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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Appellate Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Appellate Case No. 2025-000189

Red Target, LLC d/b/a
SCJ Commercial Financial Services,

Plaintiff-Respondent,

v.

Andrew M. Smith,

Defendant-Appellant.

INITIAL BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION AND FACTUAL BACKGROUND

On or about December 23, 2019, Wateree Site Services, LLC ("WSS") entered into and executed Equipment Finance Agreement # 1600352.301 ("Agreement") with Priority Capital to finance one (1) 2014 CAT CS44, S/N: OM4C00570 ("Equipment") further described in the Agreement. The Agreement was assigned by Priority Capital to Financial Pacific Leasing, Inc. The Agreement was subsequently assigned to Cherrywood Enterprises, LLC who assigned the Agreement to Plaintiff, Red Target, LLC d/b/a SCJ Commercial Financial Services ("Respondent" or "Plaintiff-Respondent"). The Agreement is now owned by Plaintiff-Respondent.

As part of the Agreement, Defendant-Appellant Andrew M. Smith ("Appellant" or "Defendant-Appellant") executed a Guaranty ("Guaranty"). The Guaranty signed by Defendant-Appellant guaranteed that Defendant Smith would pay to Plaintiff any amounts not paid by WSS under the Agreement.

WSS defaulted on the Agreement by failing to make the payments required under the terms of the Agreement. Simultaneously, Defendant-Appellant defaulted on the Guaranty by failing to pay to Plaintiff the amounts due and owing by WSS. Thereafter, on or about October 27, 2021, WSS, through Appellant, entered into an *Authorization to Recover & Sell Contracted Assets Prior to Expiration of Contract Term* ("Sale Authorization") with Financial Pacific Leasing, Inc.

On July 5, 2023, Respondent filed its Complaint, alleging breach of guaranty.

On December 30, 2024, Judge Marvin H. Dukes III entered Summary Judgment against Defendant-Appellant, and in favor of Plaintiff-Respondent, in the total amount of $110,483.01 (the "Judgment"), plus continuing interest accruing at the legal rate of 12.50% per annum until the Judgment is paid in full. Appellant filed his Notice of Appeal on January 29, 2025.

ARGUMENT

I. DEFENDANT IS BARRED FROM ARGUING UNCONSCIONABILITY FOR THE FIRST TIME ON APPEAL.

It is well established that an issue cannot be addressed at the appellate level if it was not first effectively argued before the trial court. Indeed, the Supreme Court of South Carolina has made clear that, "[i]t is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). Such a requirement incentivizes "a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *Town of Mt. Pleasant*, 338 S.C. at 422, 526 S.E.2d at 724.

The issue in the instant case is whether an unconscionability claim was effectively raised and ruled upon for purposes of summary judgment. Appellant's suggestion that he "imperfectly" argued that "the original contract was unconscionable throughout [the case]," an imperfection that Appellant now seeks to clarify by way of this appeal, is an overstatement of Appellant's efforts before the trial court when arguing in opposition to summary judgment. Indeed, it was not Appellant's "imperfect" unconscionability argument that induced the trial court to enter a judgment against Appellant, in favor of Respondent—it was Appellant's failure to clearly make the unconscionability argument altogether that reinforced the trial court's finding that there was no genuine issue at to any material fact with respect to the Agreement and Guaranty. At the hearing

on Plaintiff-Respondent's Motion for Summary Judgment ("Summary Judgment Hearing"), and in Defendant-Appellant's Amended Answer, Defendant-Appellant relies heavily, if not solely, on the defense of novation—arguing that the Sale Authorization represented an independent, subsequent agreement between Appellant and First Pacific Leasing. Indeed, Defendant-Appellant's Affidavit filed in opposition to Plaintiff-Respondent's Motion for Summary Judgment exclusively suggests that Appellant (incorrectly) interpreted the Sale Authorization as some form of release from his obligations under the Agreement. The Affidavit did not address the issue of unconscionability, nor did Appellant's counsel make an effective argument that the Agreement was unconscionable or otherwise imply that the circumstances surrounding the Sale Authorization were commercially unreasonable, before the trial court. Appellant went so far as to admit this point in the Initial Brief of Appellant, stating that "counsel did not note this particular defect in the answer or in the memorandum in opposition to motion for Summary Judgment," referring to an adhesion contract argument [Initial Brief of Appellant, pp. 4-5]. Now disappointed with the outcome at the trial level, Appellant improperly seeks to make that additional argument, and others, on appeal—a tactic long rejected by the Supreme Court of South Carolina. *See Brown v. Singletar*y, 226 S.C. 482, 85 S.E.2d 738 (1955); *see also State v. Ballew*, 83 S.C. 82, 87, 63 S.E. 688, 690 (1909) ("The general principle that a party can not take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just.").

