STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable J. Mark Hayes, II

RECEIVED
JUN 19 2015
SC Court of Appeals

Appellate Case No. 2014-002755

Brannon Poe, CPA, LLC, Respondent,

v.

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

RESPONDENT'S FINAL BRIEF

Christy Ford Allen, Esquire
WILLS MASSALON & ALLEN LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144

and

Hannah R. Metcalfe, Esquire
METCALFE & ATKINSON, LLC
P.O. Box 1826
Greenville, SC 29602
ATTORNEYS FOR RESPONDENT

Scott F. Talley
TALLEY LAW FIRM
2500 Winchester Place, Suite 100
Spartanburg, SC 29301
Attorney for Appellants

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to consider Appellants' argument that Upstate CPAs, PA should not be bound by the judgment when that issue was first raised on motion to alter of amend the order granting partial summary judgment on liability? If the court did err in refusing to consider the issue, did the court err in granting summary judgment against Upstate CPAs on the breach of contract claim?
2. Did the trial court err in its calculation of damages under the contract?

STATEMENT OF THE CASE

On July 5, 2011, Brannon Poe CPA, LLC brought this case alleging breach of contract against Steve Stravolo ('Stravolo"), his accounting firm Stravolo & Company PA (Stravolo & Co.), and Upstate CPAs, CPAs f/k/a Mathur & Co., PA (Upstate CPAs) another accounting firm alleged to be the successor in interest to Stravolo & Company, PA. Stravolo, Stravolo & Co, and Upstate CPAs were represented by the same counsel, and answered denying the claims. Poe filed a motion for partial summary judgment on the contract liability on March 13, 2012. The court granted the motion for partial summary judgment against Stravolo, Stravolo & Co., and Upstate CPAs on May 17, 2012. The court conducted the damages trial, nonjury, on September 11, 2013. The court issued its decision on October 4, 2013 awarding Poe judgment against Stravolo, Stravolo & Co., and Upstate CPA in the amount of $29,823.40 plus $11,713.24 in attorneys' fees and costs, totaling $ 41,536.64. On December 17, 2015, Stravolo, Stravolo & Co., and Upstate CPA served the Notice of Appeal.

FACTS

In July 2009, the parties entered into a written contract ("Sales Agreement") for the listing and marketing of Stravolo's accounting practice, Stravolo & Co. (R. pp. 12-13). Poe proceeded to list Stravolo's practice for sale and actively marketed the business for sale, including marketing the business through Poe's online business brokerage website and via email. (R. pp. 140-50).

The Sales Agreement provides that Poe would facilitate and market the sale or merger of Stravolo's accounting practice, similar to that of a real estate listing agreement. The Sales Agreement provides that Poe had an exclusive right to sell/merge the Practice, and that Stravolo shall refer all contacts and/or inquiries regarding the sale of the Practice to Plaintiff during the term of the Agreement. Stravolo agreed to pay Poe a performance fee of the greater of: (1) Ten percent (10%) of the Transaction Value or (b) Ten Thousand and No/100 Dollars ($10,000.00) (the "Performance Fee".) "Transaction Value" is a defined term in the Sales Agreement:

> "Transaction Value" is defined as the total of all valuable consideration given in exchange for the assets or shared, 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 revenues of the Firm for the year preceding the transaction. Transaction Value shall include the full potential value of any contingencies.

Stravolo agreed that said Performance Fee was payable at the closing of the sale or merger of the accounting practice. The Sales Agreement provides that the fee is due if the sale or merger takes place (a) within the terms of this Agreement regardless of buyer or other transferee taking part in such transaction, or (b) within three (3) years after the termination of this Agreement if the eventual buyer or other transferee is any party with

whom Seller or Poe had negotiations or contact regarding the sale or transfer of the Practice during the term of the Agreement. In the event of non-payment of the Performance Fee, the Sales Agreement provides that Poe is entitled to an award of legal fees and court costs related to the enforcement of the Agreement, and provides that the Agreement inures to the benefit of and shall be binding upon the respective successors and assigns of the parties. (R., pp. 12-13).

Stravolo began negotiations with Bharti Mathur regarding merger of Stravolo's accounting practice with Mathur's accounting practice. Neither Stravolo nor Mathur notified Poe of their negotiations regarding the listed accounting practice. On November 5, 2010, Stravolo & Co. and Mathur & Company, PA entered into an agreement whereby Stravolo agreed to sell his accounting practice to Mathur & Co. for a Purchase Price of $290,000. (R., p. 122-23). On November 16, 2010 Mathur & Co. PA formally changed its name to Upstate CPAs, PA by filing an amendment with the Secretary of State on November 16, 2010. (R., p. 246).

