THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-In-Equity

Appellate Case No. 2014-000605

Senneka Trading Incorporated, Respondent

v.

George O. Nwachukwu, Eleke Ijioma, Celtex Export Corporation, Celtex, Inc., and Josling Inc., Defendants,

v.

Of Whom George O. Nwachukwu and Josling, Inc. are the Appellants.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities i

Statement of Issues on Appeal 1

Statement of the Case 2

Facts 3

Arguments 5

I. THE TRIAL COURT PROPERLY DETERMINED THAT RESPONDENT WAS THE OWNER OF THE TEXTILE GOODS, BECAUSE THE TESTIMONY AND EVIDENCE SHOWED THAT RESPONDENT PURCHASE THE GOODS AND THAT APPELLANTS HAD MISAPPROPRIATED SOME OF THE GOODS 7

II. THE TRIAL COURT PROPERLY DETERMINED THAT APPELLANTS HAD NOT PURCHASED THE TEXTILE GOODS, BECAUSE THE TESTIMONY AND EVIDENCE SHOWED THAT RESPONDENT PURCHASED THE GOODS AND THAT APPELLANTS HAD MISAPPROPRIATED SOME OF THE GOODS 9

Conclusion 12

TABLE OF AUTHORITIES

Consignment Sales, LLC v. Tucker Oil Company, 391 S.C. 266, 705 S.E.2d 73 (S.C. Ct. App. 2010) 6

First Palmetto State Bank and Trust Co. v. Boyles, 302 S.C. 136, 394 S.E.2d 313 (S.C. 1990) 6

McMaster v. Strickland, 322 S.C. 451, 472 S.E.2d 623 (S.C. 1996) 6

Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 391 S.E.2d 538 (S.C. 1989) 5

Townes Associates, LTD. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (S.C. 1976) 7

Watford v. Whetstone, 305 S.C. 535, 409 S.E.2d 791 (S.C. Ct. App. 1991) 6

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT PROPERLY DETERMINE THAT RESPONDENT WAS THE OWNER OF THE TEXTILE GOODS?

II. DID THE TRIAL COURT PROPERLY DETERMINE THAT THE TEXTILE GOODS WERE NOT PURCHASED BY APPELLANT?

STATEMENT OF THE CASE

Respondent generally agrees with the Statement of the Case as set forth in Section 2, designated "Procedural History," under the heading "Statement of the Case" as set forth in Appellant's Initial Brief. The balance of the Appellant's Statement of the Case consists of allegations, facts, proposed standard of review, and other matters not properly designated as Statement of the Case.

FACTS

Appellants (George O. Nawachukwu, and his company, Josling, Inc.) introduced Respondent Senneka Trading Incorporated (owned by Robert "Bob" Udeagha, also referred to as "Bob Bundy" in the record), to an opportunity at Walkertown, North Carolina to purchase textile goods. (Oct. 1 Transcript p. 25; Dec. 16 Transcript p. 135). Respondent was given the opportunity to purchase textiles from five (5) different locations in or about Walkertown. (Oct. 1 Transcript p. 26). After Respondent purchased the textile goods, Appellant would bale the goods for shipping to Nigeria. Respondent agreed to pay Appellant a $0.03 commission for each pound of goods purchased, and a $0.03 fee for each pound of goods baled (Oct. 1 Transcript p. 52). The testimony shows that the Respondent paid for all of the merchandise in question, including the three (3) containers that the trial judge awarded the Respondent. (Oct. 1 Transcript pp. 51, 92-97; Oct. 2 Transcript pp. 114-115; Dec. 16 Transcript pp. 68, 108-110, 134-136; Dec. 17 Transcript pp. 7-8). The Respondent presented detailed records showing that the pounds of textile goods purchased by the Respondent from Walkertown, and in fact delivered to Spartanburg, was significantly greater than the amount Appellants subsequently shipped or proposed to ship from Spartanburg. (Oct. 1 Transcript pp. 36, 45, 46). The missing textiles amounted to approximately 207,000 pounds. (Oct. 1 Transcript p. 39; Dec. 16 Transcript pp. 103-104). The testimony shows that the three (3) containers that the trial judge awarded the Respondent came from Walkertown. (Dec. 16 Transcript pp. 134-135). The testimony shows that the Respondent paid for the Walkertown merchandise that was shipped to Spartanburg. The testimony from the two (2) former employees of Appellants, Mark Boyd and Billy Johnson, shows that the Appellants agreed that the merchandise in question belonged to the Respondent, and came from Walkertown. (Dec. 16 Transcript pp. 110, 134-135; Dec. 17 Transcript pp. 7-8).

