

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

5
APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr , Common Pleas Court Judge

2013-CP-26-00980

RAWCLIFFE RESORTS, INC.,

Respondent.

v

MATT BECKER AND ASSOCIATES, INC. d/b/a OCEAN BREEZE
VACATIONS, MATT BECKER AND KAREN CLARK BECKER,

Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING APPELLANTS IN CONTEMPT OF THE CONSENT ORDER GRANTING TEMPORARY INJUNCTION

Respondent argues that the Trial Court correctly found Appellants to be in civil contempt of the Consent Order Granting Temporary Injunction and did not abuse its discretion in so finding. In support of this conclusion, Respondent maintains “it is clear from the Court’s order that it desired to coerce the Defendant into advertising their own rental program correctly and in compliance with the temporary injunction” (Initial Brief of Respondent, p. 9.) Respondent further argues that “the calculation of the contempt fine was in no way connected to the damages suffered by the Plaintiff, but instead was offered as a way to ensure that Defendants would comply with the Court’s order in the future” (Initial Brief of Respondent, p. 9) Furthermore, Respondent goes so far as to claim that “the lack of direct compensation to Rawcliffe in the Order of Contempt is less significant because of its location within the actual lawsuit...” implying that Respondent will recover damages relating to the alleged contemptuous acts in the underlying action “after discovery is completed and it is able to calculate damages and make a request for those damages at trial in this matter.” (Initial Brief of Respondent, p. 10.) Even further, Respondent opines rather cavalierly “as the Defendants *were only fined \$1000 00 if they did not wish to be incarcerated*, the Defendants could hardly have been less damaged than they were.” (Emphasis added.) (Initial Brief of Respondent, p. 10.) However, Respondent’s argument does not logically support its conclusion that the Trial Court properly found Appellants in civil contempt of the Consent Order Granting Temporary Injunction.

“The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised, including the nature of the relief and the purpose for which the

sentence is imposed.” Poston v. Poston, 331 S C 106, 502 S.E.2d 86 (1998) *citing to* 17 Am Jur.2d Contempt § 9 (1990), Hicks v. Feiock, 485 U.S 624, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988); State v Magazine, 302 S C 55, 393 S.E.2d 385 (1990), *abrogated on other grounds by* State v Easler, 327 S C 655 [327 S C 121], 393 S.E.2d 385 (1997). “The purpose of civil contempt is ‘to coerce the defendant to do the thing required by the order *for the benefit of the complainant.*’” Poston, 331 S.C. at 111 *citing to* Gompers v. Buck’s Stove & Range Co., 221 U.S. 418, 441, 31 S.Ct 492, 498, 55 L.Ed. 797, 806 (1911).

As Appellants mentioned in their Initial Brief, the Poston Court provided several examples of both criminal contempt sanctions and civil contempt sanctions. (Initial Brief of Appellants, pp. 17-18) The sanction levied by the Trial Court in the instant case, specifically a sentence of thirty (30) days imprisonment, of which Appellants could purge themselves by the payment of One Thousand and 00/100ths Dollars (\$1,000 00) to the Clerk of Court for Horry County, was identified as an example of a classic criminal contempt sanction. Respondent incidentally does not seem to dispute this, opting instead to suggest that the Trial Court could have held Appellants in either criminal or civil contempt. Regardless of whether the Trial Court *could have* held Appellants in either civil or criminal contempt, it is clear that the Trial Court fashioned a criminal contempt sanction upon the application of a civil contempt standard of review. It is foolish of Respondent to argue otherwise

Quite possibly more quizzical is Respondent’s assertion that the imposition of the fine upon Appellants payable to the Horry County Clerk of Court is supportive of the finding of civil contempt, even though by its own admission, the calculation of the fine was “in no way connected to the damages suffered by Plaintiff.” Respondent suggests that due to the timing of

the hearing on the issue of contempt, *ie* taking place during the lawsuit, that the alleged damages incurred by Respondent could not be ascertained at that time and anticipated that the damages incurred by Respondent would be fully addressed at the conclusion of the underlying matter.

“Where compensation is intended, a fine is imposed, *payable to the complainant* Such fine must of course be based upon evidence of complainant’s actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy ” United States v. Mine Workers, 330 U S. 258, 304, 67 S Ct 677 (1947). (Emphasis added.) “But where the purpose is to make the defendant comply, the court’s discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.” Id. “Compensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order. The goal is to indemnify the plaintiff directly for the harm the contemnor caused by breaching the injunction.” Curlee v. Howle, 277 S.C. 377, 287 S E.2d 915 (1982) *citing to* Rendleman, Compensatory Contempt. Plaintiff’s Remedy When a Defendant Violates an Injunction, 1980 Ill. L.F. 971: “Courts utilize compensatory contempt to restore the plaintiff as nearly as possible to his original position. Therefore, it is remedial.” Curlee v. Howle, 277 S.C. 377, 287 S.E 2d 915 (1982) “Therefore, the compensatory award should be limited to the complainant’s actual loss Included in the actual loss are the costs in defending and enforcing the court’s order, including litigation costs and attorney’s fees. *The burden of showing what amount, if anything, the complainant is entitled to recover by way of compensation should be on the complainant* ” Curlee v. Howle, 277 S.C. 377, 287 S E.2d 915 (1982) (Emphasis added)

