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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM SPARTANBURG COUNTY COURT OF COMMON PLEAS JUN 18 2015

THE HONORABLE J. MARK HAYES, II

SC Court of Appeals

APPELLATE CASE NO. 2014-002755

Brannon Poe, CPA, LLC,

Respondent

vs.

Steve Stravolo, Stravolo & Company, P.A.,
and Upstate CPAs, P.A., f/k/a Mathur & Co., PA,

Appellants

FINAL BRIEF OF APPELLANTS

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ISSUES ON APPEAL

1. **Only Stravolo was a party to the Agreement with Poe and therefore it was error to find that Appellant Upstate CPAs is liable to Poe for breach of the Sales Consulting Agreement, to which Upstate CPAs was not a party.**
2. **The trial court erred in calculating damages based on a merger of the practices, instead of a sale, resulting in an incorrect damages award to Poe.**

STATEMENT OF THE CASE

This action was commenced by Respondent, Brannon Poe, CPA, LLC (hereinafter referred to as “Poe”) by the filing of its Complaint in the Court of Common Pleas for Spartanburg County on July 5, 2011. (R. p. 7). On or about July 28, 2009, Poe entered into an agreement with Appellant Steve Stravolo entitled “Sales Consulting Agreement”. (R. p. 7, line 5 and R. p. 12-13). Appellant Stravolo and Poe were the only parties to said Agreement. (R. p. 7 and R. p. 12-13). Pursuant to the Agreement, Poe was to list and advertise for sale Appellant Stravolo’s accounting practice known as Stravolo & Company, P.A. If the practice merged into another, Poe’s fee was to be calculated based on the practice’s former year’s revenue. (R. p. 12-13). If the practice was sold, Poe’s fee was to be based on the transaction price. (R. p. 12-13). Due to Poe’s seeming failure to obtain potential buyers for the practice, Stravolo terminated the agreement with Poe on November 17, 2010. (R. p. 9, line 17).

On or about December 20, 2010, pursuant to an Asset Purchase Agreement (“APA”), Appellant Upstate CPA’s acquired the assets of Stravolo & Company, P.A. (R. p. 121). The transaction between Appellants Stravolo & Company, P.A. and Upstate CPA’s was a sale of assets, not a merger of the two companies, as set forth in the APA. (R. p. 121 and R. p. 117-120). Poe was not paid by Stravolo and filed its Complaint alleging breach of contract by all Appellants. The allegations of the Complaint were denied in Defendants’ Answer. After the lawsuit commenced, Stravolo discovered that Poe had sent Upstate CPA’s an e-blast regarding Stravolo’s practice and knew Upstate CPA’s had viewed the link, but failed to follow up with Upstate CPA’s.

On or about March 9, 2012, Plaintiff filed its Motion for Summary Judgment on Liability Only and Defense of Comparative Negligence. (R. p. 175). Subsequent to the filing of said Motion, a Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment was filed. (R. p. 230). In its Memorandum, Respondent relies upon admissions by Stravolo in the course of discovery. (R. p. 166-174). Stravolo did admit that the Sales Consulting Agreement was the written agreement between Poe and Stravolo; he further admitted that the assets of Stravolo & Company were *sold* to an entity related to Bharti Mathur. In response, Appellants filed an Affidavit of Steve Stravolo. (R. p. 117-120). A hearing on Plaintiff's Motion was held on May 14, 2012 before the Hon. J. Derham Cole in Spartanburg County. (R. p. 17). By Form 4 Order filed May 17, 2012, Plaintiff's Motion for Summary Judgment as to liability was granted. Appellants herein timely filed a Motion to Reconsider. A hearing was held on the Motion to Reconsider on December 6, 2012 before Judge Cole. (R. p. 29). The Motion to Reconsider was denied by order filed January 4, 2013.

