THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
W. Jeffrey Young, Presiding Judge

Case No. 2011-CP-43-1418

Berry, Quackenbush & Stuart, P.A.,.....Appellant,

v.

BEI Sensors & Systems Company, Inc., d/b/a BEI Duncan Electronics, and The Commercial Collection Corporation of New York, Inc.,.....Defendants,

Of Whom The Commercial Collection Corporation of New York, Inc. is the .....Respondent.

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

South Carolina Supreme Court

South Carolina Court of Appeals

Federal Courts

OTHER AUTHORITIES

SUPPLEMENTAL STATEMENT OF FACTS

1. Contrary to Respondent's comments in the Statement of Facts in the Brief of Respondent (p. 3), Appellant does not contend that BEI Sensors verbally "agreed to an additional contingency fee arrangement other than the May 2010 arrangement negotiated through CCCNY." The second suit, under the Statute of Elizabeth, which was suggested by Appellant, is not the subject of a written fee agreement, and BEI Sensors never agreed to a contingency-fee arrangement regarding this second suit.

2. Contrary to Respondent's comment that, "Appellant never obtained any written fee agreement for (sic) authorizing pursuit of litigation"(Brief of Respondent, p. 3), the subject contract (R.p. 81) does not require a separate fee agreement or a specific authorization by BEI Sensors before litigation is instituted.

3. Contrary to Respondent's comment, with regard to Appellant's proposed Complaints *and Verifications,* that, "CCCNY forwarded the documents to BEI Sensors" (Brief of Respondent, p. 3), the Record fails to support that Respondent forwarded these documents to BEI Sensors.

4. Contrary to Respondent's comment that, "CCCNY asserted as a disclosed agent acting within the scope of its agency for the principal" (Brief of Respondent, p. 4), the Record fails to support that there was any mention of "scope of its agency" prior to the issuance of the appealed Order.

5. Contrary to Respondent's comment that, "CCCNY and BEI Sensors objected to the Court's consideration of the affidavit of Leonard Jordan submitted in opposition to the Motion for Summary Judgment" (Brief of Respondent, p. 4), the Record fails to support this objection.

APPELLANT'S REPLY TO RESPONDENT'S ARGUMENTS

Argument A: **Did the Appellant present evidence that Respondent acted outside the scope of its authority in performing as agent of a disclosed principal, subjecting it to potential liability for interference with contractual relations?**

The fact that Respondent was a collection agent for BEI Sensors (a disclosed principal) is not in dispute. The fact that routine communications were to be relayed to and from Appellant and BEI Sensors by and through Respondent and were within Respondent's scope of authority is not in dispute. It is Appellant's position that Respondent's failures, time-and-time-again, to relay communications between Appellant and BEI Sensors (in other words, Respondent's constant failures to perform its fiduciary duty as agent for BEI Sensors) resulted in significant delays and, ultimately, a decision by BEI Sensors to stop the collection, as stated in the Affidavit of Leonard R. Jordan, Jr. (R.p. 86).

The Affidavit of Leonard R. Jordan, Jr. describes various communications between Mr. Vecchio and Mr. Wilkins and between Mr. Vecchio and Mr. Jordan, which make clear that Appellant received instructions or approval to file two (2) suits. These communications also indicate or imply that Respondent was, at all times, the intermediary between Appellant and BEI Sensors, with the duty or expectation that it would promptly relay communications between the two.

Did Respondent's failure to relay communications lead to the decision of BEI Sensors to stop collection? The answer to this question is yes, as Respondent's failures were constant and blatant. In any event, it is clear that this is genuine issue of material fact in dispute, which must be resolved by the trier of facts.

Did Respondent's failure to perform (breach) its duties as intermediary between Appellant and BEI Sensors exceed the scope of its authority? The answer to this question is yes, as an agent

which fails to perform its duties to its principal, e.g. ignoring or disobeying instructions, is guilty of a breach of fiduciary duty. See CGB Occupational Therapy, Inc. v. RHA Health Services, Inc.[1], infra, wherein the corporate-agent was found to have breached its fiduciary duty to its principal when it disobeyed its principal's direct order. How could an agent's not-performing its duties fall within the scope of its authority, especially when so constant and blatant as to be willful or intentional? In any event, it is clear that this is a genuine issue of material fact in dispute, which must be resolved by the trier of facts.