The testimony also showed that Appellants had improperly disposed of some of the more valuable textiles paid for by Respondent, by selling Respondent's trimming lace to a third-party named "Ms. Pinto." (Dec. 16 Transcript pp. 120-121; Dec. 17 Transcript pp. 12-18, 26-28, 40).

ARGUMENT

The trial in this case was tried by a Judge alone, by consent of the parties. The actual trial consumed four (4) full days. The trial judge took copious notes and asked multiple questions of all witnesses. The judge rendered his decision within a day or two (2) of the last day of testimony. Most of the testimony given by each of the principals was contradicted by the other party. It is fair to say the parties did not agree on much of anything. The judge was confronted with the age-old question of who was telling the truth, or who was more accurate with regard to his testimony. The testimony of the Respondent was based upon detailed and accurate records furnished by third parties. (Respondents' exhibits). The decision rendered by the trial judge was based upon the evidence as a whole. Given the fact that the credibility of the witnesses was key to the outcome of this case, only the trial judge was in a position to have an objective opinion, and the judge rendered a decision that he believed, based upon the testimony and records presented, and on the demeanor and credibility of the witnesses, was appropriate. Since the outcome of this case was based on the testimony given by the witnesses, and by the records offered into evidence, Respondent, although not happy with the trial judge's decision to award the Appellants a sum of money, believes that the decision is, as a whole, consistent with the testimony given, and therefore should be affirmed.

STANDARD OF REVIEW

Appellants incorrectly characterize the trial judge's decision as an award of specific performance, therefore concluding that the action is one in equity, and resulting in a less deferential standard of review. Although this is not an equity case, the South Carolina Supreme Court has recognized that even in such cases, the Appellate Court "do[es] not disregard the findings of the Master, who saw and heard the witnesses and was in a better position to evaluate their credibility." Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 391 S.E.2d 538 (S.C. 1989).

Respondent's Complaint did not allege an action for specific performance, but, rather, for breach of contract, among other claims. A breach of contract action is an action at law. Consignment Sales, LLC v. Tucker Oil Company, 391 S.C. 266, 705 S.E.2d 73 (S.C. Ct. App. 2010). The trial judge's decision included an award of money damages in favor of Appellants, for what the trial judge determined to be unpaid commissions and baling fees for the textile goods in dispute. The trial judge also determined the ownership of the goods in dispute, of course, determining that the goods were owned by Respondent. An action to determine the ownership of personal property is also an action at law. Watford v. Whetstone, 305 S.C. 535, 409 S.E.2d 791 (S.C. Ct. App. 1991); see also First Palmetto State Bank and Trust Co. v. Boyles, 302 S.C. 136, 394 S.E.2d 313 (S.C. 1990) (holding that a claim and delivery action, for the recovery of personal property, is also an action at law). The trial judge had the discretion to award the ownership of the goods to one of the parties as a part of his ruling, even though there was no specific claim for a declaratory judgment. McMaster v. Strickland, 322 S.C. 451, 472 S.E.2d 623 (S.C. 1996) (holding that a prayer for general relief set out in the complaint allows the trial court to grant relief not specifically requested). The parties' two warehouses are located next door to each other in Spartanburg, South Carolina, and, therefore, it was logical that the trial judge would order the Appellants to deliver the goods next door to the Respondent, having determined that the Respondent owned the goods. This minor aspect of the ruling does not change the action into one for specific performance.

Being an action at law, on appeal of a case tried without a jury, the standard of review is that "the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. The rule is the same whether the judge's findings are made with or without, a reference. The judge's findings are equivalent

to a jury's findings in a law action." Townes Associates, LTD. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (S.C. 1976) (emphasis added). Consequently, if there is any evidence to support the trial judge's decision, it should be affirmed. Respondent respectfully submits that there is a substantial amount of evidence supporting the decision, as described below.

Appellants have set forth two (2) reasons why they think the trial Judge's verdict should be reversed. Both arguments have to do with Appellants' allegation that Respondent did not "show" that it had purchased the goods in question that were contained in the three (3) containers involved. The second argument presented by the Appellants has to do with the fact that the Appellants allege they purchased the contents of three (3) containers. There is no proof that Appellants paid for anything involved in this particular case. In fact, clearly, all of the merchandise from the five (5) Walkertown locations in question were purchased by and paid for by the Respondent. (Oct. 1 Transcript pp. 51, 92-97; Oct. 2 Transcript pp. 114-115; Dec. 16 Transcript pp. 68, 108-110, 134-136; Dec. 17 Transcript pp. 7-8).