A damages hearing was later held before the Hon. J. Mark Hayes, II in Spartanburg County. Testimony was presented by Poe and Stravolo. See Transcript of September 11, 2013 Hearing. An Order was filed on October 4, 2013 (yet neither party received said Order until January 2014) granting Poe judgment against all Defendants/Appellants in the amount of \$41,536.64. Said order found that the Appellant entities had merged and calculated the "performance fee" set forth in the Sales Consulting Agreement based on a merger theory, not a sale of assets. During the hearing that led to this Order filed October 4, 2013, the issue of privity of contract between Appellant Upstate CPA's and Poe was presented to the Court over the objection of Poe's counsel (R. p. 52, line 25 – p. 53, lines

1-19). However, the Court's order filed October 4, 2013 did not address the issue of liability, only stating that it was not for the Court to decide based on Judge Cole's previous orders filed May 17, 2012 and his Order denying the Motion to Alter/Amend filed by Appellants. (R. p. 5 and R. p. 1). Both parties moved to alter/amend the October 4, 2013 Order. (R. p. 261 and R. p. 263). These motions were heard on August 26, 2014 before Judge Hayes. (R. p. 91). An Order was filed November 17, 2014 denying both Motions. Judge Hayes ruled that the Appellant's motion relating to issues of liability were untimely and were not before the Court at the damages hearing. Judge Hayes further ruled that there was no distinction in the damages calculation regardless if the complained of conduct by Stravolo was determined to be a merger or a sale. This appeal followed.

1. No Other Appellant Besides Stravolo may be held liable on the contract at issue.

Although the final order found all defendants liable to Poe, there are no grounds for the determination that anyone other than Stravolo should be liable to Poe. Poe had no privity of contract with any other defendant, and Upstate CPA's did not assume Stravolo's liabilities when it purchased the assets of his company.

a. There is no privity of contract between Poe and Upstate CPA's.

Upstate CPA's hereby appeals the grant of summary judgment against it regarding liability, because Upstate CPA's cannot be held liable on the contract between Poe and Stravolo when Upstate CPA's was not a party to that contract and is not a successor in interest under any merger theory. *See Link v. Sch. Dist. of Pickens Cnty.*, 302 S.C. 1, 393 S.E.2d 176, 179 (S.C. 1990) (finding plaintiff was entitled to wait to appeal earlier summary judgment ruling in appeal from final judgment, pursuant to S.C. Code § 14-3-330(1)). Under South Carolina law, there is a presumption that there is no privity between parties substantiating a breach of contract claim if there is no contract between the parties, as one "who is not a party to a contract generally cannot be liable for its breach." *See Holder v. Haskett*, 283 S.C. 247, 251, 321 S.E.2d 192, 194 (Ct. App. 1984). The underlying rationale behind this tenant is that the parties' intent in forming the contract should be effected by the court if possible; thus, if a party had no intention of entering into a contract with another, the former should not be held liable to the latter. *See Gilbert v. Miller*, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct. App. 2003) (holding language of a lease evidenced no intent that the landlord have a duty to protect plaintiff from a tenant's dog).

Here, Poe centered his argument for summary judgment on liability on the existence of the Sales Consulting Agreement with Stravolo. (R. p. 17). Paragraphs 7, 11 and 12 of

Plaintiff's Complaint allege that only Stravolo, not other Defendants, agreed to pay Plaintiff (Poe) any fees that may be due pursuant to the agreement. (R. p. 12-13). Stravolo was the only signer of the Sales Consulting Agreement, and all parties have acknowledged that the agreement dated July 28, 2009 is the only agreement that is the subject of the suit commenced by Poe. (R. p. 43, lines 10-13, line 25 - p. 44, line 1, then p. 52, lines 22-24). Appellant Mathur was not a party to the agreement between Poe and Stravolo, and nothing in the Agreement shows Mathur or Upstate CPA's intended to be bound by such agreement or even knew of an agreement between Poe and Stravolo. There was no evidence submitted at the hearing on the Motion for Partial Summary Judgment by Poe to suggest that anyone other than Stravolo was or would be a party to the agreement with Poe. Poe agrees that Appellant Upstate CPAs, PA f/k/a Mathur & Co., PA was not a party to the agreement between Stravolo and Poe. (R. p. 54, lines 6-8).