The appealed Order (prepared by Respondent's counsel) states that Respondent's duty was to relay communications between Appellant and BEI Sensors (R.p. 2), and Appellant does not dispute that Respondent's duty (scope of authority), as agent for Respondent, was to do just that, notwithstanding that the Affidavits of Frank Vecchio (for Respondent) and Richard Wilkins (for BEI Sensors) do not support this matter of fact and provide almost no assistance on that matter.

Vecchio: "Acting as agent for BEI Sensors, Inc., Commercial Collection Corp. of N.Y. communicated the proposed lawsuit recommendations to BEI Sensors, Inc." (R.p. 80) (Not only is this statement not one specifically made on Mr. Vecchio's personal knowledge or involvement, even though he was the point-of-contact at all relevant times, but also this is Respondent's only statement of fact even touching on scope of authority.)

Wilkins: BEI Sensors referred the collection of the debt to Respondent in November 2009 and, in May 2010, approved that Appellant be retained "to pursue legal remedies against Fluid Power to collect the unpaid debt." (R.p. 28) (There is no mention of Respondent's duties, except the implication that it had communicated with the debtor on at least one occasion and the statement that

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[1]357 F.3d 375 (3rd Cir. 2004). This case, which was cited in Dutch Fork Development Group II, LLC v. SEL Properties, LLC, 398 S.C. 406, 730 S.E.2d 290 (2012), is further discussed infra., p. 5.

it had contracted with Appellant to pursue legal remedies.)

The evidence of Respondent's actions and inactions leading to the decision by BEI Sensors to stop collection is not limited to these two Affidavits. The discovery responses provided by BEI Sensors in support of its Motion for Summary Judgment (R.p. 24) are much more enlightening. These responses make it clear that Respondent, only on rare occasions, communicated with BEI Sensors and that Appellant's recommendation (to file two suits) was relayed to BEI Sensors only months after being received by Respondent. (See a full discussion of this "scope of authority" issue in the Brief of Appellant, pp. 9-11.)

The case of Dutch Fork Development Group II, LLC v. SEL Properties, LLC, 398 S.C. 406, 730 S.E.2d 290 (2012), which is cited in the appealed Order, is distinguishable from, and not dispositive of, the present case. This case is not applicable to the facts of the present case on the issue of whether a corporate-agent for a disclosed principal can be liable in tort for interference with a contract between the principal and a third party.

In Dutch Fork, the appellant was the manager (the agent) of his limited liability company (the principal). He claimed that, as the manager of said company, he could not be held individually liable for tortious interference with a contract, as he acted on behalf of his company and was, effectively, a party to the contract breached by his company. The Supreme Court "rejected Appellant's contention that a manager of an LLC may not be held individually liable for torts of the LLC"[2] (following 16 Jade Street, LLC v. R. Design Constr. Co., LLC, 398 S.C. 338, 728 S.E.2d 448 (2012)), but then it held that, since there was no evidence that the appellant-manager exceeded his

[2]The contention of whether or not the Limited Liability Act absolves a member of an LLC of personal liability for negligence committed while acting in furtherance of the company business remains an unresolved, novel issue in this State. See 16 Jade Street, LLC v. R. Design Construction Co., LLC, 27305 (August 28, 2013).

authority, his actions can only be attributable to his company. The Court, following the Jade Street case, which also involved a claim against a manager of his and his wife's limited liability company, determined that the appellant-manager could be held to be individually liable for wrongfully interfering with his company's contracts depending on the manager's authority and whether he exceeded his authority, but the Court's analysis ultimately focused, as in the Jade Street case, on the appellant's position as an employee or officer of his limited liability company. The present case, to the contrary, involves a corporation (Respondent), which was an agent of an unrelated, separate, corporate principal, not an employee or officer of such principal.

