

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stillwell, Circuit Court Judge

C/A No. 2012-CP-23-03738
Appellate Case No. 2013-002091

Marathon Community Church,.....Appellant,

v.

CIT Technology Financing Services, Inc.,.....Respondent.

**RESPONDENT'S MEMORANDUM ADDRESSING ISSUES OF
APPEALABILITY
AS REQUESTED BY THE COURT**

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SC Court of Appeals

STATEMENT OF THE ISSUES

CIT Technology Financing Services (CIT) is an assignee in good faith of a business finance lease between Ricoh Business Solutions (Rico) and Marathon Community Church (Marathon) pursuant to Article II(A) of the South Carolina version of the Uniform Commercial Code. Marathon ceased making payments under the lease. CIT filed an action on June 7, 2012, for breach of contract against Marathon. Marathon amended its Answer and Counterclaims to include Rico as a Third-Party Defendant.

Marathon admits entering the financing lease, accepting delivery of the copiers, and initially paying the installment payments due under the financing lease. Marathon admits it has stopped making payments under the lease and is, therefore, in default under the terms of the lease. (Order of Judge Stillwell, attached as Exhibit A, "Stillwell Order").

CIT moved for summary judgment. Judge Stillwell heard arguments on Tuesday, July 23, 2013, and filed an order on August 30, 2013, granting summary judgment to CIT as to liability. However, the court stated that "[a] subsequent hearing on the merits should be convened to determine how much is owed and by whom it should be paid considering third-party liabilities and attendant offsets." Stillwell Order, p.2. Marathon has appealed the Stillwell Order to this Court.

ARGUMENT

I. THE STILLWELL ORDER IS NOT APPEALABLE BECAUSE IT IS AN INTERLOCUTORY ORDER THAT DOES NOT INVOLVE THE MERITS OF THE CASE OR AFFECT A SUBSTANTIAL RIGHT.

A fundamental rule of appellate procedure is that a judgment or order must usually be final before it can be appealed. *Doe v. Howe*, 362 S.C. 212, 216, 607 S.E.2d 354, 355 (Ct. App. 2004). S.C. Code § 14-3-330 states:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions ... and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment....

S.C. Code Ann. § 14-3-330 (2013). South Carolina adheres to the final judgment rule. Accordingly, with certain exceptions, an appeal lies only from a final judgment. *Hagood v. Sommerville*, 362 S.C. 191, 194–195, 607 S.E.2d 707, 708 (2005); S.C. Code Ann. § 14-3-330(1); Rule 72, SCRCP; Rule 201(a), SCACR. “Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final.” *Ex parte Wilson*, 367 S.C. 7, 625 S.E.2d 205 (2005); *see also Adickes v. Allison & Bratton*, 21 S.C. 245 (1884) (“If there is some further act

which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory”).

An interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right. S.C. Code Ann. § 14-3-330 (Supp. 2003); *Mid-State Distributors, Inc. v. Century Importers*, 310 S.C. 330, 334–35, 426 S.E.2d 777, 780 (1993); *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991). To involve the merits of a case, “the order must finally determine some substantial matter forming the whole or part of some cause of action or defense.” *Mid-State Distribs., Inc.*, 310 S.C. at 334, 426 S.E.2d at 780.

The Stillwell Order is an interlocutory order, because it leaves a further act to be done by the court. It is not a final judgment. The order states that “[a] subsequent hearing on the merits should be convened....” Stillwell Order, p.2. This is another act that must be done by the court before the rights of the parties are determined, which makes the order an interlocutory order. Therefore, it is only appealable if it involves the merits of the case or affects a substantial right.

The order does not involve the merits of the case because it does not finally determine some substantial matter forming part of some defense or counterclaims. In its Answer, Marathon has asserted counterclaims and defenses. However, the factual allegations of those defenses and counterclaims involve only Ricoh and Marathon Community Church. (Amended Answer attached as Exhibit B). There has been no allegation of wrongdoing against CIT as financier of the contract.

