THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY COURT OF COMMON PLEAS
W. Jeffrey Young, Circuit Court Judge

Case Number 2013-000770

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.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

A. Did the Appellant present evidence that Responded 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?

B. Did the Appellant present evidence of an enforceable contract to support a claim of tortious interference with contractual relations?

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?

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

STATEMENT OF THE CASE

The Appellant filed the Complaint in this action on July 29, 2011, asserting a collection action against a commercial defendant, and breach of contract actions against its client, Defendant BEI Sensors & Systems Company (hereinafter BEI Sensors") and its collection agency, Commercial Collections Corporation of New York Inc. (hereinafter "CCCNY") (R., p. 6). Respondent CCCNY filed an Answer and Counterclaim on September 26, 2011; the Appellant filed its Reply on October 26, 2011. Defendant BEI Sensors filed its Answer on October 28, 2011. The Appellant filed an Amended Complaint on November 21, 2011 (R., p. 10); in the Amended Complaint, the Appellant dismissed the collection claim against the third party debtor and dismissed the breach of contract claim against Respondent CCCNY, but added a cause of action against CCCNY for tortious interference with contractual relations. Defendant BEI Sensors filed its Answer to the Amended Complaint on December 1, 2011, and Respondent CCCNY filed its Answer and Counterclaim to the Amended Complaint on December 15, 2011 (R., p. 15).

Following the exchange of discovery requests and responses, Defendant BEI Sensors filed a Motion for Summary Judgment on July 24, 2012 (R., p. 24), supported by the affidavit of its Controller, Richard Wilkins (R., p.27). Respondent CCCNY filed and served its Motion for Summary Judgment as to the allegations of the Amended Complaint (R., p. 26), as well as the Affidavit of Frank J. Vecchio (R., p. 79), on November 21, 2012. On December 14, 2012, Appellant submitted the affidavit of Leonard R. Jordan in opposition to the Motion for Summary Judgment (R., p. 83).

The motions for Summary Judgment were heard on December 17, 2012, and taken under advisement by the trial judge. The Honorable W. Jeffrey Young initially took the matters under advisement. On March 6, 2013, the Court issued an Order granting summary judgment in favor of Respondent CCCNY upon the Appellant's claim of tortious interference with contractual relations (R., p. 1); the Court denied Defendant BEI Sensors' motion for summary judgment.

The Appellant filed the current appeal on April 3, 2013. CCCNY moved to dismiss the appeal as interlocutory, which motion was denied by this Court on July 2, 2013.

STATEMENT OF FACTS

BEI Sensors is a manufacturer of electronic sensor products. CCCNY is a corporate financial management company providing financial collection and management services (R., p. 79). In November 2009, BEI Sensors contracted with CCCNY to collect a debt owed by Fluid Power of the Carolinas, Inc., a company in Sumter County, South Carolina. (R., pp. 28,79). CCCNY was unable to collect the balance owed by Fluid Power of the Carolina, Inc. to BEI Sensors, Inc.

In May 2010, CCCNY sent correspondence to the Appellant, stating that BEI Sensors "has authorized us as its agent to forward to you the enclosed claim for collection on the rates and conditions stated." (R., pp. 79, 81) The commissions offered for collection of the claim were 20% of the first $300.00 collected, 18% of the next $1,700.00 collected, and 13% of the excess. The letter also provided for a suit fee of 10%; all were stated to be contingent upon collection. On May 19, 2010, the Appellant accepted the case on those terms.

From May 2010 to February 2011, Appellant attempted without success to attempt to collect the debt owed by Fluid Power. Appellant suggested that BEI Sensors bring two suits against Fluid Power of the Carolinas; one for collection, and a second to set aside a fraudulent transfer of real estate. The communication from Appellant was sent to CCCNY, as collection agent, who passed the proposal along to BEI Sensors (R., p. 80). BEI Sensors declined to pursue litigation on the claim.

In January 2011, Appellant communicated directly with BEI Sensors and recommended pursuit of litigation against Fluid Power (, p.28). Although disputed by BEI Sensors, Appellant contends that BEI Sensors verbally agreed to pursue litigation and agreed to an additional contingency fee arrangement other than the May 2010 arrangement negotiated through CCCNY (R, p. 84). Appellant never obtained any written fee agreement for authorizing pursuit of litigation nor agreeing to any additional or different fee arrangement.

Appellant drafted proposed Complaints and affidavits and sent them to CCCNY to forward to BEI Sensors. CCCNY forwarded the documents to BEI Sensors, who failed to take any action upon them. In September 2011, BEI Sensors communicated to CCCNY that it declined to pursue litigation against Fluid Power. CCCNY sent this notification to Appellant. BEI Sensors refused to sign a proposed representation agreement directly with Appellant, and never authorized proceeding to litigation. (R., p. 29.)

