

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2014-002467

Dealer Services Corporation Respondent,

v.

Total, Inc. d/b/a Gault's Used Cars d/b/a Gault's Auto Parts d/b/a Gault's Used Cars and Auto Parts d/b/a Gault's Used Cars and Motormaxx; Edward Keith Potter; Michael Wayne Gault; Christopher Drye d/b/a Drye's Auto Crushing; Ben D. Kochenower, CPA; Automotive Finance Corporation; Grandsouth Bank d/b/a CarBucks; Mason Motors, Inc. d/b/a Mason Ent; American Community Bank, a Division of Yadkin Valley Bank and Trust Company; Quick Capital, LLC d/b/a Quick Capital; and Auto Bank Floor plan, LLC Defendants,

Of whom,

Total, Inc. d/b/a Gault's Used Cars d/b/a Gault's Auto Parts d/b/a Gault's Used Cars and Auto Parts d/b/a Gault's Used Cars and Motormaxx; Edward Keith Potter; Michael Wayne Gault are the Appellants.

INITIAL BRIEF OF APPELLANTS

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ISSUE ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WHERE EVIDENCE PRESENTED AT THE HEARING PLAINLY CREATED A GENUINE ISSUE OF MATERIAL FACT FOR TRIAL?

FACTS

Appellants Total Inc., d/b/a/ Gault's Used Cars, d/b/a Gault's Auto Parts, d/b/a Gault's Used Cars and Auto Parts, d/b/a Gault's Used Cars and Motormaxx ("Total") entered into a Demand Promissory Note and Security Agreement ("Agreement") with Dealer Services Corporation ("Respondent" or "DSC") on January 3, 2012. Michael Wayne Gault ("Gault"), General Manager, and Edward Keith Potter ("Potter"), President, executed personal guaranties. Under the Agreement, DSC financed certain vehicles that Total sold and/or held for sale.

On July 5, 2012, DSC notified Gault that it had picked up nine cars from Gault's property. (January 14, 2014 Affidavit of Michael Gault and Exhibits thereto) (Deposition of Michael Gault, Exhibit 9). DSC sold some of these vehicles on July 9, 2012. This sale violated the required 10 day notice before sale. Kevin Frederick, an executive with and representative of DCS, contacted Gault shortly thereafter about settling the dispute. (January 14, 2014 Affidavit of Michael Gault and Exhibits thereto) (Deposition of Michael Gault, Exhibit 9).

On August 9, 2012, Frederick and Gault agreed to settle DSC's claims for payment of \$22,500 to DSC and DSC's retention of the nine cars that it had taken, many of which it had sold in violation of the Agreement. Frederick put this settlement agreement in writing and faxed it to Gault on August 9, 2012. Gault accepted the terms that day. This settlement agreement provided a deadline for payment of August 15, 2012. (Affidavit of Kathy Clark, Exhibits 1 and 2) (January 14, 2014 Affidavit of Michael Gault and Exhibits thereto, paragraphs 7-9) (Deposition of Michael Gault, Exhibit 9, paragraphs 7-9).

Gault contacted Frederick on August 15 and requested more time to provide the payment called for by the settlement agreement. Frederick, on behalf of DSC, agreed to extend the time for payment for an additional 30 days, or until September 12, 2012. (January 14, 2014 Affidavit of Michael Gault and Exhibits thereto, paragraph 10) (Deposition of Michael Gault, Exhibit 9, paragraph 10) (Affidavit of Kathy Clark, Exhibit 2).

Gault advised Frederick of his progress on August 29, 2012, and again on September 6, 2012. At no time did Frederick indicate in any way that DSC would not stand by the written settlement agreement and the verbal 30 day extension and/or new verbal settlement agreement. (January 14, 2014 Affidavit of Michael Gault and Exhibits thereto, paragraph 11) (Deposition of Michael Gault, Exhibit 9, paragraph 11) (Affidavit of Kathy Clark, Exhibit 2).

Gault called Frederick on September 12, 2012 to request a copy of the written settlement agreement memorializing the September 12 deadline so that he could execute and tender payment. Frederick for the first time on September 12, 2012, changed positions and stated that DSC would no longer accept the settlement amount of \$22,500 from Gault. DSC breached the settlement agreement with Gault on September 12, 2012, even though he stood ready to comply with the terms of the agreement to pay \$22,500 to DSC. (January 14, 2014 Affidavit of Michael Gault and Exhibits thereto, paragraphs 12-13) (Deposition of Michael Gault, Exhibit 9, paragraphs 12-13) (Affidavit of Kathy Clark, Exhibit 2).