The Supreme Court of South Carolina has held if a plaintiff could still pursue its claim as described in the pleadings, then a partial summary judgment order was not


appealable. *Thornton v. South Carolina Elec. & Gas Corp.* 391 S.C. 297, 306-07, 705 S.E.2d 475, 480-81 (S.C. App. 2011). In that case, summary judgment was granted on an action not listed in the pleadings. The trial court had not granted summary judgment on the other actions which were listed in the pleadings. The court held that the order did not have the effect of removing any material issues from the case and therefore did not affect a substantial right by striking a pleading. *Id.* at 307, 705 S.E.2d at 480. Since the plaintiffs could still pursue their claim as originally pled in their complaint, the summary judgment order was not immediately appealable. *Id.* at 307, 705 S.E.2d at 480-81.

Just as in *Thornton*, Marathon is still able to pursue all of its claims in its pleading, since all counterclaims and defenses are directed at the Third-Party Defendant Ricoh. No material issues have been removed. No pleadings have been struck. The order does not involve the merits of the case nor does it involve a substantial right. Therefore, the order is not immediately appealable.

CONCLUSION

For the reasons set forth above, the Respondent asks this Court to deny the Appellant's request for appeal.

Respectfully submitted,



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October 18, 2013

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 CIT Technology Financing Services, Inc.,)
)
 Plaintiff,)
)
 vs.)
)
 Marathon Community Church,)
)
 Defendant/Third Party Plaintiff,)
)
 vs.)
)
 Ricoh Americas Corporation,)
)
 Third Party Defendant.)

IN THE COURT OF COMMON PLEAS

C/A No. 2012-CP-23-03738

ORDER

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 OF COMMON PLEAS
 COUNTY OF GREENVILLE
 SOUTH CAROLINA

INTRODUCTION

This matter came before the Court on Tuesday, July 23, 2013. The Plaintiff CIT moved for Summary Judgment. Based upon the arguments of the parties and the materials submitted to the Court, the Court grants the Plaintiff's motion in part. The Court enters Summary Judgment as to liability while leaving the issue of damages outstanding.

DISCUSSION

This lawsuit arises from a financing lease agreement for copiers. The Defendant admits entering the financing lease and accepting delivery of the copiers. The Defendant admits it initially paid the installment payments due under the financing leases. The Defendant admits it has ceased making payments under the lease and is, therefore, in default under the financing lease.

This matter is governed by South Carolina's adoption of the Uniform Commercial Code. In particular, Section 36-2A-407(1) makes a commercial financing lease irrevocable upon

acceptance of goods. Thus, based on the arguments and materials submitted, the Court finds that the Defendant entered a valid and enforceable commercial lease. The Defendant cannot avoid its responsibilities under the contract as it relates to the Plaintiff.

The Defendant, however, has asserted claims pending regarding the Third-Party Defendant.

Therefore, the Court finds that the lease contract is enforceable, and the Defendant is liable to the Plaintiff upon it. The Court declines to enter a money judgment at this time in favor of a subsequent hearing on the merits to determine how much is owed.

CONCLUSION

IT IS, THEREFORE, ORDERED that the Plaintiff is granted Summary Judgment as to liability. A subsequent hearing on the merits should be convened to determine how much is owed and by whom it should be paid considering third-party liabilities and attendant offsets.

AND IT IS SO ORDERED.