On July 29, 2011, Appellant filed an action against Fluid Power, BEI Sensors and CCCNY (R., p. 6). Although the Plaintiff in the action was the Appellant, the Complaint

attempted to state a cause of action for BEI Sensors against Fluid Power. The Complaint also stated a cause of action against BEI Sensors and CCCNY for alleged breach of contract. Notice was given to Appellant that CCCNY was a disclosed agent of BEI Sensors in offering the case for collection, as specifically stated in the referral letter, and thus that CCCNY was not a party to the contingency fee arrangement contract. CCCNY thereafter amended its Complaint to assert a cause of action against CCCNY for interference with contractual relations (R., p. 10).

CCCNY moved for summary judgment, asserting that there was no evidence that BEI Sensors had breached a contract with the Appellant, and further no evidence that CCCNY had interfered with the alleged contractual relations between the Appellant and BEI Sensors. Furthermore, CCCNY asserted as a disclosed agent acting within the scope of its agency for the principal, CCCNY could not as a matter of law have interfered with the contract between Appellant and CCCNY's principal. At the hearing conducted hereon, 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, on the grounds that it was impermissible for Mr. Jordan to act as witness and attorney in the same matter. The court reserved ruling on this issue, and took the matter under advisement. The Court eventually granted summary judgment upon the ground that CCCNY was a disclosed agent acting within the scope of its agency, and thus could not as a matter of law interfere with the contract of its principal (R., p. 1).

STANDARD OF REVIEW

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the circuit court. *Evening Post Publishing Company v. Berkeley County School District*, 392 S.C. 76, 81, 708 S.E. 2d 745, 748 (2011); *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The grant of summary judgment motion is reviewed under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 14 n. 2,677 S.E.2d 612, 614 n. 2 (Ct. App. 2009).

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 Complaint acknowledges that Respondent CCCNY acted as an agent for the disclosed principal, BEI Sensors. The South Carolina Supreme Court recently addressed the issue of whether an agent for a disclosed principal can be individually liable in tort for alleged interference with a contract between the principal and a third party. In Dutch Fork Development Group II, LLC v. SEL Properties, LLC, 398 S.C. 406, 730 S.E.2d 290 (2012)(opinion withdrawn and refiled August 22, 2012), the Court extensively examined the limited circumstances under which such a tort can be claimed against an entity acting in an agency relationship for the contracting party.

> "The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). "[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties." *Threlkeld v. Christoph*, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984). "Therefore, it does not protect a party to a contract from actions of the other party." Id.
>
> *It is generally recognized that when a contract is breached by a corporation as the result of the inducement of an officer or agent of the corporation acting on behalf of the corporation and within the scope of his employment, the inducement is privileged and is not actionable.*" Bradburn v. Colonial Stores, Inc., 273 S.C. 186, 188, 255 S.E.2d 453, 455 (1979). Thus, "[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract." CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 385 (3d Cir. 2004).

Dutch Fork Development Group II, LLC v. SEL Properties, LLC, 398 S.C. at 414-15, 730 S.E.2d at 294 (emphasis added).

The evidence in the lower court established that Respondent CCCNY relayed the communications from the Appellant to BEI Sensors, and that BEI made the decision not to pursue litigation against the debtor (R., p. 79). Further, the affidavit from BEI Sensors' Controller, Richard Wilkins, established the Appellant communicated directly with BEI Sensors concerning a proposal to proceed with two lawsuits, and that BEI Sensors made the decision not to authorize litigation (R., p. 27-30).

The Appellant contends that there is some evidence that the actions of Respondent CCCNY contributed to the decision of BEI Sensors not to proceed with litigation. In support of its contention, the Appellant points to several allegations made in the Complaint; however, the allegations of the Complaint are insufficient to contradict the assertions of fact contained in the affidavits of Frank Vecchio and Richard Wilkins. The Appellant did present the affidavit of Leonard R. Jordan[1] wherein conclusory allegations are made that Mr. Jordan that he believes that CCCNY failed to timely respond to his e-mails and failed to timely communicate with BEI Sensors and that but for this delay, BEI Sensors may not have decided to refuse to proceed with litigation. The only direct evidence regarding the decision to proceed with the litigation comes from the affidavit of Richard Wilkins, however, establishing that BEI Sensors knew of the strategy proposed by Appellant, it decided not to proceed with the litigation, and did not agree with any proposed engagement by the Appellant to do so. The allegations by Mr. Jordan that he suspects some delay may have caused this, unsupported by any direct evidence or circumstantial evidence, are insufficient

[1]The presentation of the Affidavit by Mr. Jordan was improper and should not have been considered by the Court in any event; this issue is addressed in a subsequent portion of this brief.

to establish an issue of material fact.

