THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

C/A No.: 2013-CP-11-0002
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 Floorplan, 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.

RESPONDENT'S INITIAL BRIEF

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ISSUE ON APPEAL

WHETHER THERE IS ANY GENUINE ISSUE OF MATERIAL FACT THAT DEALER BREACHED THE DEMAND PROMISSORY NOTE AND SECURITY AGREEMENT AND PERSONAL GUARANTY AGREEMENTS AND THAT DSC IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

STATEMENT OF THE CASE

This appeal arises out of a commercial debt collection action in which the lower court granted judgment as a matter of law to Respondent Dealer Services Corporation (hereinafter "DSC") based on the absence of any genuine issue of material fact that 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 (hereinafter "Dealer") defaulted on a Demand Promissory Note and Security Agreement. (Order p.1.) The Note[1] was entered into by DSC, a floorplan financier, and Dealer on January 3, 2012, for a principal amount of two hundred thousand dollars plus interest. The Note granted DSC a security interest in Dealer's vehicle inventory and required written mutual consent for any amendments or modifications. (Note ¶14.) At the same time, Dealer's owner and general manager, Edward Keith Potter and Michael Wayne Gault, signed agreements personally guaranteeing the Note.

Dealer defaulted on the Note when it failed to repay the funds advanced to it by DSC for the purchase of retail inventory. (K. Clark Aff. ¶3.) Dealer's insolvency and subsequent filing for Chapter 11 Bankruptcy constituted an Event of Default under the terms of the Note. (Note ¶6(d).) During the pendency of the bankruptcy action the parties entered a Consent Order for the Use of Cash Collateral and Adequate Protection Payments of Dealer Services Corporation. The October 23, 2012 Order authorized Dealer use of the cash collateral of DSC and ordered adequate protection payments to DSC including six thousand dollars per month for six months,

[1] The Note constituted an amendment and restatement of all prior notes between Dealer and DSC, including but not limited to a note executed by DSC and Dealer on March 16, 2007.

beginning with October 1, 2012, and several other payments culminating on April 1, 2014. (Order ¶6.) Dealer breached the Cash Collateral Order when it failed to make the required payments due to its insolvency. (Gault Dep. 79:11-13.) Under the terms of the Order, Dealer's failure to remit the required payments constituted an event of Default and entitled DSC to immediate relief from the Automatic Stay. (Order ¶¶6, 8, 9.) By order of the Bankruptcy Court dated December 11, 2012, DSC was granted relief from the Automatic Stay and is, therefore, entitled to enforce its lien against Dealer's collateral by way of this action which includes claims for breach of contract, replevin of collateral / claim and delivery, foreclosure of the security interests and turnover of the property, and breach of the Gault and Potter guaranty agreements.

Prior to filing for bankruptcy, Dealer and DSC discussed settlement opportunities including Dealer's payment of $22,500.00 to DSC by August 15, 2012, in order to resolve Dealer's repayment obligations under the Note. (K. Clark Aff. ¶¶4, 5.) On August 9, 2012, DSC sent a proposed Settlement Agreement to Dealer. (K. Clark Aff. ¶ 6.) In addition to proposing the payment of $22,500.00 by August 15, 2012, the Agreement stated that "In the event Dealership fails to remit to DSC the stated sum as set forth herein, this Agreement shall terminate." (Proposed Agreement ¶2.) DSC received neither an executed Settlement Agreement from Dealer nor the required payment of $22,500.00 by the designated deadline and Edward Keith Potter admitted the payment was never made. (K. Clark Aff.¶ ¶8, 9; Potter Dep. 55:15.)

The October 14, 2014 Order granting DSC summary judgment was based on the absence of any genuine issue of material fact that Dealer, Potter and Gault are in default on the Demand Promissory Note and Security Agreement as obligor and guarantors and money is now owing and due by the terms of the note. (Order p.1.) The lower court held the terms of the Note provide it may not be modified or amended except in writing with the consent of DSC. (Order

p.1.) In the absence of both an executed agreement or modification and any detrimental reliance upon a representation made or offered by DSC, DSC is entitled to judgment on the Note as a matter of law. Due to Dealer's failure to execute the proposed Settlement Agreement and its continued refusal to fulfill its obligation under the Note, the value of Dealer's debt totaled in excess of $167,715.29 as of March 31, 2014. (K. Clark Aff. ¶3.)

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the Court of Appeals applies the same standard that governs the circuit court under Rule 56(c), SCRCP. Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 387-88, 701 S.E.2d 776, 779 (Ct. App. 2010). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Rule 56(c), SCRCP. However, neither the trial court nor the Court of Appeals is "required to single out some one morsel of evidence ... to create an issue of fact that is not genuine." Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984)).