Albeit misplaced, and brief, Appellant did raise unconscionability in the Amended Answer. [*See* Amended Answer, ¶ 15]. However, as argued in Plaintiff-Respondent's Memorandum in Support of Plaintiff's Motion for Summary Judgment, a party cannot rely on mere allegations in its pleadings to overcome summary judgment and must produce documentary evidence or proof

in addition to a general denial in a pleading. *Peterson vs. West American Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999). Where a party fails to respond to a properly made summary judgment motion and does not provide specific facts showing the existence of some genuine issue for trial, summary judgment should be entered for the moving party. S.C.R. Civ. P. 56(e). That is precisely the case here. Appellant is seeking review of an issue that counsel for Appellant failed to sufficiently argue before the trial court. Additionally, Appellant did not produce any evidence by way of affidavits, witnesses, the production of documents, or other facts that sufficiently establish the unconscionability defense.

Put simply, Defendant-Appellant failed to effectively raise and argue unconscionability at the trial level. And because Appellant cannot merely rely on his general alleged defense set forth in the pleadings to overcome summary judgment, unconscionability should not be considered by this Court and the trial court's entry of summary judgment should be upheld.

II. THE AUTHORIZATION TO RECOVER & SELL CONTRACTED ASSETS PRIOR TO THE EXPIRATION OF CONTRACT TERM IS NOT A NOVATION OF THE AGREEMENT, LEAVING THE RESPONDENT LIABLE UNDER THE AGREEMENT.

The heart of Appellant's argument, both in Defendant-Appellant's opposition to Plaintiff-Respondent's Motion for Summary Judgment and in the Initial Brief of Appellant, is that Appellant is not liable for the debt owed to Respondent because the Sale Authorization effectively represented a novation that replaced the terms, and most importantly the guaranty, of the Agreement. Indeed, Appellant's only identified issue on appeal is whether the trial court erred "in failing in finding there was no issue of fact even though Appellant argued that his personal liability was extinguished by a novation of the original agreement." [Initial Brief of Appellant, p. 1]. The trial court, correctly, disagreed with this characterization of the Sale Authorization.

The party alleging novation has the burden of proving it. *Ophuls & Hill, Inc. v. Carolina Ice & Fuel Co.*, 160 S.C. 441, 454, 158 S.E. 824, 829 (1931). "It is not proved by the mere fact that one note is given for another." *Id.* (quoting *Union Bank v. Wando Min. & Mfg. Co.*, 17 S.C. 339 (1882)).

"A novation may be broadly defined as a substitution of a new obligation for an old one, thereby extinguishing the old debt." *Moore v. Weinber*g, 373 S.C. 209, 218, 644 S.E.2d 740, 745 (Ct. App. 2007); *see also Smith Bros. Grain Co. v. Adluh Milling Co.*, 128 S.C. 434, 122 S.E. 868 (1924) (defining a novation as "a mutual agreement between all parties concerned for the discharge of a valid existing obligation by the substitution of a new valid obligation on the part of the debtor."). More specifically, however, the Supreme Court of South Carolina has made clear that there can be no novation unless there is the intent of both parties. *See Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 262, 199 S.E.2d 719, 722 (1973). To create a novation, there must be an intention for such, and the circumstances attending the transaction alleged to be a novation must show the intention to substitute a new obligation in place of the existing one. *See generally Carolina Ice & Fuel Co.*, 160 S.C. 441, 158 S.E. 824; *see also Scott v. Stone*, 149 S.C. 386, 147 S.E. 449 (1929).

To reiterate Respondent's argument in its Memorandum in Support of Plaintiff's Motion for Summary Judgment, Appellant has failed to argue any legitimate legal or factual basis for Appellant's claim of novation, or that Appellant was released under the Guaranty by way of the Sale Authorization. The Sale Authorization is between Financial Pacific Leasing, Inc. and WSS and outlines the terms for the recovery and sale of the Equipment following WSS's default *pursuant to* the terms of the Agreement. There is no language in the Sale Authorization that states that Appellant was released from the Guaranty or that the Sale Authorization was an outright

replacement of the Agreement. Further, Appellant has presented no evidence that Respondent or any prior assignors agreed to release Appellant from the Guaranty.