Respondent contends that the finding of the Trial Court and the subsequent contempt sentence invoked by the Trial Court was appropriate, even though Respondent admits that the fine bears no relation, real or otherwise, to the alleged damages incurred by Respondent. Furthermore, Respondent maintains this position even while tacitly admitting that the alleged damages are entirely speculative. Yet, as the Howle Court explained, any compensatory contempt award must be limited to the complainant's actual loss and must be proven by the complainant in order to be recoverable. In the instant case, Respondent failed to even attempt to show the alleged actual damages in the contempt proceeding. As even Respondent admits that the fine bears no relation to the alleged damages claimed by Respondent, the contention that the purpose of the fine ordered by the Trial Court was to ensure future compliance with the prior Consent Order Granting Temporary Injunction is tenuous.

Insofar as the contempt sanctions could not be avoided by Appellants by simply complying with the prior order, that the fine paid by Appellants was payable, not to Respondent, but instead to the Clerk of Court; and that the fine bears no actual relation to the alleged damages incurred by Respondent it is reasonable to infer that the contempt sanctions issued by the Trial Court in this matter were not civil in nature, as Respondent has suggested, but were in fact criminal sanctions. This position is further strengthened by the fact that the exact sanction meted out here by the Trial Court was given as an example of a criminal contempt sanction by the Poston Court

As the ultimate sanction is criminal in nature, it logically leads to the larger issue if the sanction by its very terms is criminal in nature, did the Trial Court review this matter under the appropriate standard? The answer is clearly negative. Several times in the Order of Contempt, the Trial Court references the standard utilized as being by clear and convincing evidence. This

would be appropriate if the sanction levied was indeed civil and remedial in nature. However, as the sanction has been proven to be criminal, the appropriate standard of review is beyond a reasonable doubt. While Appellants contend that Respondent failed to meet the clear and convincing evidence standard required for civil contempt, it is obvious that Respondent failed to meet the heightened standard of beyond a reasonable doubt when the evidence adduced at the hearing is assessed. Due to the ambiguity of the Order of Contempt, and the impossibility to determine whether the Trial Court intended for Appellants to be found in criminal or civil contempt based upon the standard used and the sanction issued, Appellants respectfully request that this Court reverse the Trial Court's finding of contempt and remand the matter accordingly.

II. ERRORS IN RESPONDENT'S CITATIONS TO TRANSCRIPT OF HEARING

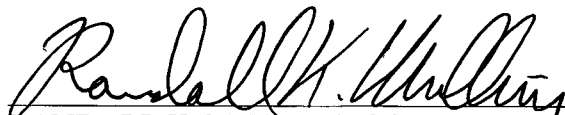
In preparing Appellant's Initial Reply Brief, Appellants' counsel reviewed the Initial Brief of Respondent and discovered that the references contained in the Initial Brief of Respondent to the Transcript of Hearing were inaccurate. While Appellant's counsel believes this to be an inadvertent error, in the interest of clarity, Appellant requests that Respondent correct the references to the Transcript of Hearing contained in its Initial Brief to reflect the passages Respondent intended to reference.

CONCLUSION

In sum, Appellants respectfully request that this Court reverse the decision of the Trial Court finding them in contempt of the Consent Order Granting Temporary Injunction in that the finding was an abuse of discretion by the Trial Court, that the sanctions were criminal in nature, and the Trial Court utilized an erroneous standard of review.

Respectfully submitted.

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Dated: 1-8-2015, 2015
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In The Court Of Appeals

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Larry B. Hyman, Jr , Common Pleas Court Judge

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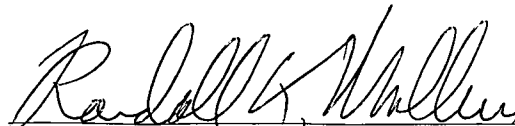
PROOF OF SERVICE

I certify that I have served a copy of the Initial Reply Brief of Appellants via regular U.S.

Mail addressed to the following:

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January 8, 2015

The Honorable Jenny Abbott Kitchlings
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RE: Rawcliffe Resorts, Inc v Matt Becker and Associates, Inc , et al
Appellate Court Case No.: 2014-001152
Trial Court Case No : 2014-
MLF File No.: 2013-357

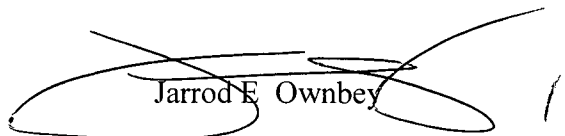
Dear Clerk Kitchlings:

Enclosed please find the original and one copy of the Initial Reply Brief of Appellants. By copy of this correspondence I am serving a copy of the same on the Respondent's attorneys, James Hills, Esquire and Jennifer D Hills, Esquires together with my Proof of Service of the same

With warmest regards, I remain

Very truly yours,

MULLINS LAW FIRM, P.A.


Jarrod E. Ownbey

JEO/klc

Enclosures

cc: James Hills, Esquire
Jennifer D. Hills, Esquire
Matt and Karen Becker

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