On November 17, 2010, Stravolo notified Poe by email "Please pull the listing of the sale of Stravolo & Company, PA as soon as possible. As I mentioned, we have merged with another firm in Spartanburg, SC." (R., p. 247). Stravolo further admitted that in December 2010, Stravolo & Co. ceased operations and immediately transitioned all clients to Upstate CPAs f/k/a Mathur & Co., PA, and all team members of Stravolo & Co. became employees of Upstate CPA. (R. p. 120).

From the inception of the Agreement until its written cancellation on November 17, 2010, Poe handled over 50 inquiries from buyers, and actively marketed Stravolo's

the accounting practice to APS's national customer base. (R. pp. 140-50). Stravolo refused to pay.

ARGUMENTS

1. BECAUSE APPELLANTS FAILED TO RAISE THE ISSUE OF THE LIABILITY OF UPSTATE CPAS AS SUCCESSOR IN INTEREST BY MERGER, IT IS NOT PRESERVED FOR APPELLATE REVIEW. IF PRESERVED, SUMMARY JUDGMENT WAS APPROPRIATE.

Poe brought claims for breach of contract against Stravolo, Stravolo & Co., and Upstate CPA. Poe alleged that Upstate CPA was the "successor in interest by merger to Stravolo & Company PA and Mathur & Co., PA." (R., p. 7). Poe alleged that the Sales Agreement "provides that it inures to the benefit of and shall be binding upon the respective successors and assigns of the parties, which would include Defendant Upstate CPAS." (R., p. 9).

When Poe moved for partial summary judgment on the contract liability, it sought summary judgment against all named defendants. (R. pp. 175-229). In support of said motion, Poe submitted a memorandum in support. The Sales Agreement, Responses to Request to Admit by Defendants, and the Deposition of Brannon Poe in support of said Motion. (R. pp. 175-252).

Stravolo, Stravolo & Co., and Upstate CPA filed no memorandum in opposition to the Motion for Summary Judgment, and filed only an Affidavit of Steve Stravolo prior to the hearing. (R. pp. 117-20). Stravolo's Affidavit consisted substantially of Stravolo's position that Poe did not perform under the agreement (which is not at issue in this appeal), and referenced Upstate CPA in only two places. The Affidavit stated the following: "On December 20, 2010, Stravolo & Company ceased operations and we

immediately transitioned our clients to Bharti's new firm Upstate CPAs, PA. The team members of Stravolo & Company, PA were immediately hired by Upstate CPAs, PA." (R. p. 120). Nothing in the Affidavit suggests that Stravolo challenged the conclusion that the transaction was a merger. Stravolo himself first disclosed and described the transaction as a merger in his November 17, 2010 notice to Poe to terminate the listing. (R. pp. 247, 167, 174). Stravolo wrote to Poe that "we have merged with another firm in Spartanburg, SC." Id. The only evidence in the record at the time of the hearing on the motion for partial summary judgment to contest that Upstate CPA was the successor in interest to Stravolo & Company was a previously "denied" Request to Admit that "on some date prior to November 17, 2010 Defendants Mathur & Co. PA and Stravolo & Co. PA merged to form Upstate CPA PA," and a general denial that Upstate CPAs was the successor in interest to Stravolo & Co. in the Answer.

At the time of the summary judgment hearing and order, neither Stravolo, Stravolo & Company, nor Upstate CPA had even presented the court with a copy of the agreement between them relating to the transfer.[1] Stravolo's Affidavit had no exhibits, and he entered none into the record at the hearing. (R., p. 18 ("no sworn testimony, no exhibits entered into evidence)). Further, when one reviews the argument made at the hearing on the motion for partial summary judgment, counsel for Appellants even stated that "as my client's [Stravolo] affidavit spells out, the merger of his practice with another

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[1] Appellants include the Asset Purchase Agreement between Stravolo and Mathur & Company, PA dated November 5, 2010 as Item No. 8 on their Designation of Matters. However, the record reflects that this document was never presented to the trial court, nor was it made part of the record until the damages trial, which took place on September 11, 2013 (over a year after the order granting summary judgment on liability). Appellants should not be permitted to reengineer the evidence presentation and ignore the requirements the nonmoving party must come forward with specific facts showing there is a genuine issue for trial in order to defeat a motion for summary judgment.