The scope of the employment of Respondent by BEI Sensors was established by the affidavit of Richard Wilkins, i.e., that Respondent CCCNY was acting as its collection agent. Any communications between Respondent and BEI Sensors regarding the collection of that obligation are, clearly, matters within the scope of the authority for which Respondent was employed as agent. The only assertions by the Appellant claim that Respondent failed to adequately relay communications between Appellant and BEI Sensors; any such actions are unquestionably in the performance of duties as a collection agent, and are thus within the scope of that authority. The Appellant does not posit any circumstance when acting as an intermediary could fall outside the scope of is position as a collection agent; merely stating that there is no evidence of the authority does not create an issue of fact to avoid summary judgment.

B. Did the Appellant present evidence of an enforceable contract to support a claim of tortious interference with contractual relations?

Even if it could be determined that Respondent acted outside the scope of its authority in allegedly delaying or failing to relay communications between the Appellant and BEI Sensors, the Appellant still failed to establish any issue of material fact to support the statutory requirements for tortious interference with contractual relations. "The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Dutch Fork Development Group II, LLC*

v. SEL Properties, LLC, 398 S.C. 406,730 S.E.2d 290 (2012); Camp v. Springs Mortgage Corp., 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993).

The initial element of a cause of action is the existence of a contract between the Complainant and a third party, as well as the breach of that contract. The Appellant contends that it had a valid contract to proceed with litigation against the debtor on behalf of BEI sensors, and in support thereof, cites to his alleged conversations and e-mails with BEI Sensors and CCCNY. There is no written fee agreement, however, to pursue litigation on a contingency fee basis against the debtor; in fact, the affidavit of Richard Wilkins establishes that BEI Sensors did not agree to pursue litigation, and it twice refused to sign proposed fee agreements forwarded by the Appellant.

Pursuant to the South Carolina Rules of Professional Conduct, Rule 1.5(c), RPC, Rule 407, SCACR,

> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement *shall be in a writing signed by the client and shall state the method by which the fee is to be determined*, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated.

The only agreement in writing between the parties in this action is the May 2010 letter from CCCNY to the Appellant, wherein commission rates were specified contingent upon collection. There was no obligation or requirement therein to proceed to litigation. Had the Appellant wished to include an obligation to proceed to litigation, it could have included such a condition in its acceptance of those terms; it did not, Furthermore, there is no writing

whatsoever to establish any separate agreement regarding an action seeking to set aside the alleged fraudulent conveyance. Since a fee agreement by law must be in writing and signed by the client, and no such fee agreement exists in this action, the Appellant cannot establish the initial element of a cause of action, i.e., the existence of a valid contract. Any claim to assert interference with that contract must, therefore, fail.

Appellant may contend that it has a right to recover against BEI Sensors on a quantum meruit theory, for the time and expense incurred in preparing the case to go to litigation. Prior to the passage of the Rules of Professional Conduct requiring a written contingency fee agreement signed by the client, courts did countenance a quantum meruit argument for the recovery of attorneys fees when no written contract exists. See *Weatherford v. Price*, 340 S.C. 572, 532 S.E. 2d 310 (Ct.App. 2000). This Court should not, however, countenance and give validity to a practice now specifically prohibited by our Supreme Court for attorneys who practice in this State. Since the Supreme Court has prohibited the practice of a contingency fee arrangement absent a written contract, permitting recovery on a contractual theory despite this prohibition would contravene public policy.

Even if the Appellant could recover against BEI Sensors on a quasi contract or quantum meruit theory for work done preparing for anticipated litigation, it is not a contract which could support the tort of interference with contractual relations. Quasi contracts

> are imposed or created by law without regard to the assent of the party bound .... They rest solely on a legal fiction, and are not contract obligations at all in the true sense, for these is no agreement; but they are clothed with the semblance of contract for the purpose of the remedy, and the obligation arises not from consent, as in the case of true contracts, but from the law or natural equity.

17 C.J.S. Contracts §6.

Since there is no written contingency fee agreement between the Appellant and BEI Sensors for the relief sought in the underlying case, the Appellant failed to establish the first element of a cause of action for interference with contractual relations. The grant of summary judgment was thus proper.

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?

Another essential element of a cause of action for interference with contractual relations is the intentional procurement of the breach of the contract by the alleged wrongdoer. The Affidavit of Richard Wilkins established that BEI Sensors had direct discussions with the Appellant regarding the proposal to proceed with two pronged litigation and the proposal for contingency fees therefore, and that BEI Sensors refused to do so. Nothing presented to the Court in any way 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. Although the Affidavit of Leonard Jordan asserts that Respondent CCCNY allegedly failed to respond to its correspondence and failed to forward correspondence to BEI Sensors, he only makes the conclusory allegation that this contributed t the decision of BEI Sensors to refuse to proceed with litigation. There is nothing in the record establishing or tending to show that CCCNY Took any intentional action to procure the alleged breach of the contract; to the contrary, the sole direct evidence is that CCCNY

passed along the information, that BEI Sensors was aware of the proposal, and that BEI Sensors decided not to proceed with litigation. The suspicion of Mr. Jordan that any delay in relaying information is simply insufficient to qualify as any evidence of the element of intentional actions by Respondent CCCNY to procure the breach of the contract; the grant of summary judgment was thus appropriate.