I. THE TRIAL COURT PROPERLY DETERMINED THAT RESPONDENT WAS THE OWNER OF THE TEXTILE GOODS, BECAUSE THE TESTIMONY AND EVIDENCE SHOWED THAT RESPONDENT PURCHASED THE GOODS AND THAT APPELLANTS HAD MISAPPROPRIATED SOME OF THE GOODS.

The disputed goods were from Walkertown, according to the testimony of most, if not all, of the witnesses. Throughout the trial, several of the witnesses, including the Appellants' expert, indicated that there are no serial numbers or other ways to identify these goods once they are mixed up or commingled. In other words, it is virtually impossible to tell which goods belonged to which person other than by the testimony as a whole. (Oct. 1 Transcript p. 50; Dec. 17 Transcript p. 204).

Regardless of what is set forth above, and that is that it is impossible to tell which goods were which and where they came from once they were commingled, the Respondent produced

records with regard to all of the shipments of goods that it bought from Walkertown, and that were shipped to Appellants' place of business for the purpose of baling and then shipping them to Nigeria. (Respondent's exhibits). This testimony was based upon actual truck bills and certified weight tickets. There was a large discrepancy between the pounds of goods purchased by Respondent and shipped to Appellant, and then the pounds of good Appellants shipped out overseas on behalf of the Respondent. The difference in the two amounts was a shortfall of approximately 207,000 pounds of textile goods. These goods, without question, were purchased by the Respondent from Walkertown, paid for by the Respondent, delivered to Appellants' place of business, and then not shipped from their place of business to Nigeria as had been agreed. Regardless whether the goods could be specifically identified, it was clear all the goods were from Walkertown, had been paid for by Respondent, and that approximately 207,000 pounds of goods had "gone missing" under Appellant's watch. (Oct. 1 Transcript p. 39; Dec. 16 Transcript pp. 103-104).

The disputed containers held approximately 160,000 pounds of textile goods. Upon a joint inspection of the remaining goods at Appellants' warehouse by all the parties, goods that Respondent did not claim any interest in, it was obvious there were no more Walkertown goods left there except for some scraps of old, water-damaged and worthless goods that George told the Court weighed approximately 48,000 pounds and came from Walkertown. (Dec. 17 Transcript p. 123-124).

Especially important, in the trial judge's ruling in this case, was the testimony given by Appellants' former employees, Messrs. Billy Johnson and Mark Boyd, that George, the principal of Josling, Inc., had told them, when they worked for him, that everything acquired from Walkertown, that is the contents of the three (3) containers in question, and the other material not

in issue, belonged to the Respondent. (Dec. 16 Transcript pp. 110, 134-135; Dec. 17 Transcript pp. 7-8).

II. THE TRIAL COURT PROPERLY DETERMINED THAT APPELLANTS HAD NOT PURCHASED THE TEXTILE GOODS, BECAUSE THE TESTIMONY AND EVIDENCE SHOWED THAT RESPONDENT PURCHASED THE GOODS AND THAT APPELLANTS HAD MISAPPROPRIATED SOME OF THE GOODS.

The Respondent had an agreement with Appellants, and specifically with George, that the Appellants were to receive only commission and baling fees for each pound of textile goods purchased and baled. The Appellants, and specifically George, on their own, determined to use Respondent's money to buy goods for themselves. Respondent still tried to work things out by making George the conditional offer that he could keep some of the truckloads of goods for himself as long as the Appellants did not convert other goods that Respondent had purchased, those being the goods which had the highest resale value. At the time Bob, Respondent's owner, made this conditional offer by telephone and text message, unbeknownst to Bob, George had already converted the best part of the Respondent's goods to himself, had sold the valuable trimming lace to a third party, and had kept the money for himself. (Oct. 1 Transcript pp. 77-79). This action on the part of George nullified the conditional offer made by Bob, and the trial court agreed, obviously viewing the conflicting testimony in favor of the Respondent. However, it is interesting to note that the trial judge, intending to be ultimately fair, determined that George had not been fully paid as per his agreement with Bob, and awarded George a significant sum of money that Respondent does not believe is properly owed George. Regardless, that is the way the trial judge ruled, and Respondent is willing to accept that ruling. From Respondent's point of view, the record would seem to support that George was owed a much smaller sum than the sum awarded him by the trial judge (i.e. a total of $0.06 per pound for baling and commissions, rather than the $0.10 per pound referenced in the judge's order).