ARGUMENT

THERE IS NO GENUINE ISSUE OF MATERIAL FACT THAT DEALER BREACHED THE DEMAND PROMISSORY NOTE AND SECURITY AGREEMENT AND PERSONAL GUARANTY AGREEMENTS AND THAT DSC IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

There is no dispute that Dealer entered a Demand Promissory Note and Security Agreement with DSC and breached the agreement by its failure to make the required payments. There is also no dispute that Dealer failed to execute the Settlement Agreement proposed by DSC and failed to pay $22,500.00 by August 15, 2012, as required by the Agreement.

According to the plain and unambiguous terms of the Note, any modifications of the Agreement between DSC and Dealer must be made in writing and signed by all parties. (Note

¶14.) "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977).

There is no evidence that either Dealer or DSC signed the proposed Settlement Agreement. According to Kathy Clark, the Director of Risk for the company with which DSC merged, DSC never received an executed Settlement Agreement from Dealer, Edward Potter, or Michael Gault. (K. Clark Aff. ¶8.) Clark further testified no person on behalf of DSC signed or executed the proposed Settlement Agreement. (K. Clark Aff. ¶9.). Dealer's general manager, Michael Gault, testified he could not remember whether the Settlement Agreement was signed. (Gault Dep. 62:8.) Dealer's owner, Edward Potter, testified he neither signed the proposed Settlement Agreement nor saw a signed copy of the Agreement. (Potter Dep. 54:1-23.)

The basis of Dealer's Appeal lies in its reliance on an unsigned settlement proposal, phone log, and an alleged verbal agreement to settle Dealer's debt with DSC. Under South Carolina law, the enforceability of an oral contract hinges upon the parties' mutual assent and performance of actions in furtherance of the terms of the contract, both of which are lacking in this case. Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 303, 468 S.E.2d 292, 300 (1996) (citing Gaskins v. Blue Cross–Blue Shield of South Carolina, 271 S.C. 101, 245 S.E.2d 598 (1978)). Clark testified DSC has not entered into a settlement with Dealer, Potter or Gault and did not receive from Dealer $22,500.00 by August 15, 2012, as required by the proposed Settlement Agreement. (K. Clark Aff. ¶¶9, 11; see also Gault Dep. 67:14 (admitting Dealer has not paid $22,500.00 to DSC).) According to the terms of the Agreement, Dealer's failure to

remit this payment resulted in termination of the Agreement. (Proposed Agreement ¶2.) By filing for Bankruptcy on August 13, 2012, just two days prior to the deadline for payment of the $22,500.00 on August 15, 2012, Dealer deliberately chose the advantages of bankruptcy over the proposed settlement with DSC and Dealer's principal intentionally recorded his signature on a Bankruptcy Petition instead of on the Settlement Agreement. Dealer's failure to remit the $22,500.00 payment to DSC resulted in termination of the Agreement and left Dealer in Default on the Note under the plain terms of the Settlement Agreement.

The proposed Settlement Agreement further provided that DSC does not waive any default or Debt owed by Dealer until Dealer satisfies its obligations under the Settlement Agreement and that any breach of the Agreement causes it to terminate. (Proposed Agreement ¶¶3, 4.) As represented to the United States Bankruptcy Court for the District of South Carolina by Dealer, the Debt owed by Dealer to DSC exceeds one hundred fifty thousand dollars. In fact, Dealer acknowledged its Debt totaled $152,685.76 in both the Schedule of liabilities filed with the Bankruptcy Petition and the October 23, 2012 Cash Collateral Order which was signed by both parties. In specifically acknowledging the $152,685.76 debt to the Bankruptcy Court, Dealer chose to neither disclose the purported settlement nor mention a $22,5000.00 debt. Dealer should be judicially estopped from claiming a Debt value in excess of one hundred fifty thousand dollars before the Bankruptcy Court and a Debt value of $22,500.00 before this Court. Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). "When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." Hayne Fed. Credit Union v. Bailey,

327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997). Dealer should not be allowed to gain an advantage by representing a substantially lower Debt in this action than the Debt represented to the Bankruptcy Court when there is no evidence of an executed agreement modifying the terms of the Note of which Dealer has admittedly defaulted.

CONCLUSION

In the absence of any evidence of an executed Settlement Agreement or payment of $22,500.00 in compliance with the Agreement and considering there is no dispute Dealer defaulted on both the January 3, 2012 Note, and the October 23, 2012 Cash Collateral Order, the order granting DSC summary judgment should be affirmed.

Respectfully submitted,

By: _____

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are.....Appellants.

PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief by mailing a copy of the same via United States Mail, on May 18, 2015, addressed to the following:

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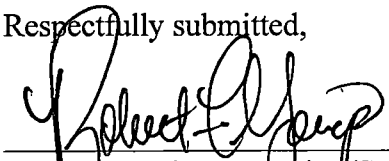
By: 

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