The Honorable Robin B. Stilwell

Greenville, South Carolina

August 28, 2013

4. To the extent the allegations contained in Paragraph 3 of the Complaint refer to any contracts allegedly between Defendant and Plaintiff, Defendant craves reference thereto and denies any allegations inconsistent therewith. Defendant would specifically note that Defendant executed said contracts attached to the complaint on November 4, 2009.
5. Defendant denies the allegations contained in Paragraphs 4, 5, 6 and 7 of the Complaint.
6. Defendant denies the allegations contained in Paragraph 8 of the Complaint. Defendant would specifically note that Defendant has already returned any and all printers and/or equipment related to said lease to Plaintiff and/or Ricoh.
7. Defendant is informed and believes that the allegations contained in Paragraph 9 of the Complaint do not require a response. To the extent a response is required, Defendant admits that, were it found to be liable to Plaintiff, it would be entitled to an offset based on the net amount collected from the sale of leased equipment, but any other allegations contained therein and demands strict and absolute proof thereof.
8. To the extent the allegations contained in Paragraph 10 of the Complaint refer to any contracts allegedly between Defendant and Plaintiff, Defendant craves reference thereto and denies any allegations inconsistent therewith.
9. Defendant is informed and believes that the allegations contained in Paragraph 11 of the Complaint do not require a response. To the extent a response is required, Defendant denies the same and demands strict and absolute proof thereof. Further, to the extent said paragraph implies that Plaintiff is entitled to judgment

against Defendant, Defendant denies the same and demands strict and absolute proof thereof. Defendant would specifically note that Defendant has already returned any and all printers and/or equipment related to said lease to Plaintiff and/or Ricoh.

FOR A SECOND DEFENSE
(Waiver, Estoppel, and Laches)

10. Defendant is informed and believes that Plaintiff's causes of action should be barred or dismissed pursuant to the doctrines of Waiver, Estoppel and Laches.

FOR A THIRD DEFENSE
(Unclean Hands)

11. Defendant is informed and believes that Plaintiff's causes of action are barred by the doctrine of Unclean Hands.

FOR A FOURTH DEFENSE
(Failure to Mitigate)

12. Defendant is informed and believes that Plaintiff's causes of action are barred or Plaintiff's damages should be reduced because of Plaintiff's failure to mitigate its damages.

FOR A FIFTH DEFENSE
(Lack of Standing/Privity of Contract)

13. Defendant is informed and believes that Plaintiff's causes of action are barred because of a lack of standing and/or a lack of privity of contract.

FOR A SIXTH DEFENSE
(By way of Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC)

14. Defendant alleges that the Complaint fails to state facts sufficient to constitute a cause of action, and therefore moves for dismissal pursuant to Rule 12(b)(6), SCRPC.

FOR A SEVENTH DEFENSE

(By way of Motion to Change Venue pursuant to Rule 12(b)(3), *SCRCP*)

15. Defendant is informed and believes that venue is improper pursuant to South Carolina Code § 15-7-30.

B. DEFENDANTS' COUNTERCLAIMS AND THIRD-PARTY COMPLAINT

FACTUAL ALLEGATIONS COMMON TO COUNTERCLAIMS AND THIRD-PARTY CLAIMS

16. Defendant realleges and incorporates each and every allegation heretofore alleged as if repeated herein verbatim.
17. Defendant is a non-profit entity organized and existing under the laws of the State of South Carolina, with its principal place of business located in Anderson County, South Carolina.
18. Upon information and belief, Third-Party Defendant Ricoh Americas Corporation ("Ricoh") is a foreign corporation organized and existing under the laws of the State of Delaware, and is authorized to and does conduct business in the State of South Carolina.
19. On or around August 20, 2008, Defendant entered into a contract with Ricoh, whereby Ricoh agreed to provide copiers and copier maintenance for Defendant.
20. After approximately one year, Ricoh represented to Defendant that Defendant could "get a better deal" on printers.
21. Specifically, Ricoh was to provide Defendant with significantly greater printing capacity.

22. Based on Ricoh's representation, Defendant entered into the contract that is the subject of this action with Ricoh, on or around November 4, 2009, said contract replacing the previous contract which had not yet expired.
23. Defendant was only interested in getting copiers from Ricoh, but Ricoh insisted that it include printers and other associated equipment free of additional charge.
24. Pursuant to the subject contract, Defendant received five copiers instead of the three which they had pursuant to the previous contract, however the new copiers were slower than the old copiers so that Defendant's printing capacity was not increased as represented and promised by Ricoh.
25. At some point in time, the contract between Ricoh and Defendant which is the subject of this matter was allegedly assigned and/or sold to Plaintiff.
26. Ricoh never notified Defendant of any assignment of the subject contract.
27. Any and all communications Defendant had regarding, or related to, the subject contract were with Ricoh, and all payments made by Defendant pursuant to the subject contract were made to Ricoh.
28. To the extent that the subject contract was assigned, if in fact it was, Ricoh at all times thereafter acted both on its own behalf and as the agent and/or representative of Plaintiff, so that all actions of Ricoh in regard to the subject contract after the assignment of same to the Plaintiff are attributable to Plaintiff as well as Ricoh.
29. Defendant discussed options with Ricoh for lowering its monthly payments. Representatives of Ricoh told Defendant that it could simply cancel the subject