At the Motion to Reconsider held on December 6, 2012, Appellant's counsel spelled out for the Court that there was no dispute that the matter was a breach of contract case; however, there was no evidence, as suggested above, that any defendant in the lawsuit other than Stravolo was a party to the agreement with Poe. (R. p. 31, lines 14-15). At the hearing on December 6, 2012, the Court's attention was also called to the Plaintiff's Complaint, specifically paragraphs 3 and 16 which was denied by the Appellants in their answer. (R. p. 34, lines 8-15, see also R. p. 7 and R. p. 14). Poe, in his deposition, on pages 16 and 18, states that he is not aware of any conduct by the other Defendants/Appellants other than Stravolo regarding the Sales Consulting Agreement. (R. p. 32, lines 16-23). The Asset Purchase Agreement whereby Stravolo sold his practice to

Mathur states clearly that Mathur did not assume any liabilities of Stravolo, such as the agreement he entered with Poe.

Further, Stravolo contested the fact that Poe actually performed, thus being entitled to a fee pursuant to the terms of the agreement, and Stravolo properly terminated the agreement with Poe prior to selling to Mathur. Poe admitted that the agreement became in essence a 30 day contract that renewed unless notice was provided regarding its termination. (R. p. 59, lines 6-8). Poe acknowledges in paragraph 17 of his Complaint that the agreement with Stravolo was terminated on November 17, 2010. Evidence showed that pursuant to the provisions of Stravolo's agreement with Poe, Stravolo gave timely notice of its termination in his November 17 e-mail to Poe terminating the agreement, over 30 days before Stravolo's APA transaction with Mathur was consummated December 20. (R. p. 7).

In Poe's deposition, he admits that he had no knowledge of any discussions/negotiations between Stravolo and Mathur prior to his lawsuit being filed. (R. p. 192, lines 10-16). Poe admits that he never had personal contact or negotiations with Mathur or Upstate CPA's, as Buyer, regarding Stravolo's practice listed pursuant to the July 28, 2009 Sales Consulting Agreement. In fact, Mathur did receive an "e-blast" from Poe and opened the message to view the information, which Poe knew, yet he never reached out to her regarding a possible deal. (R. p. 190, lines 3-12). Poe admitted that he did nothing to consummate the transaction. (R. p. 57, line 8). Poe stated he did not do anything because he wanted to see "motivation" on Mathur's part, or in other words, wanted to see Mathur come to him. (R. p. 189, line 23 – p. 190, line 2). Yet, he knew Mathur was a qualified buyer because he dealt with her in the past. He had identified her as a qualified buyer but

did nothing beyond sending an “e-blast” to her along with other buyers. There is nothing in the record that shows Mathur even knew the practice in the “e-blast” was Stravolo’s practice. Poe did not pursue or secure the sale to Mathur and thus did not perform under the agreement. As a result of Poe’s failure to secure any deal for Stravolo, the agreement was terminated prior to the sale to Mathur.

The Order filed October 4, 2013 fails to address the privity of contract issue properly raised by Defendant/Appellant as it pertains to Mathur and Upstate CPAs. (R. p. 1). It is clear, however, that Mathur was not a party to the Sales Consulting Agreement and did not agree to purchase the liabilities of Stravolo or his company, and thus should not have been held liable to Poe for breach of the Sales Consulting Agreement. Further, Poe has placed no evidence in the record to impute liability to Mathur.

b. There is no successor liability theory under which a defendant not a party to the contract at issue could be liable to Poe.

The trial court seemed to base its opinion that Mathur should be liable to Poe on a theory of de facto merger, which is incorrect as a matter of law. The Asset Purchase Agreement between Stravolo & Company, P.A., as Seller, and Mathur & Co., P.A., as Buyer, is clear that it is an agreement by which Buyer is buying and Seller is selling business assets, not merging two companies. Pursuant to Section 1.4 of the APA, Mathur was not assuming any liabilities of the Seller, Stravolo. (R. p. 121-122). Mathur then formed Upstate CPA’s without Stravolo having a co-owner, partner, employee, or any other relationship to Upstate CPA’s.

In opposing the Motion to Reconsider, mentioned in more detail above, Poe argued from the Requests to Admit served on Appellants by his counsel but conceded that the agreement is only between Poe and Stravolo, not Mathur and not Upstate CPAs. (R. p. 34,

lines 3-5). This argument is contradicted by counsel in the Record (R., p. 35, lines 3-5) where the argument is made (the only time it is made) that all Defendants were parties to the agreement with Poe. Yet there is no evidence to support this argument – not in Poe’s deposition, not in his Motion to the Court, not in responses to Request for Admission and certainly not in the Sales Consulting Agreement itself. The argument could only be “supported” by a finding that Stravolo and Mathur/Upstate CPAs are one and the same under a de facto merger theory. This theory is not supported by the facts of this case.