The Dutch Fork case cites, as authority for the legal conclusion that "the actions of a principal's agent are afforded a qualified privilege from tortious interference with the principal's contract," the following cases, which are based upon Pennsylvania state law, to wit:

a. CGB Occupational Therapy, Inc. v. RHA Health Services, Inc., 357 F.3d 375, 389 (3rd Cir. 2004), which was decided against the corporate-agent, finding that it was guilty of a breach of fiduciary duty to its principal. ("Conduct that is independently actionable by anyone is sufficiently 'wrongful' to satisfy the requirements of the tort of interference.")

b. Kia v. Imaging Sciences Intern., Inc., 735 F.Supp.2d 256, 268 (E.D.Pa. 2010), which like Dutch Fork, held that an officer of a corporation cannot be liable for interfering with a contract to which the said corporation was a party unless he acted in his personal capacity or outside the scope of his authority. The court granted the officer's motion for summary judgment, following the general rule that "corporate officers are immune from interfering with contracts of their corporation, as the officers and the corporation are considered a single entity when the officer is acting within the scope of his employment."

The Dutch Fork case also cited, as additional authority: *Liability of Corporate Director,*

Officer, or Employee for Tortious Interference with Corporation's Contract with Another and *Fletcher Cyclopedia of the Law of Corporations*, both of which authorities were, apparently, limited to internal corporate relationships and liabilities, rather than relationships between two unrelated, separate corporations.

Appellant asserts, in essence, that an employee or officer, which is an agent of a corporate-principal, is effectively viewed the same as the employer-corporation (i.e. "a single entity"– see Kia, supra) while a non-employee-agent (such as an altogether separate entity) is not viewed the same as its corporate-principal (not "a single entity"). As an employee-agent is controlled, in all or most respects, by its employer-principal, he generally has a clearly-defined scope of authority, while the corporate-agent's scope of authority is often less defined (even undefined), as such agent is not generally controlled by the principal.

It is undisputed that Respondent is not a party to the subject contract, so it is interesting that Threlkeld v. Christop, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct.App. 1984) ("[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties.") is cited in the appealed Order and the Brief of Respondent. Its citation in the Dutch Fork case, however, is quite logical and confirms the arguments made in the preceding paragraphs.

The Dutch Fork case differs factually from this case so significantly that it has little or no precedential value with regard to this case.

Appellant admits that Respondent was a collection agent for BEI Sensors and that "communications between Respondent and BEI Sensors regarding the collection of that (sic) obligation are, clearly, matters within the scope of the authority for which Respondent was employed as agent " (Brief of Respondent, p. 8), but Appellant denies that the failures of Respondent "to

adequately relay communications between Appellant and BEI Sensors are "within the scope of that authority." If it is an agent's duty or requirement is to perform a defined act on behalf of its principal, the performance of such act would be within the scope of authority; but certainly, the agent's failure to perform such required act is, not only, not within such agent's scope of authority, but it is also a breach of the agent's fiduciary duty to principal. Could it be that Respondent believes that its constant failures to perform the act of relaying communications were somehow approved in advance by BEI Sensors as part of its scope of authority? In any event, this factual matter creates a genuine issue of material fact in dispute to be decided by the trier of facts.[3]

Argument B: **Did the appellant present evidence of an enforceable contract to support a claim of tortious interference with contractual relations?**

The relationship among the litigants began with a forwarding letter/contingency-fee agreement (R.p. 81), which was directed to Appellant by Respondent, as agent for BEI Sensors, the terms of which agreement were accepted by Appellant. This is a matter of fact to which all of the litigants have stipulated. (R.pp. 28, 79, 83) This forwarding letter/contingency-fee agreement is the subject contract.

Respondent, in the Brief of Respondent (R.p. 9), now claims, for the first time, that there is no written fee agreement "to pursue litigation on a contingency fee basis against the debtor."

If it is now Respondent's position[4] that it had no authority to bind BEI Sensors to this

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[3]As quoted in the Kia case, supra, at 261, "A fact is 'material' when it 'might affect the outcome of the suit under governing law" and "[t]o decide if a dispute regarding a material fact is 'genuine,' we ask whether any reasonable jury could return a verdict in favor of the non-moving party." (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91L.Ed.2d 202 (1986)).