On or about August 13, 2012, Potter on behalf of Total filed for bankruptcy. The bankruptcy court entered a consent order on October 23, 2012 for the limited purpose of allowing Total to use the cash collateral pledged to DSC. This order specifically noted that “[t]he entry of this Order shall not constitute a waiver of any pre-petition default or

of any remedy Lender may have under applicable non-bankruptcy law.” The bankruptcy court further noted that “[n]othing herein constitutes a finding regarding the value of the Collateral or proposed treatment of the Note under a plan of reorganization. The parties’ rights to assert and/or dispute valuation and treatment of Lender’s claims under a plan of reorganization is hereby preserved.” The bankruptcy court lifted the automatic stay by order dated December 11, 2012. This order provided that “DSC is allowed to proceed and enforce any and all legal remedies in and to its property or security interests of the Debtor” The bankruptcy proceedings did not change the original Agreement or the parties’ rights thereunder, including Appellants’ right to pursue enforcement of the settlement agreement that DSC breached. (October 23, 2012 Order).

STATEMENT OF THE CASE

On January 7, 2013, DSC sued Appellants for breach of contract, replevin/claim and delivery, foreclosure of security/turnover of property, and breach of guaranty by Potter and Gault. (Complaint). Appellants answered, denying DSC's right to collect and asserting various defenses, including the existence of the settlement agreement. (March 11, 2013 Answer).

Respondents filed their motion for summary judgment on or about July 17, 2014. (Motion for Summary Judgment). The motion was heard on October 13, 2014. (Transcript of Hearing). The lower court granted the summary judgment motion by order filed on October 14, 2014. (October 14, 2014 Form 4 Order). This appeal followed.

ARGUMENT

1. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WHERE EVIDENCE PRESENTED AT THE HEARING PLAINLY CREATED A GENUINE ISSUE OF MATERIAL FACT FOR TRIAL.

Standard of Review

Summary judgment is appropriate only when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. In determining whether any triable issue of fact exists, the court must view the evidence in the light most favorable to the nonmoving party. David v. McLeod Regional Med. Ctr., 367 S.C. 242, 626 S.E.2d 1 (2006). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Lanham v. Blue Cross & Blue Shield of S.C., 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002). Moreover, because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006) . “[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.” Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Evidence

DSC moved for summary judgment, asserting that Total, Gault, and Potter were in default on the Agreement. The terms of the Agreement provided that it "may not be modified or amended except upon the written consent of DSC and Dealer." However, the Agreement also provided that a number of items, including the maturity date extension, amounts and terms of advances, late fees, NSF fees, terms and conditions, and "other changes" allowed by the Agreement "may be proven by the ordinary course of business records of DSC." (Agreement, paragraph 14). The evidence of record establishes that not only did DSC breach the Agreement, it entered into a settlement agreement with Appellants through a specific and detailed course of dealing, then

renege on the deal that it had established, and which is memorialized in the record by business records of DSC.

South Carolina courts have a long standing policy favoring settlements, and litigants are free to devise agreements to resolve matters in any manner that does not contravene public policy or the law. Hudson v. Lancaster Convalescent Center, 407 S.C. 112, 754 S.E.2d 486 (2014). A settlement agreement is subject to construction by general contract principles. Summary judgment is not appropriate if a contract is ambiguous. If the terms of a settlement agreement are reasonably susceptible of more than one interpretation, either because of the language used or because of a question about the application of the language to the claims being resolved, then summary judgment is not a proper disposition. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (Ct. App. 2009).

On July 5, 2012, DSC came to Appellants' property and took back at least nine vehicles that were covered by the contract between the parties. At that time, DSC could have taken back as many as they needed to satisfy the Agreement, and they took nine. DSC was required to hold these vehicles for a ten day statutory period for the right to cure. DSC instead sold them before the statutory period expired, thereby violating both the statute and the Agreement.

A telephone log detailing the negotiations and resulting agreement was attached to the Affidavit of Kathy Clark, a DSC employee, and presented to the trial court below. It shows that in August 2012, DSC representative Kevin Frederick entered into an agreement with Gault to settle the account for the payment of \$22,500 and DSC's retention of the nine vehicles that it untimely sold. DSC prepared the settlement agreement and sent it to Gault on August 14, 2012, the day before payment was

originally to be remitted. DSC admitted that there was a verbal agreement in place. Gault relied on this.

DSC's telephone record further shows that on August 15, 2012, Gault called Kevin Frederick. Gault testified that he asked if the parties could consummate the settlement in 30 days, and Frederick agreed. Again, DSC's own telephone record backs up this testimony – it shows that Frederick talked to Gault again on August 29 (prior to the new September 12 payment deadline), and the parties discussed the status of the payment. The parties spoke again on September 6. On September 12, 2012, Gault called Frederick to request that Frederick fax the settlement agreement again with the new dates so that they could complete the settlement, including the payment, on the date agreed. For the first time, Frederick stated that DSC had decided not to settle after all. (Transcript of Hearing, pp. 14-17) (January 14, 2014 Affidavit of Michael Gault and Exhibits thereto, paragraphs 12-13) (Deposition of Michael Gault, pp. 56-67, Exhibit 9, paragraphs 12-13) (Affidavit of Kathy Clark, Exhibit 2).