- contract without penalty, turn the equipment it had back in to Ricoh, and enter into a new contract with Ricoh under new terms with lower monthly payments.
30. Based on and in reliance on said representations of Ricoh, Defendant did in fact notify Ricoh of its desire to cancel the subject contract and turn in the equipment.
31. At no time did Ricoh inform Defendant of any additional costs, penalties, fines associated with the cancelation of the subject contract.
32. After Defendant notified Ricoh of its intentions, the equipment was in fact picked up by either Ricoh, Plaintiff, or a representative thereof.

FOR AN EIGHTH DEFENSE BY WAY OF COUNTERCLAIM AND THIRD-PARTY COMPLAINT
(Fraud)

33. Defendant realleges and incorporates each and every allegation heretofore alleged as if repeated herein verbatim.
34. As described above, Ricoh represented to Defendant that Defendant could "get a better deal" and could get more printing capacity.
35. As described above, Ricoh represented to Defendant that Defendant could simply cancel the subject contract without penalty, turn the equipment it had back in, and enter into a new contract with Ricoh with lower monthly payments.
36. Pursuant to the subject contract, Defendant received five copiers instead of the three which they had pursuant to the previous contract, however the new copiers were slower than the old copiers so that Defendant's printing capacity was not increased as represented by Ricoh.

37. Defendant is informed and believes that Ricoh knew, or should have known, that the printers it was providing to Defendant would not significantly increase Defendant's printing capacity as represented.
38. Ricoh's representations were material.
39. Defendant is informed and believes that Ricoh knew its representations were false.
40. Defendant is informed and believes that Ricoh intended for Defendant to rely on their representations.
41. Defendant was ignorant of the falsity of Ricoh's statements.
42. Defendant rightfully relied on the statements of Ricoh.
43. Defendant was injured by its reliance on Ricoh's misrepresentations.
44. Defendant is entitled to judgment against Plaintiff and Ricoh, jointly and severally, for such an amount of actual, incidental, consequential, and punitive damages as the trier of fact may find, for the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper.

**FOR A NINTH DEFENSE BY WAY OF COUNTERCLAIM AND THIRD-PARTY
COMPLAINT**
(Fraudulent Inducement to Contract)

45. Defendant realleges and incorporates each and every allegation heretofore alleged as if repeated herein verbatim.
46. As a direct and proximate result of Ricoh's above described fraud, Defendant was induced to enter into the subject contract.
47. Plaintiff is entitled to judgment against Plaintiff and Ricoh, jointly and severally,

for such an amount of actual, incidental, consequential, and punitive damages as the trier of fact may find, for the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper.

FOR A TENTH DEFENSE BY WAY OF COUNTERCLAIM AND THIRD-PARTY COMPLAINT
(Constructive Fraud)

48. Defendant realleges and incorporates each and every allegation heretofore alleged as if repeated herein verbatim.

49. As a direct and proximate result of Ricoh's misrepresentations Defendant has been and will be damaged in an amount to be determined and shown at trial, all of which damages are directly and proximately the result of the acts of Ricoh as above described.

50. Defendant is entitled to judgment against Plaintiff and Ricoh for such an amount of actual, incidental and consequential damages as the trier of fact may find, for the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper.