Under South Carolina law, a successor company cannot be held liable on a predecessor’s debts or liabilities unless one of the following four exceptions applies:

- (a) That there was an agreement to assume such debts;
- (b) the circumstances surrounding the transaction must warrant a finding that there was a consolidation of the two corporations;
- (c) or that the purchasing corporation was a mere continuation of the selling corporation;
- or (d) that the transfer was pretensive of the transaction fraudulent in fact.

Brown v. Am. Ry. Express Co., 123 S.E. 97, 99 (S.C. 1924) (finding successor not liable where assets were purchased, liabilities not assumed, and predecessor left with substantial means). Courts have found subsection (b) cited in *Brown* to mean a merger of two companies, which “typically involves the transfer of stock, not just the transfer of assets such as real, personal, or intellectual property or goodwill.” See *Simmons v. Mark Lift Indus., Inc.*, 622 S.E.2d 213, 217 n.2 (S.C. 2005). Subsection (c) has been interpreted as a continuation or *de facto* merger theory. *Id.* In *Simmons*, the South Carolina Supreme Court stated, “[m]ost courts traditionally have applied the mere continuation exception (also known as a *de facto* merger) contained in the general rule on successor liability only when there is commonality of ownership, *i.e.*, the predecessor and successor corporations have substantially the same officers, directors, or shareholders, and the business continues

largely unchanged.” *Id.* Implicit in this line of cases is the courts’ allowing a plaintiff recovery against a successor when the predecessor is left without means to pay plaintiff.

See id.

As noted above, there is no evidence of an actual or de facto merger in this matter. Rather, the Asset Purchase Agreement between Stravolo & Company, P.A., as Seller, and Mathur & Co., P.A., as Buyer, is clear that it is an agreement by which Buyer is buying and Seller is selling business assets. In admitting paragraph 12 of the Requests to Admit, Stravolo was admitting that the assets were sold, pursuant to the APA as set forth. Pursuant to Section 1.4 of the APA, Mathur did not assume any liabilities of the Seller, Stravolo. (R. p. 122-123). This is exactly like the asset purchase in *Brown*, through which assets were purchased and liabilities were not assumed. *See Brown*, 123 S.E. at 99. Poe somehow wants this Court to believe that Stravolo’s admission that the assets were sold means he merged, but that would require the Court to disregard Asset Purchase Agreement’s disclaimer of liability and the intentions of the parties in entering into the agreement. (R. p. 121).

There are no facts in evidence supporting a merger theory, as there is no evidence that shares of Stravolo’s company were sold along with its assets, or that company ownership continued unchanged. (R. p. 121). There is no evidence of a de facto merger, as there was no commonality of officers, directors, or shareholders between Stravolo’s company and Upstate CPA’s. Indeed, there is no evidence whatsoever supporting a finding these two companies merged such that Upstate CPA’s should be held liable for Stravolo’s agreement with Poe. Poe even acknowledges that the firm was sold, not merged. (R., p. 45, lines 14-16).

Thus, the trial court erred as a matter of law in finding that Upstate CPA's was liable to Poe on the contract between Stravolo and Poe under a merger theory. The judgment as to Upstate CPA's should be reversed.

- c. The amount of damages awarded is excessive and should be reduced, because the transaction between Appellants Stravolo & Company, P.A. and Upstate CPA's was a sale of assets, not a merger of the two companies.**

Stravolo herein appeals the calculation of the amount of the judgment based on the following: his agreement with Poe, the Asset Purchase Agreement with Mathur and the consideration actually paid by Mathur to Stravolo pursuant to the APA. The Sales Consulting Agreement dated July 28, 2009 (the "Agreement") states that the Performance Fee shall be, in this case, 10% of the Transaction Value. Transaction Value is defined as "the total of all valuable consideration given in exchange for the assets or shares, if applicable, of the Practice. Valuable consideration is defined as broadly as possible and includes anything of value that is obtained pertaining to the assets or shares of the Firm. If the Firm is merged, the Transaction Value shall be the gross revenue of the Firm for the year preceding the transaction. Transaction Value shall include the full potential value of any contingencies."

