this state, and that measure is the difference between the contract price and that reasonable market value at the time and place of the breach of the contract”).

Case law on breach of executory contracts for the sale of an ongoing business is scarce in South Carolina. However:

“The general rule is that where the buyer repudiates an executory contract for sale, or wrongfully refuses to accept the property thereunder, the seller’s measure of damages is the difference between the contract price and the market value at the time and place of delivery. To this rule, however, there are exceptions where required to afford to the seller indemnification for the loss ascribable approximately to the buyer’s breach. ***One very general exception is to base the damages upon the market value of the property at the time of the breach, rather than at the time of delivery. Such exceptions may be essential where, as here-after pointed out, either by the terms of the contract or the subsequent agreement of the parties, the time for delivery is indefinite, or depends upon some affirmative act of the buyer.***” 44 A.L.R. 215. [*emphasis added*].

The “market measure” of damages has been adopted in nearby jurisdictions in disputes involving the sale of an ongoing business; notably, in the State of Georgia. Turner Broadcasting System, Inc. v. McDavid, 303 Ga. App. 593, 693 S.E.2d 873 (Ct. App. Ga. 2010) involved the breach of an agreement to sell the Atlanta Hawks NBA franchise and Atlanta Thrashers NHL

same principle applies to the seller’s damages claims, but the seller shows damages by showing that the contract price is greater than the market value on the relevant date. Market measures are applied in chattel sales contracts (subject to some special rules of the U.C.C.), real estate sales, *and to analogous single-shot market transactions.*” Dan B. Dobbs, *Laws of Remedies* § 12.2(2) (3d ed. 2018). [*emphasis added*].

franchise, as well as the operating rights to Phillips Arena. At trial, the jury was instructed that the proper measure of damages was “the difference between the contract price and the fair market value of the [assets] at the time the contract was breached.” This instruction was affirmed on appeal. More distant jurisdictions have likewise adopted the “market measure” of damages in actions involving the breach of a contract for the sale of an ongoing business. See Peery v. Hansen, 120 Ariz. 266, 585 P.2d 574 (Ct. App. Ariz. 1978); Redmond v. Prosper, Inc., 364 So.2d 812 (Fla. Dist. Ct. App. 1978); Wickman v. Opper, 188 Cal.App.2d. 129 (Cal. 1961); Turner v. Shalberg, 70 S.W.3d 653 (2002).

D.G. Porter, Inc. v. Fridley, 373 N.W.2d. 917 (1985) involved the breach of a contract for the sale of a bar. The Supreme Court of North Dakota noted “the general rule is that the seller’s remedy for the buyer’s breach of an executory contract to purchase an ongoing business is to recover damages for the difference between the contract price and the fair market value of the business on the date of the breach.” 373 N.W.2d at 924. The Fridley Court explicitly addressed the fact that the seller retained possession of the assets after the breach, as the Plaintiff has done in the present matter with its Hyundai/Genesis franchise. “By receiving this remedy, [the seller] will receive the equivalent of what he bargained for under the agreement: in addition to retaining the business he will receive an amount equal to the difference between the contract price of \$250,000 and the value of the business on the date of [the buyer’s] breach.” 373 N.W.3d at 925.

Accordingly, this Court finds that the Plaintiff has established that there is no genuine issue of material fact that the appropriate measure of damages in an action involving the buyer’s breach of an executory contract to purchase an ongoing business, regardless of whether the seller retains possession of the assets, is the “market measure” of damages. Therefore, the Plaintiff’s measure

of damages in this case for the alleged breach of the APAs shall be the difference between the contract price of the assets and their fair market value at the time of the breach.

In making this ruling, the Court is aware this alleged breach occurred at the height of the COVID-19 pandemic. At that moment in time, the future of the automobile sales industry nationwide was uncertain. Car sales had declined, customer traffic in dealerships was significantly low due to feared spread of disease, and many consumers were out of work. Subsequently, the federal government's Paycheck Protection Program was put in place, reviving the sales market and causing dealership values to significantly increase. To allow subsequent market fluctuations to influence damages at the time of a breach is unfair in this case particularly, but also would establish an untenable public policy allowing those who might breach a contract to await more favorable market conditions before determining damages. Such is not the longstanding law of this jurisdiction.

DEFENDANTS' MOTION TO SEAL

The Defendants filed a motion to seal and memorandum in support on May 20, 2022. This motion was filed in conjunction with the Defendants' Motion for Partial Summary Judgment on the grounds that the Plaintiff had no recoverable damages or that such damages have been fully mitigated.

The Defendants sought to file portions of affidavits under seal to the extent that they referenced the terms of the sale of Peacock Automotive's Columbia Hyundai franchise. According to the Defendants, these terms are subject to a Confidentiality Agreement.

Court records are presumptively open to the public under the common law, the First Amendment of the federal constitution, and the state constitution. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 10, 630 S.E.2d 464, 469 (2006). Public access to court records may be restricted

in certain situations, such as matters involving juveniles, legitimate trade secrets, or information covered by a recognized privilege. Id.

Pursuant to Rule 41.1(b), SCRCPP, this Court must consider seven factors, including: (1) the need to ensure a fair trial; (2) the need for witness cooperation; (3) the reliance of the parties upon expectations of confidentiality; (4) the public or professional significance of the lawsuit; (5) the perceived harm to the parties from the disclosure; (6) why alternatives other than sealing the documents are not available to protect legitimate private interests as identified by this Rule; and (7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

This Court finds that sealing the relevant portions of the affidavits would not serve any of the above factors. While the Defendants are correct that the common law presumption of access may be overcome if competing privacy interests outweigh the presumption of access, that is not the case here. The Defendants' memorandum in support of their motion characterizes this matter as a breach of contract case between two businesses and not a matter that has an impact upon the public at large.

Furthermore, if this Court were to grant the Defendants' motion, it would contradict the Court's previous decision to grant the Plaintiff's motion to compel, which sought the disclosure of information related to the disposition of Defendant Peacock Automotive, LLC's South Carolina assets, including the Columbia Hyundai franchise.

For the foregoing reasons, the Defendants' motion to seal is DENIED.

CONCLUSION

IT IS THEREFORE ORDERED that the Plaintiff's motion for partial summary judgment be, and the same hereby is GRANTED.

IT IS FURTHER ORDERED that the Defendants' motion to seal is DENIED.

THIS COURT'S PREVIOUS ORDERS from the bench and on the record to GRANT Plaintiff's motion to Compel certain Defendants' communications information and to DENY Defendants' motion for partial summary judgment as to damages are hereby restated.

AND IT IS SO ORDERED.

The Honorable Alex B. Hyman
Presiding Judge

Conway, South Carolina

This _____ day of _____, 2023.



Richland Common Pleas

Case Caption: Stivers Brothers Automotive Inc vs W Warner Peacock , defendant, et al
Case Number: 2020CP4001934
Type: Order/Summary Judgment

15th Circuit Resident Judge

s/ B. Alex Hyman