With regard to the testimony, Mark Boyd, one of Appellants' former employees, testified that the trimming laces belonging to Respondent were loaded, by Appellants' employees, onto a container truck belonging to Appellants' customer, Ms. Pinto. (Dec. 16 Transcript pp. 120-121, 141). In other words, this was clear proof that George had converted some of the valuable goods, that being the trimming lace, for his own use, and had sold this trimming lace, which without question Respondent had paid for, to a third party, keeping the sales proceeds.

Billy Johnson, another one of Appellants' former employees, testified the trimming laces were always set aside at the direction by George (Dec. 17 Transcript pp. 16-18) and ultimately were put into the container belonging to Ms. Pinto. Mr. Johnson also testified that he actually helped load the valuable trimming laces onto Ms. Pinto's container. (Dec. 17 Transcript pp. 13-15).

Appellants were asked to prove by bank records that George had $69,600 in his bank account before he started dealing with Respondent in January, 2013 in order to show that they, in fact, had the money to purchase any goods on their own. Instead of answering the questions, he went on to give a far-fetched answer in an apparent attempt to cloud the issues by saying "ask Bob how many containers he cleared for me last year." (Dec. 17 Transcript p. 146).

Only the trial judge could determine who was telling the truth or who was more accurate with regard to the testimony, regardless of the fact that the Appellants seemed to be trying to cloud the issues, and surely failed to produce any credible information. The testimony given by Appellant's principal, George, was contradictory and confusing. For example, George testified that he always paid Cottonall (the seller of the Walkertown goods, and other textile goods) by wire transfer, but that the price of goods would have been less for a cash payment. (Dec. 17 Transcript p. 103). However, when asked to provide proof that he had paid for any of the

Walkertown goods, George said that he paid cash, but that paying cash did not get him a better deal. (Dec. 17 Transcript p. 177). George also provided a confusing answer when asked a simple question concerning the ownership structure of this business. (Dec. 17 Transcript p. 142).

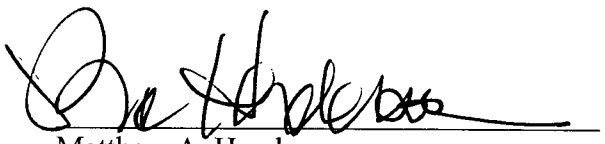
The testimony given by Bob was supported by facts and records. Basically, it was Bob's position that he bought "x" amount of goods, that was shipped to Appellants' place of business, and when shipped out, was approximately 207,000 pounds less than it should have been. Since the missing merchandise was always in Appellants' possession, and since Appellants had the three (3) containers which contained merchandise consistent with that which Respondent had purchased from Walkertown, it stands to reason the trial judge could easily find that the three (3) containers of Walkertown goods belonged to Respondent who, without question, paid for it. (Oct. 1 Transcript pp. 94-97).

In summary, given the fact that so much of the testimony given by one side was contradicted by the other side, the trial judge did well to reach the conclusions that he did. Without question, the most valuable goods were converted, as shown by that testimony and evidence, by the Appellants, and disposed of without Respondent's knowledge or consent. Given the conflicting and contradictory testimony, it cannot be challenged, and it is Respondent's position, that the trial judge reached appropriate conclusions, that were fully supported by the testimony and evidence, and his ruling should be affirmed.

CONCLUSION

For the reasons set forth above, Respondent asks this Court to affirm the decision rendered by the trial judge.

Respectfully submitted,



August 6, 2014

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Of Whom George O. Nwachukwu and Josling, Inc. are the Appellants.

PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal, on George O. Nwachukwu and Josling, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on August 6, 2014, addressed to their attorneys of record, Thomas A. Belenchia, Esq. and T. Camden Shealy, Esq., P.O. Box 3421, Spartanburg, South Carolina 29304.

August 6, 2014

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The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
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RE: Senneka Trading Inc. v. George O. Nwachukwu
Appellate Case No. 2014-000605

Dear Ms. Kitchings:

Enclosed please find the following:

(a) An original and one copy of Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal.

(b) An original and one copy of the Proof of Service.

(c) A stamped, self-addressed envelope.

Assuming you find the attached to be satisfactory, I would appreciate your filing the above documents and returning to me a clocked in copy for my records. For your convenience, you may use the enclosed envelope. By copy of this letter, as indicated by the attached Proof of Service, and the lower portion of this letter, I am serving a copy of the attached upon the attorneys for the Appellants.

Should you have questions or require anything further, please contact me. Otherwise, thanking you in advance for your assistance in this matter, I remain,

Respectfully,

Matthew A. Henderson
FOR: HENDERSON, BRANDT & VIETH, P.A.
MAH/lal
Enclosures

cc: Thomas A. Belenchia, Esq. (w/encl.)
T. Camden Shealy, Esq. (w/encl.)