[4]Respondent admitted in the Answer to Amended Complaint and Counterclaim that, ". . . as agent of the Defendant BEI Sensors, it offered on behalf of Defendant BEI Sensors to retain the Plaintiff upon the rates stated in the forwarding letter. . . . " (R.p. 15), and BEI Sensors

contract, this change of position would shed an altogether new light on the agency-relationship between Respondent and BEI Sensors. Respondent's claim from the outset was that it was authorized to act on behalf of BEI Sensors. (R.p. 16) If Respondent had no authority to contract with Appellant with regard to the collection of the debt owed by BEI Sensors, then Appellant's claim for damages against Respondent should stand because, in such event, the Respondent clearly acted outside the scope of its authority in contracting with Appellant.

There is, admittedly, no specific obligation or requirement in the subject contract to proceed to litigation, but the contract also does not require prior approval of litigation. Instead it expresses the intention that Appellant "pursue legal remedies against Fluid Power to collect the unpaid debt." (R.p. 28). This expressed intention can, quite logically, be construed to leave the manner of pursuit of the legal remedies to Appellant's discretion. Nevertheless, as stated in the Affidavit of Leonard R. Jordan, Jr. (R.p. 84), BEI Sensors specifically agreed with Appellant's plan of collection to institute two suits and instructed Appellant to proceed accordingly. Appellant prepared Complaints for two (2) suits and sent them to Respondent. BEI Sensors, about four months thereafter, before the two suits were filed, reversed its position and stopped the collection. The Record indicates that BEI Sensors never received the Complaints (with Verifications) from Respondent. Appellant admits that, with regard to this second suit under the Statute of Elizabeth, there was no fee agreement.

In the Brief of Respondent, Respondent attempts to mislead the Court by asserting that "[t]here is no written fee agreement, however, to pursue litigation on a contingency basis against the debtor" and that BEI Sensors "twice refused to sign proposed fee agreements forwarded by the Appellant." With regard to the basic collection, the forwarding letter/contingency-fee agreement

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affirmed, in the Affidavit of Richard Wilkins, that it, acting through Respondent, retained Appellant "to pursue legal remedies against Fluid Power to collect the unpaid debt." (R.p. 28)

Appellant." With regard to the basic collection, the forwarding letter/contingency-fee agreement (discussed above and stipulated to by all litigants) is the written fee agreement. The other fee agreements proposed by Appellant were suggested in August and September 2011 (R.p. 74), two or three months after BEI Sensors had announced its decision to stop collection. Appellant admits that these suggestions of fee agreements in August and September 2011, the purposes of which were to get the collection of the debt (and the subject contract) back on track, were not accepted by BEI Sensors, and Appellant submits that such suggested fee agreements, therefore, had no effect on the subject contract (with regard to the basic collection) or the breach of such contract.

In any event, this argument fails due to lack of issue preservation and should be stricken. See authorities cited under the reply to Argument D, infra.

Argument C: **Did the Appellant present evidence that the Respondent procured the alleged breach of contract by BEI Sensors, necessary to support a cause of action for intentional interference with contractual relations?**

Contrary to Respondent's assertion that nothing has been presented to establish that the failures (actions and inactions) of Respondent had anything to do with BEI Sensors' decision not to proceed with litigation (Brief of Respondent, p. 11), Appellant again calls attention to the Affidavit of Leonard R. Jordan, Jr. (R.p. 84), which cites several emails and letters to which Frank Vecchio was a party, which make it clear that the collection litigation was approved (authorized) and, importantly, show that there were extremely lengthy delays between communications and that, by email sent on April 20, 2011, Mr. Jordan informed Mr. Vecchio that "the ball is in your court." The discovery responses received from BEI Sensors (R.p. 84), make it clear that, even after Mr. Jordan's April 2011 email to Mr. Vecchio, BEI Sensors received no communication from Mr. Vecchio until August 2011, two months after BEI Sensors decided (in June 2011) to stop collection.

After Appellant first informed Respondent of its plan for two suits, months passed before BEI Sensors learned of this plan, and then only directly from Appellant (R.p. 84). Appellant provided to Respondent (in February 2011) its drafts of two Complaints along with Verifications (for execution by BEI Sensors) (R.p. 85); and contrary to Respondent's position, there is no evidence in the Record that Respondent passed these pleadings on to BEI Sensors. Four months later (in June 2011), BEI Sensors announced its decision to stop collection.