Appellants argue that it was error to define the Stravolo/Upstate CPAs transaction as a merger; it was in fact a sale pursuant to an Asset Purchase Agreement and thus, the damages calculation used by the trial court is wrong. In admitting paragraph 12 of the Requests to Admit, Stravolo was admitting that the assets were sold, pursuant to the APA as set forth. Poe somehow wants this Court to believe that the admission that the assets were sold means he merged – nothing of the sort. The terms of the APA are clear that Stravolo was selling his business assets to Mathur. As mentioned above, the Asset

Purchase Agreement between Stravolo & Company, P.A., as Seller, and Mathur & Co., P.A., as Buyer, is clear that it is an agreement by which Buyer is buying and Seller is selling business assets. (R. p. 121). Poe even acknowledges that the firm was sold, not merged. (R., p. 45, lines 14-16). Pursuant to Section 1.4(b) of the APA, Mathur did not assume any liabilities of the Seller, Stravolo. (R. p. 122-123).


The deal between Stravolo and Mathur was a sale. (R., p. 71, ln. 13-21). Under the Sales Consulting Agreement, if the firm is merged, the fee is 10% of the gross revenue of the firm for the year preceding the merger, while Poe's fee was only 10% of the purchase price if Stravolo sold the assets of his company. (R. p. 12-13). For the assets, Stravolo only received \$220,000, not \$290,000 as set forth in the Order dated October 4, 2013. The preceding year revenues of Stravolo & Company should have no bearing on the determination of the Performance Fee due to Poe. The Transaction Value should be the valuable consideration actually paid by Upstate CPAs (successor to Mathur) to Stravolo pursuant to the Asset Purchase Agreement.

The ruling on November 17, 2014 that there is no distinction between a merger and the sale in the Agreement is incorrect. The only evidence before the Court regarding monies paid by Upstate to Stravolo pursuant to the Asset Purchase Agreement was around \$220,000 as Stravolo testified at the hearing held September 11, 2013. (R., p. 72, lines 8-9). The trial court's determination that the Asset Purchase Agreement deal with Upstate was a merger by Stravolo should be reversed, as should the calculation of damages due to the fact that it was not based on valuable consideration paid by Upstate CPA's and received by Stravolo, but was rather based on prior year revenues.

As to the issue of attorney's fees, Poe did not pay his attorney's fee as an hourly rate or retainer; it was strictly contingency. (R. p. 61, lines 1-2). Again, part of the basis for the order granting summary judgment initially was that the assets of Stravolo were sold to Mathur. This issue was raised in the Motion to Reconsider the October 4, 2013 order on August 26, 2014. (R. p. 95). Pursuant to the Sales Consulting Agreement, damages awarded should be based on the amount paid for the practice, which was \$220,000.00.

CONCLUSION

Wherefore, Appellants pray that the summary judgment finding of liability as to Mathur and Upstate CPA's be reversed, and the case be reversed and remanded for proper damages calculation under an asset sale theory.



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June 16, 2015

CERTIFICATE OF COUNSEL

IT IS HEREBY CERTIFIED that the Final Brief of Appellants in this matter complies with South Carolina Rule of Appellate Procedure 211(b). This Certification was served upon Counsel for Respondent, Christy Ford Allen, Esquire and Hanna R. Metcalfe, Esquire, by placing copies of same in the United States Mail this date, with sufficient postage affixed thereto, addressed as follows:

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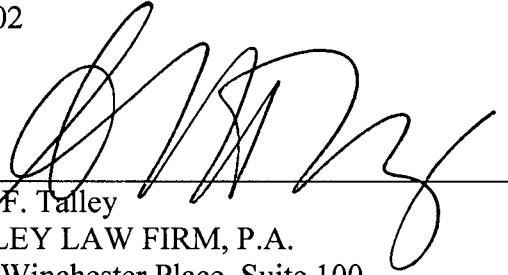
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PROOF OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing FINAL BRIEF OF APPELLANTS in this action was served upon Counsel for Respondent, Christy Ford Allen, Esquire and Hannah R. Metcalfe, Esquire, by placing copies of same in the United States Mail this date, with sufficient postage affixed thereto, addressed as follows:

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