firm is somebody that was the same person who bought this practice in 2007." (R., pp. 23, ll. 14-17. The week following the hearing, the trial judge issued an order granting Poe's Motion for Partial Summary Judgment. (R., p. 5)

On May 30, 2012, Stravolo, Stravolo & Company, and Upstate CPAs filed Motion to Alter of Amend the Order on the grounds that "only one party Defendant was a party to the Contract complained of yet the Court's ruling does not state as to which Defendant the Plaintiff's Motion was granted." (R., p. 261). Again, Appellants did not, even at this time, attempt to supplement the record with the alleged evidence that Upstate CPA should not be deemed a successor. The court held a hearing on the motion to alter or amend, and concluded that this issue of Upstate CPA's responsibility for the judgment had never been raised prior to the motion to alter and amend, and therefore pursuant to black letter law, it cannot be raised for the very first time at a SCRCP, Rule 59(e) motion to alter or amend. (R., pp. 1-2). Upstate CPAs argued that the denial of the allegation in the Complaint that Upstate CPAs was the successor in interest to Stravolo & Co. should suffice has having raised the issue.

It is black-letter law in South Carolina that "[a] party cannot use Rule 59(e) to resent to the court an issue the party could have raised prior to judgment, but did not." C.A.H. v. L.H., 315 S.C. 389, 392, 434 S.E.2d 268, 270 (1993) (quotations omitted). In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court. Elam v. S.C. DOT, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-780 (2004). Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments. Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004). The rationale for the rule is that until

the trial court considers the matter and makes a ruling, an appellate court is unable to find error. Id. Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review. Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 371, 628 S.E.2d 902, 919 (Ct. App. 2006).

In this case, Upstate CPA did not submit any argument or evidence to rebut the claim by Poe that it was a successor by merger to Stravolo & Co. No person claiming to act on behalf of Upstate CPA attended the hearing, nor submitted an Affidavit in opposition to the motion. Counsel for Upstate CPA made no mention of any objection by Upstate CPA as the successor by merger at the hearing. Instead, Poe submitted evidence of Stravolo's own admission in this email dated November 17, 2010 that he had "merged" his accounting firm with another accounting firm. And, Stravolo himself attested that all clients were transitioned to Upstate CPAs and all employees went to work at Upstate CPAs.

While the party seeking summary judgment has the burden to establish the absence of a genuine issue of material fact, once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, "the nonmoving party must come forward with *specific facts* showing there is a genuine issue for trial." Miller v. Blumenthal Mills Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (emphasis added). It is well settled in South Carolina that a party "may not rest upon the mere allegations or denials of his pleading" to defeat a motion for summary judgment. Rule 56(e), SCRCP; see also Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994) (stating "an adverse party may not rely

on the mere allegations in his pleadings to withstand a summary judgment motion"); see West v. Gladney, 341 S.C. 127, 135, 533 S.E.2d 334, 338 (Ct. App. 2000) (affirming summary judgment where statement of fact presented only in attorney's argument would not be considered by the court in determining whether a genuine issue of material fact exists sufficient to preclude summary judgment).

Here, the trial court heard the motion for partial summary judgment, considered all arguments and submissions made by the parties, and decided that Poe was entitled to summary judgment on the breach of contract claim, subject only to a trial on the amount of damages. The grant of summary judgment in favor of Poe should be affirmed. There is no basis on which to remand this case to the trial court for further proceedings on whether Upstate CPA is liable as successor to Stravolo & Co.

In their Brief, Appellants attempt to argue facts which were discovered and made part of the record long after the court's order granting partial summary judgment on May 17, 2012. After the grant of summary judgment against all Defendants on the contract liability, the parties proceeded to take additional discovery for the purposes of the damages phase of the case. Appellants should not be allowed to reorder the record in this case, make arguments and submit evidence which should have been so presented to the court and Respondents prior to the grant of partial summary judgment. This issue was simply not raised by the Appellants prior to the court's grant of partial summary judgment, and the court should decline to review it now.