FOR AN ELEVENTH DEFENSE BY WAY OF COUNTERCLAIM AND THIRD-PARTY COMPLAINT
(Breach of the Covenant of Good Faith and Fair Dealing)

51. Defendant realleges and incorporates each and every allegation heretofore alleged as if repeated herein verbatim.

52. There is a covenant of good faith and fair dealing implied by law in every contractual agreement in South Carolina.

53. Ricoh has breached the covenant of good faith and fair dealing.

54. Defendant was harmed as a direct and proximate result of Ricoh's breach of this duty.

55. Defendant is entitled to judgment against Plaintiff and Ricoh for such an amount of actual, incidental and consequential damages as the trier of fact may find, for the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper.

FOR A TWELFTH DEFENSE BY WAY OF COUNTERCLAIM AND THIRD-PARTY COMPLAINT

(Violation of South Carolina Unfair Trade Practice Act, S.C. Code § 39-5-10 *et seq.*)

56. Defendant realleges and incorporates each and every allegation heretofore alleged as if repeated herein verbatim.

57. Ricoh's conduct, as described above, constitutes unfair and deceptive trade practices and is a violation of the South Carolina Unfair Trade Practices Act, SC Code § 39-5-10 *et seq.*

58. Ricoh's conduct was willful.

59. Ricoh's conduct is capable of repetition, and, upon information and belief, has been repeated.

60. Ricoh's conduct affects the public interest.

61. Ricoh knew or should have known that its actions constituted unfair and deceptive trade practices.

62. As a direct, foreseeable, and proximate result of Ricoh's unfair and deceptive trade practices, Defendant has suffered an ascertainable loss of money and property.

63. Defendant has been damaged as a result of Ricoh and Plaintiff's actions in that it

has had to retain and pay legal counsel to defend itself.

64. Defendant is entitled to judgment against Plaintiff and Ricoh for such an amount of actual damages as the trier of fact may find, which amount should be trebled, for the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper.

FOR A THIRTEENTH DEFENSE BY WAY OF THIRD-PARTY COMPLAINT
(Tortious Interference with Contract)
(As to Third-Party Defendant Ricoh Only)

65. Defendant realleges and incorporates each and every allegation heretofore alleged as if repeated herein verbatim.

66. If it is found that the subject contract is found to be a valid and enforceable contract between Plaintiff and Defendant, then Ricoh interfered with said contract.

67. Ricoh knew of the subject contract, its alleged assignment, and knew that Defendant had no knowledge of the alleged assignment.

68. Ricoh intentionally procured breach of the subject contract by telling Defendant that it could simply cancel the subject contract without penalty, turn the equipment it had back in to Ricoh, and enter into a new contract with Ricoh under new terms with lower monthly payments.

69. Ricoh did not have justification for intentionally procuring the breach of the Agreement.

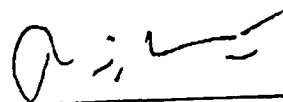
70. Defendant has been damaged by Ricoh's intentional procurement of breach of the Agreement.

WHEREFORE, having answered the Complaint of the Plaintiff herein, and having pled its Third-Party Complaint, Defendant would ask that the Complaint be dismissed with costs and:

- a) For an Order denying each of Plaintiff's causes of action and dismissing the same with prejudice;
- b) For judgment against Plaintiff and Third-Party Defendant for actual, incidental, consequential, statutory, and punitive damages in amounts to be proven at trial;
- c) For an award of attorneys' fees and the costs and disbursements borne by Defendant in this action; and
- d) For such other and further relief as this Court may deem just and proper.

DEFENDANT DEMANDS A TRIAL BY JURY

RESPECTFULLY SUBMITTED,



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May 14, 2013

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C/A No. 2012-CP-23-03738
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Marathon Community Church,.....Appellant,

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CIT Technology Financing Services, Inc.,.....Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent's Memorandum Addressing Issues of Appealability As Requested By The Court on the parties to the appeal by depositing a copy of same in the United States Mail, postage prepaid, on October 18, 2013, addressed to attorneys of record as follows:

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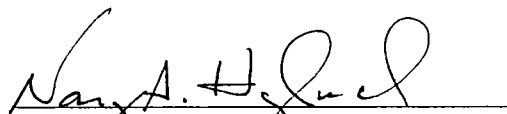
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