

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012-CP-40-05587

Emser Tile, LLC

John D. Cattano

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other: Dismissed without prejudice
- ACTION STRICKEN (CHECK REASON):  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

APPROVED

DEC 19 2013

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

SC Court of Appeals

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
Emser Tile, LLC	John D. Cattano	\$ 77,965.24
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge S. W. [Signature] Judge Code 2-26 Date 11-20-13

For Clerk of Court Office Use Only

This judgment was entered on the 20 day of NOV, 20 13 and a copy mailed first class or placed in the appropriate attorney's box on this 20 day of NOV, 20 13 to attorneys of record or to parties (when appearing pro se) as follows:

Anthony D. Hofer  
ATTORNEY(S) FOR THE PLAINTIFF(S)

Pro Se  
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court Jeanette W. [Signature]

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
Emser Tile, LLC, )  
) )  
Plaintiff, )  
) )  
v. )  
) )  
John D. Cattano, )  
) )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2012-CP-40-05587

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

NOV 20 PM 4:40

This matter can before me for a hearing on October 8, 2013, on Plaintiff's Motion for Summary Judgment. Present before me was Plaintiff, by and through its attorney, Anthony D. Hoefer, Esq., of Messrs. Levi, Wittenberg, Harritt, Hoefer & Davis, P.A., and Defendant John D. Cattano, appearing *pro se*. Based upon the pleadings and record in the case, including Plaintiff's Complaint, Defendant's Answer and Third-Party Complaint, Plaintiff's Request for Admissions and Defendant's Answers to Request for Admissions, the Affidavit of Plaintiff's Employee in Support of the Motion for Summary Judgment, the Affidavit of John D. Cattano in Opposition to the Motion, Plaintiff's Affidavit in Support of Attorney's Fees, and the arguments presented, I find and conclude as follows.

Plaintiff's Complaint alleges that Defendant is indebted to Plaintiff under an unconditional guaranty of payment of any and all indebtedness of Congaree Triton Acquisitions, LLC to Emser Tile, Inc., with interest at the rate of 18% per annum, as well as attorney's fees. Defendant's Answer generally denies the allegations of the Complaint and asserts set-off as a defense. Plaintiff submitted specific Requests for Admission to which the Defendant responded, admitting the Application for Credit, personal guaranty, and the Statement of Account, which reflected the invoices and prices of merchandise sold and delivered to Congaree Triton Acquisitions, LLC. Defendant denied Plaintiff's

GTZ

Request for Admission as to the balance due and contended that Defendant was entitled to an off-set of Fifty-Four Thousand Nine Hundred Ninety-Six and 62/100 (\$54,996.62) Dollars for credit erroneously applied to pre-acquisition debt.

The Affidavit of Plaintiff's employee, Patrick Lyle, in support of Plaintiff's Motion for Summary Judgment sets forth the e-mail and fax authorization for employees of Triton Stone Group of Charlotte, Inc., a business acquired by Congaree Triton Acquisitions, LLC, to apply credits to specific invoices. Under the law of this State, a creditor must apply payments as instructed by the debtor, but absent a written designation or instructions from the debtor, the creditor may apply payments in its own discretion. See Wardlaw v. Troy, 74 S.C. 368 (1906).

Defendant's Affidavit asserts that pre-acquisition liabilities were responsibilities of the Sellers in its Asset Purchase Agreement and that no employee of Congaree Triton Acquisitions, LLC, could authorize payment of pre-acquisition debt. However, in his Third-Party Complaint, Defendant alleges that he was pressured by the Sellers to make payments of pre-existing debt to vendors and did so despite not being obligated to do so under the Asset Purchase Agreement.

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452 (2001) (internal citation omitted). Rule 56 of the South Carolina Rules of Civil Procedure provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. While the Court is required to review the record in the light most favorable to the non-movant, "a Court cannot ignore facts unfavorable to the party and [it] must determine whether a verdict for the party opposing the Motion would be reasonably possible under the facts." Bloom v. Revoira, 339 S.C. 417, 423 (2000) (internal citation omitted). Where a party makes no factual showing in




opposition to a motion for summary judgment, the Court is required to grant summary judgment under Rule 56 if, under the facts presented, the movant is entitled to judgment as a matter of law. Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponent's case, "the nonmoving party must come forward with specific facts showing there is a genuine issue for trial and cannot simply rest on mere allegations or denials contained in the pleadings". Roland v. Heritage Litchfield, Inc., 372 S.C. 161, 165 (Ct. App. 2007).

The Defendant, having failed to provide any evidence to refute the actual or apparent authority of employees of Congaree Triton Acquisitions, LLC to apply credits to pre-acquisition debt or to provide evidence establishing any specific directions from Defendant as to how those credits should have been applied, has not shown that there remains a genuine issue as to any material fact. Accordingly, Plaintiff's Motion for Summary Judgment is hereby **GRANTED** for the following amounts: those claimed due in the Complaint in the amount of Fifty-Five Thousand Two Hundred Sixty-Four and 24/100 (\$55,264.24) Dollars; interest of 18% per annum from the date of the last invoice of October 22, 2011 to October 8, 2013 totaling Nineteen Thousand Five Hundred Eleven and 00/100 (\$19,511.00) Dollars; court costs of One Hundred Ninety and 00/100 (\$190.00) Dollars; and attorney's fees of Three Thousand and 00/100 (\$3,000) Dollars. The amounts come to a total judgment of Seventy-Seven Thousand Nine Hundred Sixty-Five and 24/100 (\$77,965.24) Dollars.

**IT IS SO ORDERED.**

Columbia, South Carolina  
November 20, 2013

  
\_\_\_\_\_  
G. Thomas Cooper, Jr., Judge  
Fifth Judicial Circuit