If the court were to consider evidence gathered after the court's grant of partial summary judgment, only portions of which were made part of the record (as damages was the only issue still to be determined), the evidence supports the conclusion that

Upstate CPAs was the successor in interest to Stravolo & Co. Steve Stravolo was deposed (after the grant of partial summary judgment), individually and on behalf of Stravolo & Co. He relies on the substance of the asset sale document to deny the transaction was a legal merger, but admitted that he took part in the plan to use the word "merger" "just for PR [public relations]" and to represent to "the clients of Mathur and Company and the clients of Stravolo and Company" that they "would now be served under one roof, basically, as Upstate CPAs." (R. pp. 156-57). He stated that "the agreement I had with Sam and Bharti [Mathur] and Kim [Stravolo] was the public would hear a merger from a PR standpoint, that's true." (Supp. R., p. 295). Stravolo also admitted "I'm part of Upstate CPAs." (Supp. R, p. 296). All of Stravolo's employees, including his wife, who had been 50% owner with him, went immediately to work for Upstate CPAs. (R. pp. 156-55, Supp. R. 297). Mr. Mathur, on behalf of Upstate CPAs, testified that they sent out a merger announcement and told clients "we are merged and created a new entity called Upstate CPAs." (R. p. 161). Both Steve Stravolo and Kim Stravolo are listed under "about us" on Upstate CPA's website. (R. pp. 162-65). Upstate CPA "wanted to project that image, that he [Steve Stravolo] is still involved and that is a true statement, that he was involved in guiding people who happened to be his clients for the last 15 years, or whatever time frame, to essentially give that impression that it is okay; that it is still one organization." (R., p. 160)

Because the Sales Agreement had alternative fee calculations depending on whether the transaction was a sale or merger, the trial court, during the damages trial, allowed testimony on the issue of whether the transaction was a merger, and he concluded in his damages order that the transaction was in fact a merger. (R., pp. 3-4).

Stravolo admitted that they sent out a "we have merged" announcement. (R. pp. 78, 161), and that Stravolo and his wife were listed on Upstate CPAs website as part of Upstate CPAs. (R. pp. 79, 162-65). Stravolo testified that "the reason I'm listed there is because . . . we merged together offices on December 20, 2010 doesn't mean there weren't clients that still needed help from me specifically . . . " (R., p. 80). Kim Stravolo works for Upstate CPAs as well. Id. Stravolo even lists Upstate CPAs on his email signature because he wants his clients "to still feel comfortable that I'm around, and I I[sic] am, in the same building and they can stop by and see me at any time." (R., p. 81).

Review of factual findings in a non-jury trial must be affirmed if there is any susceptible basis for the conclusion. Here, there was competent evidence to conclude that the transaction between Stravolo & Co. and Mathur & Co. was a merger. That finding should be affirmed.

In the absence of a statute, a successor company is not ordinarily liable for the debts of a predecessor company under a theory of successor liability unless: (a) there was an agreement to assume such debts; (b) the circumstances surrounding the transaction indicate a consolidation of the two corporations; (c) the successor company was a mere continuation of the predecessor company; or (d) the transaction was fraudulently entered into for the purpose of wrongfully denying creditor claims. Simmons v. Mark Lift Indus., 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005) (citing Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924)). While the written agreement between Stravolo & Co. and Mathur & Co. appears not to include an agreement to assume debts, the evidence presented supports findings that support the successor liability of Upstate CPAs under all other three (3) exceptions: there is substantial evidence of circumstances

that the two corporations were effectively consolidated, that Upstate CPAs was a mere continuation of Stravolo & Co., or that the transaction was fraudulently entered for the purpose of wrongfully denying creditor claims, in particular the claim of Poe. (Infra. at pp. 9-10).

The court's order should be affirmed.

1. THE TRIAL COURT DID NOT ERR IN ITS CALCULATION OF DAMAGES

Appellants seek to have the appellate court reverse the trial court's finding that Poe was entitled to $41,536.64, and submits that amount of damages owed Poe should have instead been $31,032.11.

The court conducted a nonjury trial on damages under the contract. Therefore, in an action at law tried without a jury, the trial court's findings are conclusive on appeal when supported by competent evidence. The standard of review is limited to correcting errors or law and determining whether the trial court's finding are supported by competent evidence. Beheler v. National Grange Mut. Ins. Co., 252 S.C. 530, 535, 167 S.E.2d 436, 438 (1969). If the trial judge reaches a conclusion of which the facts are susceptible, the appellate court is bound by his findings of fact. Id.