The Record clearly demonstrates that there was a clog in the communications, which were channeled through Respondent. That clog was Respondent. It simply failed to perform (breached) its duty to relay communications. Such failure (breach) was so constant and blatant to have been the result of a willful or intentional strategy by Respondent. Whether or not Respondent's constant failures to relay the communications between Appellant and BEI Sensors procured the breach of the subject contract by BEI Sensors is a genuine issue of material fact in dispute, which should be decided by the trier of facts.

Argument D: **Should the Affidavit of Leonard Jordan be considered in opposing the Respondent's Motion for Summary Judgment?**

Appellant disputes Respondent's arguments and points out that the Affidavit of Leonard R. Jordan, Jr. (R.p. 83) was accepted by the Court and filed.

Although there is nothing whatsoever in the Record to suggest that there were any arguments presented with regard to the Affidavit of Leonard R. Jordan, Jr., assuming this issue was argued at the motion hearing, the appealed Order (which was drafted by Respondent's counsel) makes no mention whatsoever of this issue, much less a ruling thereon. There was no motion under Rule 59(e), South Carolina Rules of Civil Procedure.

This matter is simply one of lack of issue preservation.

"[W]here an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal." Caldwell v. Wiquist, 402 S.C. 565, 741 S.E.2d 583, 589 (Ct.App. 2013).

"It is axiomatic that for an issue to be preserved for appeal, it must have been raised to and ruled upon by the trial court. . . . When an issue or argument has been raised to but not ruled upon by the trial court, a party must file a Rule 59(e), SCRCP, motion to preserve the issue for appeal." Shirley's Iron Works, Inc. v. City of Union, 387 S.C. 389, 400 693 S.E.2d 1, 6 (Ct.App. 2009).

"A party *must* file [a Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772, 780 (2004).

This issue having not been ruled upon by the lower court, Respondent's Argument D should be stricken.

RESPONDENT'S FAILURE TO ADDRESS ARGUMENTS RAISED BY APPELLANT

Respondent failed to dispute or even address, in the Brief of Respondent, Appellant's identification, in the Brief of Appellant, of specific matters of fact, each of which creates a genuine issue of material fact in dispute, including the following:

a. conflict in the Record with regard to Respondent's failure to timely relay communications from Appellant to BEI Sensors (Brief of Appellant, p. 11);

b. no evidence of any communications whatsoever between Respondent and BEI Sensors after Appellant was retained (Brief of Appellant, p. 11);

c. Respondent's failure to relay communications caused significant delays in the

performance of the contract and sabotaged Appellant's collection efforts (Brief of Appellant, p. 12)[5]; and

d. Respondent's actions and inactions were improper and unjustified (Brief of Appellant, p. 13).

If Respondent fails to respond to an issue in its brief, the appellate court may treat the failure to respond as confession that Appellant's position is correct. First Union Nat. Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct.App. 1996), reversed on other grounds, 328 S.C. 290, 494 S.E.2d 429 (1997).

The Brief of Respondent effectively concedes that there are several genuine issues of material fact in dispute, which should be resolved by the trier of facts.

CONCLUSION

"Summary Judgment is a drastic remedy." Baughman v. Am. Tel & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). The burden is on the moving party (Respondent) "to show that there is no genuine issues as to any material fact," and the "non-moving party [Appellant] need only present a scintilla of evidence to withstand a motion for summary judgment." D.R. Horton, Inc. v. Wescott Land Co., LLC, 398 S.C. 528, 730 S.E.2d 340, 347 (Ct.App. 2012); Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

As the Respondent has failed to demonstrate that there are no genuine issues of material fact in dispute, the appealed Order granting summary judgment to Respondent should be reversed.

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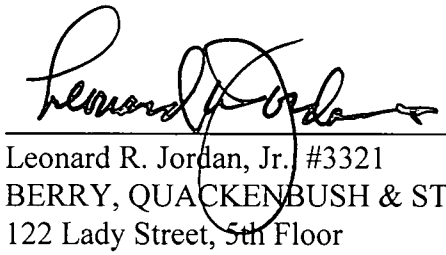
[5]Respondent did state that nothing presented by Appellant "established that any alleged delay or failure to convey information by CCCNY to BEI Sensors had anything to do with its decision not to proceed with litigation." This comment suggests a difference of opinion on the facts, which facts are material to a final decision in this case.

Respectfully submitted,



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