

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM RICHLAND COUNTY
Court of Common Pleas**

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2013-002806

EMSER TILE, LLC,

Respondent,

v.

JOHN D. CATTANO,

Appellant.

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SC Court of Appeals

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the Trial Court erred in granting Summary Judgment to Plaintiff Emser Tile, LLC by its entry of an Order granting Plaintiff's Motion for Summary Judgment dated November 20, 2013, finding that there was no genuine issue as to any material facts remaining in the case and that the Plaintiff was entitled to judgment of the matter of law.

STATEMENT OF THE CASE

This case was initiated by a Complaint filed by Emser Tile, LLC (“Emser”) filed in a Court of Common Pleas on or about June 27, 2012 (R. pgs. 6-16). The Complaint asserted among other things recovery under a personal guarantee purportedly signed by the Appellant John D. Cattano (“Cattano”), for the delivery of certain goods and merchandise, plus the recovery of interest, attorney fees, and costs.

On or about October 10, 2012, Cattano filed an Answer, Defenses, and a Demand for a Jury Trial, along with a Third Party Complaint (R. pgs. 17-40). On October 26, 2012, Emser filed a Reply to Cattano’s Answer generally and specifically denying that Cattano is entitled to any Off-Set or recoupment or any affirmative relief whatsoever (R. pg. 41). Thereafter, on August 23, 2013, counsel for Emser filed a Motion for Summary Judgment along with an affidavit of Emser’s employee (R. pgs 45-52). On or about September 3, 2013, Cattano filed Defendant’s Affidavit in Opposition to Plaintiff’s Motion for Summary Judgment contesting and refuting the assertions set forth in Emser’s supporting affidavit (R. pgs 53-54). A hearing was held on this matter on October 8, 2013. The Honorable G. Thomas Cooper, Jr., Judge of the Fifth Judicial Circuit, entered Summary Judgment in favor of Emser finding among other things that there was no genuine issue of any material facts relying on the affidavit of Emser’s employee, and apparently disregarding the affidavit in opposition to that filed by Cattano (R. pgs 53-54).

Cattano filed and served his Notice of Appeal to the Court of Appeals for the State of South Carolina on December 19, 2013, and also filed a copy thereof in the trial Court (R. pgs 57-58).

ARGUMENT

As correctly set forth by the lower Court, Rule 56 of the South Carolina Rules of the 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. That Court also acknowledged that it is required to review the record in the light most favorable to the non-moving party. The Court later erroneously concluded that “The Defendant, having failed to provide any evidence to refute the actual apparent authority of employees of Conagree Triton Acquisitions, LLC to apply credit to pre-acquisition debt or to provide evidence establishing any specific direction from defendant as to how those credits should have been applied, has not shown that there remains a genuine issue of any material fact.” (R. pg. 5, first paragraph). That is a statement that is erroneous as reflected in Cattano’s affidavit.

Emser’s Motion for Summary Judgment contained absolutely no reference to any legal authority but merely recited Rule 56 of the South Carolina Rules of the Civil Procedure. It referenced the attached affidavit obviously prepared in part by the attorney and signed by an employee of Emser (R. pgs. 46-52). Attached to the affidavit were a series of emails and account statements.

However, the lower Court seemed to completely disregard Cattano’s affidavit in opposition to the Plaintiff’s Motion for Summary Judgment. In such affidavit, Cattano clearly sets forth that “On March 11, 2011, the Officers of Conagree Triton Acquisitions, LLC executed the Asset Purchase Agreement and acquired all the assets of Triton Stone of Myrtle Beach, Inc. and Triton Stone of Charlotte, Inc. The Asset Purchase Agreement confirmed that all pre-acquisition liabilities were the responsibility of the selling parties and were not included in the acquisition.” (R. pg. 53, second paragraph). The affidavit goes on to state “that no employee of

the new company had authority to bind Conagree Triton, Acquisitions LLC to pre-acquisition debts, and only the Officers of Conagree Triton Acquisitions, LLC” (R. pg 53, third paragraph).

Thus, Cattano’s Affidavit in Opposition to Motion of the Summary Judgment refutes the application of payments made to Emser as they were erroneously applied to pre-acquisition debts, as set forth in Cattano’s affidavit.

As such, there is a dispute as to the authority, apparent or otherwise, of the persons communicating with Emser and the Officers of Conagree Triton Acquisitions, LLC as to the application of payments made. There could not be a more clear genuine issue of material fact that exists in this case.

Further, it appears that a significant issue in this case is whether the employees of Conagree Triton Acquisitions, LLC (“Triton”) had authority, apparent or otherwise, to direct application of a credit payment(s) made to Emser. Assuming the case law cited by Emser in its brief is an accurate recitation of the law, then such case law supports a reversal of the Trial Court’s findings in this case granting Summary Judgment for Emser. The case law supports Cattano’s assertion that a genuine issue of material fact exists and a trial on the merits is warranted.

The case law cited clearly sets forth that any apparent authority can only be created by conduct or words of the principal. Frazier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 374 S.E. 2d 865. There is no evidence or any indication in the pleadings, affidavit filed by Emser, or the supporting emails, that any employee of Triton had the authority from the principal. Cattano asserts that he never conveyed such authority, and there is nothing in the record to suggest by his words or conduct that any apparent authority was conveyed by or from Cattano, the principal.

If Rule 56 of the South Carolina Rules of the Civil Procedure which is unambiguous means what it says, then clearly a genuine issue of material fact exists as to the critical issue in this case regarding whether the application of funds paid to Emser were erroneously and without authorization applied to pre-acquisition debt.

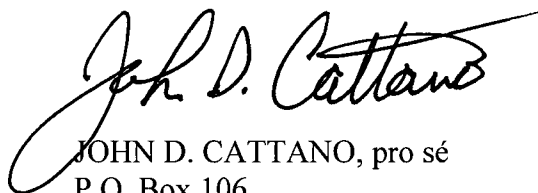
Unfortunately, the lower Court was apparently more concerned with the “purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” George vs. Fabri, 345 sc 440, 452 (2001). That may be an appropriate statement of law, but it is inapplicable in this case and its application is resulting in a miscarriage of justice.

All Cattano wants is this case to be heard on its merits, preferably before a jury as demanded in his Answer to the Complaint. He should not be deprived of the opportunity to do so in the Courts of South Carolina.

CONCLUSION

It appears that there can be no question but that there was a genuine issue of material fact which was wholly ignored by the lower Court and as such the lower Court should be reversed on appeal and Cattano's claims on the merits should be tried in the lower Court.

Respectfully submitted,

A handwritten signature in black ink that reads "John D. Cattano". The signature is written in a cursive style with a large, sweeping initial "J".

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CERTIFICATE OF SERVICE

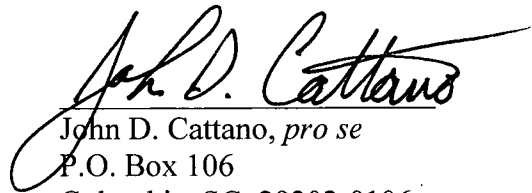
I hereby certify that I have mailed a true copy hereof to: Anthony D. Hoefler, Esq., Levi, Wittenberg, Harritt, Hoefler & Davis, PA, P.O. Box 730, Sumter, SC 29151-0730, this 11th day of April 2014.


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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211 (b), SCACR.



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