D. Should the Affidavit of Leonard Jordan have been considered in opposing the Respondent's Motion for Summary Judgment?

In support of its Motion for Summary Judgment, Respondent submitted the affidavit of Frank Vecchio establishing that the Respondent had not failed to pass along information, and further establishing that it had not interfered with any contract. In addition, BEI Sensors had submitted the affidavit of Richard Wilkins in support of its Motion for Summary Judgment, establishing that there was no agreement with Appellant to proceed to litigation. The affidavit of Leonard R. Jordan, submitted to the Court days prior to the hearing, forms the basis for the Appellant's opposition to the Motion for Summary Judgment. Mr. Jordan, however, is the attorney of record, and he argued the motion before the court. The consideration of his affidavit as a witness is improper when he is also acting as an advocate before the Court, so it should not have been considered in opposing the Motion for Summary Judgment.

South Carolina Rules of Professional Conduct, Rule 3.7(c), RPC, Rule 407, SCACR provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

In the present action, the substance of Mr. Jordan's affidavit - the existence of and terms of an alleged agreement to proceed to litigation, as well as any asserted interference with that contract - was not only contested but were the central issue in the lawsuit. As such, it was improper to permit him to act as witness - indeed, the sole witness for the Plaintiff - and advocate at the hearing. Since Mr. Jordan chose to act as advocate and argue against the Motion for Summary Judgment, his affidavit should have been disregarded.

The Comments to Rule 3.7 exhibit the impropriety of permitting an attorney to act as both advocate and witness:

> [1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.
>
> Advocate Witness Rule
>
> [2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof.
>
> [3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those

circumstances specified in paragraphs (a)(1) through (a)(3).

In the present suit, the Respondent was prejudiced by counsel's actions as both witness and advocate. Mr. Jordan continues to argue the matter before the lower court and the current tribunal, arguing that his own testimony creates issues of fact regarding his right to recover upon his own contract. The credibility of Mr. Jordan is thus being put directly in issue in this proceeding. Had Mr. Jordan presented another member of his firm to argue the case, it is possible that his affidavit might be considered[2]. However, since he chose to act as an advocate, his affidavit should have not been considered. Since no proper evidence was thus presented to the Court contradicting the clear affidavits of Frank Vecchio and Richard Wilkins, it is clear that evidence of interference with contractual relations was not properly presented to the Court, and thus that the grant of summary judgment was appropriate.

CONCLUSION

There are very limited circumstances when an agent can be held liable in tort for the alleged interference with contractual relations between the principal and a third party. The Appellant failed to present competent evidence to the lower court establishing any issue of fact which could support a finding either that the Responded acted outside the scope of its authority in acting for its principal in this case, that the Appellant had a valid and binding contract which could have been the subject of an interference claim, or showing that the Respondent took any action which could be construed to intentionally interfere with an

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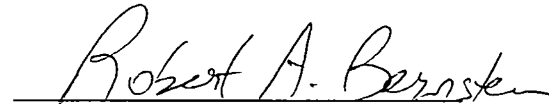
[2]It is likely, however, that even another member of his firm could not have acted as the advocate in this proceeding, since the firm itself is the Plaintiff/Appellant in this case; it thus has a pecuniary interest in these proceedings, putting the firm's credibility at issue.

existing contract. Furthermore, the Appellant failed to present competent affidavit testimony to contradict the affidavits on file supporting the Respondent's Motion for Summary Judgment. For the foregoing reasons, the judgment of the lower court should be affirmed, and the matter remanded to the trial court to conduct a trial upon the Plaintiff's Complaint against Defendant BEI Sensors, and upon the Respondent's Counterclaim against the Appellant.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY COURT OF COMMON PLEAS
W. Jeffrey Young, Circuit Court Judge

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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.

CERTIFICATE OF SERVICE

The undersigned, an employee of Bernstein & Bernstein, P.A., does hereby certify that on November 1, 2013, he served a copy of the Brief of Respondent upon Appellant's attorneys, Leonard R. Jordan, Jr., Esquire and C.E. Hardin, Jr., Esquire by placing a copy of the same in the United States Mail, postage prepaid, and addressed to the following:

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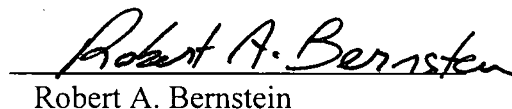

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