To the contrary, the language of the Sale Authorization states that it relates to the Agreement and that WSS remains liable for the deficiency balance remaining due on the Agreement after the sale of the Equipment. Additionally, as evidenced in Plaintiff-Respondent's Affidavit in Support of Plaintiff's Motion for Summary Judgment, Financial Pacific Leasing, Inc. explicitly advised Appellant during its correspondences with Appellant regarding the Sale Authorization that the sale of the Equipment for an amount less than the outstanding balance owed would not satisfy the obligations due by WSS.

Defendant-Appellant's single piece of evidence in opposition to Respondent's Motion for Summary Judgment was his own Affidavit filed on September 25, 2024, in which Appellant states that "it was [his] intention" to resolve the debt with First Pacific Leasing, Inc., and that "[i]t was [his] understanding" that his obligation would end after the sale of the Equipment. Not only does this testimony not prove that there was a mutual intention of the parties, as is required to establish a novation, but this testimony is directly contradicted by the language in the Sale Authorization itself, and by Plaintiff-Respondent's communications with Appellant, which clearly proves that the sale of the Equipment would not satisfy his debt.

Defendant-Appellant failed to set forth a legitimate legal or factual basis that even suggested, let alone established, that there was a mutual intention between the involved entities to enter into an entirely new and independent agreement with the Sale Authorization, thus failing to meet his legal burden in proving that a novation occurred. Because of this, the trial court's granting of summary judgment should be affirmed.

III. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT AGAINST DEFENDANT-APPELLANT.

"On appeal of an action at law tried without a jury, an appellate court will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 45, 686 S.E.2d 200, 200 (Ct. App. 2009). "A trial court's findings are equivalent to a jury's findings in a law action. Questions regarding credibility and the weight of the evidence are exclusively for the trial court." *Id.* When a lower court grants summary judgment on a question of law, the appellate court will review the ruling de novo. *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 569, 776 S.E.2d 397, 402, (Ct. App. 2015). "Under the de novo standard of review, the aggrieved party bears the burden of establishing the trial court's factual findings are against the weight of the evidence." *Wilson v. Gandis*, 430 S.C. 282, 306, 844 S.E.2d 631, 644 (2020).

In this case, the trial court's entry of summary judgment was proper on factual and legal grounds. Although it is undisputed that Appellant entered into the Sale Authorization with First Pacific Leasing, Inc., there is no evidence in the record to support Appellant's contention that a novation had occurred when the relevant entities entered into the Sale Authorization. To the contrary, there is substantial evidence in the record to support Respondent's position that Appellant remained liable under the Agreement following the execution of the Sale Authorization. The record, on its face, shows that the trial court did not err in denying Appellant's contention that a novation existed and entering summary judgment in favor of Plaintiff-Respondent.

Additionally, to the extent that this Court feels inclined to address Appellant's unconscionability argument, the evidence in the record clearly shows that Defendant-Appellant willingly entered into the Agreement, willingly executed the Guarantee, and admitted that both he and WSS defaulted on their obligations under each respectively. In Defendant-Appellant's Response to Plaintiff's First Set of Admissions to Adrew M. Smith, Defendant-Appellant admitted

that WSS entered into an Equipment Finance Agreement with Priority Capital, admitted that he—individually—signed as guarantor of the Equipment Finance Agreement, and admitted that both he and WSS defaulted under the Equipment Finance Agreement and Guaranty. [Plaintiff's First Set of Admissions to Adrew M. Smith, ¶¶ 5, 7-9, 11-12]. Therefore, because all evidence weighs in favor of Plaintiff-Respondent, this Court should affirm the trial court's entry of summary judgment.

CONCLUSION

For all of the foregoing reasons, this appeal should be dismissed because Appellant waived his right to argue unconscionability and is unable to meet the burden required to establish that a novation occurred—eliminating Appellant's ability to argue that he was no longer liable under the Agreement. On the merits, the trial court's entry of summary judgment should be affirmed because Appellant's arguments requesting reversal raise no reversible error and are without merit.

Respectfully Submitted,

May 30, 2025

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PROOF OF SERVICE

I certify that I have served Plaintiff-Respondent's Initial Brief by sending the same to Defendant-Appellant's attorney of record at the e-mail address listed for said counsel in the AIS system the 30th day of May 2025, in accordance with *In re Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024)* (d)(4), S.C. Sup. Ct. Order filed April 24, 2024. A copy of the email to opposing counsel is attached hereto and incorporated by reference. I further certify that I have caused a copy of the Plaintiff-Respondent's Initial Brief to be sent to counsel for the Defendant-Appellant by depositing the same in the United States Mail, with sufficient postage attached, addressed as follows: Paul Held, Post Office Box 521, Sumter, South Carolina 29151-0521.

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