Appellants have established the settlement agreement through DSC's own business records, as well as the testimony of Gault. DSC should be estopped as a matter of public policy from specifically promising to enter into a settlement agreement, memorializing the settlement agreement in writing, extending a 30 day extension within which to finalize the agreement (which is plainly reflected in DSC's own telephone log) then refusing to send the document it has promised. At the very least, these records and testimony, along with the language of the Agreement in paragraph 14, create a genuine issue of material fact as to whether the parties agreed to settle their dispute for a specific amount.

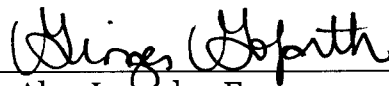
At the hearing on Respondent's Motion for Summary Judgment, Appellant Gault presented sworn testimony and more than a scintilla of evidence supporting the defense

and counterclaim for DSC's breach of the valid settlement agreement. He presented unequivocal evidence of reaching an independent settlement agreement with DSC. DSC's own sworn affidavits and documents provide more than a scintilla of evidence to support Gault's claim.

Further, the bankruptcy pleadings relied upon by DSC did nothing to extinguish the parties' rights under the Agreement, including the settlement discussions/settlement agreement that are part of this record. The consent order was put in place by its own terms to assure "adequate protection" for DSC's assets. The concept of "adequate protection" in bankruptcy court is not designed or intended to place a creditor in a better position vis-à-vis the debtor post-filing than it was before the bankruptcy stay. See, e.g., In re: Evans Coal Corp., 485 B.R. 162 (E.D. Tenn. 2013). Once the stay was lifted, the parties were free to proceed under the terms that existed prior to the filing.

CONCLUSION

For the reasons set forth herein, Appellants submit that the Court of Appeals must reverse the grant of summary judgment in Respondents' favor.



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March 23, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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Dealer Services Corporation Respondent,

v.

Total, Inc. d/b/a Gault's Used Cars d/b/a Gault's Auto Parts d/b/a Gault's Used Cars and Auto Parts d/b/a Gault's Used Cars and Motormaxx; Edward Keith Potter; Michael Wayne Gault; Christopher Drye d/b/a Drye's Auto Crushing; Ben D. Kochenower, CPA; Automotive Finance Corporation; Grandsouth Bank d/b/a CarBucks; Mason Motors, Inc. d/b/a Mason Ent; American Community Bank, a Division of Yadkin Valley Bank and Trust Company; Quick Capital, LLC d/b/a Quick Capital; and Auto Bank Floor plan, LLC Defendants,

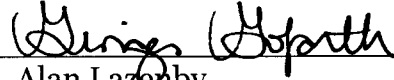
Of whom,

Total, Inc. d/b/a Gault's Used Cars d/b/a Gault's Auto Parts d/b/a Gault's Used Cars and Auto Parts d/b/a Gault's Used Cars and Motormaxx; Edward Keith Potter; Michael Wayne Gault
are the Appellants.

PROOF OF SERVICE

I, the undersigned, hereby certify the Initial Brief of Appellant and Designation of Matter in the above referenced matter was mailed, postage prepaid, to Respondent's Attorney, Robert Goings on March 23, 2015 as follows:

Robert F. Goings
P.O. Box 436
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SC Court of Appeals

March 23, 2015

The Honorable Jenny Abbott Kitchings
SC Court of Appeals Clerk
PO Box 11629
Columbia, SC 29211

**Re: Dealer Services Corporation, Respondent v. Total, Inc. d/b/a Gault's Used Cars d/b/a Gault's Auto Parts d/b/a Gault's Used Cars and Auto Parts d/b/a Gault's Used Cars and Motormaxx; Edward Keith Potter; Michael Wayne Gault; Christopher Drye d/b/a Drye's Auto Crushing; Ben D. Kochenower, CPA; Automotive Finance Corporation; Grandsouth Bank d/b/a CarBucks; Mason Motors, Inc. d/b/a Mason Ent; American Community Bank, a Division of Yadkin Valley Bank and Trust Company; Quick Capital, LLC d/b/a Quick Capital; and Auto Bank Floor plan, LLC, Defendants, Of Whom Total, Inc. d/b/a Gault's Used Cars d/b/a Gault's Auto Parts d/b/a Gault's Used Cars and Auto Parts d/b/a Gault's Used Cars and Motormaxx; Edward Keith Potter; Michael Wayne Gault are the Appellants
In the Court of Common Pleas for Cherokee County
Appellant C.A. No: 2014-002467**

Dear Ms. Kitchings:

Enclosed for filing is an original and one copy of Appellants' Initial Brief and Designation of Matter in the above case. I also include a Proof of Service certifying service of these documents upon Robert Goings, Esq.

Please file the original and send a clocked copy back to me in the envelope I have enclosed for your convenience. I appreciate your assistance in this regard.

Sincerely,



Ginger D. Goforth
ginger@lazenbylawfirm.com

GDG: je

Enclosures

cc: Robert Goings, Esq. (via US Mail)

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SC Court of Appeals

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