The trial judge concluded that the measure of damages was determined by the terms of the Sales Agreement which provided the "performance fee" is calculated as 10% of the preceding year's gross revenues "if the firm is merged," (R., pp 44-45). The court held that the transaction was a merger, and therefore applied 10% to the evidence of Stravolo & Co.'s preceding year's gross revenue figure ($298,234) to conclude that the contract damages were $29,823.40.

In response to Appellants' motion to alter and amend objecting to the conclusion that the transaction was a merger, the court concluded that the damages calculation of $29,823.40 (10% of the preceding years' gross revenues of $298,234) was nearly identical to a damages calculation under the "sale" alternative measure – that of 10% of the $290,000 transaction price. The court denied the motion to alter or amend. (R., 3-4)

Stravolo & Co.'s 2009 Income Statement listed total Income of $298,234. (R., p. 47). The transaction at issue, sale or merger, took place in 2010. The November 5, 2010 agreement between Stravolo & Co. and Mathur & Co. provides that that the Purchase Price is allocated: $30,000 to equipment, furniture, and inventory and $260,000 to goodwill, which totals $290,000. (R., p. 62). The contract provides a payment schedule of four payments, the first two totaling $150,000, and the last two payment amounts contingent on subsequent Stravolo & Co former clients' account revenue. (R., p. 76). Stravolo submitted evidence indicating that he eventually only actually received $220,000 (R., p. 73).

Appellants argue that using 10% of the 2009 gross revenue figure was error because he objects to the finding that the transaction was in effect a merger. However, as set forth above, there was plenty of competent evidence in the record to support the conclusion that the transaction was merger. Appellants also argue that if the court were relying on the agreement price, that the court is required to use the actual amount Stravolo & Co. eventually collected, which was $220,000, as opposed to the agreed upon Purchase Price of $290,000.

The Sales Agreement with Poe provided that Poe was to be paid his "performance fee" at "the closing of the sale or merger." Therefore, the court has competent evidence

to support its conclusion that at the closing of sale, the contract price of $290,000 was the appropriate measure of Poe's performance fee. Further, the Sales Agreement plainly says that the Transaction Value includes "the full potential of any contingencies." It makes no sense to interpret the Sales Agreement to mean Poe's performance fee is contingent on the ability of the seller to collect all of the purchase price, if structured in some way other than full payout at the time of the closing.

Appellants in the last paragraph of their brief object to the amount of the attorneys' fee awarded, and apparently seek modification of the amount to reflect one-third of $22,000 instead of one-third of $29,834 based on its objection to the court's calculation of the Performance Fee.[2] However, Appellants do not present any argument that the amount of the attorney fee awarded was not reasonable. Therefore, there is no basis on which to challenge the trial court's attorneys' fee award calculation.

The court should affirm the order.

C. CONCLUSION

Based on the foregoing, the court should affirm the judgment against Upstate CPAs, and the court should affirm the court's determination of damages.

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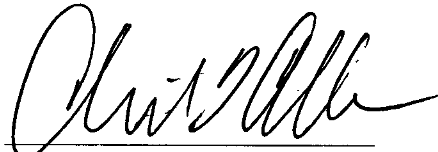
[2] Poe had objected to the trail court's complete reliance on the one-third contingency fee agreement as the sole basis for the attorneys' fee calculation and rejection of Poe's submission of detailed attorney fee affidavits and evidence of a reasonable hourly fee. (R., pp. 265-94) (R., pp. 263-64). The trial court stated that "while the court does not disagree with the Plaintiff's analysis [presumably that the hourly fee in the amount of $ 24,892 is reasonable], the court believes, under the facts of this case, that the price agreed to between the client and Plaintiff's attorneys – which was a contingency fee – is a reasonable award of attorneys' fees, plus the costs of the litigation. (R., p 4).



Christy Ford Allen
WILLS MASSALON & ALLEN & LLC
97 Broad Street
Charleston, SC 29401

June 18, 2015

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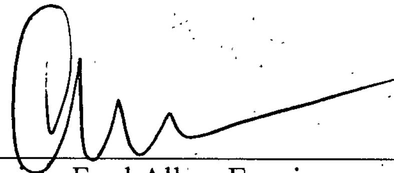
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondent's Final Brief complies with Rule 211(b), SCACR.

June 18, 2015



Christy Ford Allen, Esquire
WILLS MASSALON & ALLEN LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144

and

Hannah R. Metcalfe, Esquire
METCALFE & ATKINSON, LLC
P.O. Box 1826
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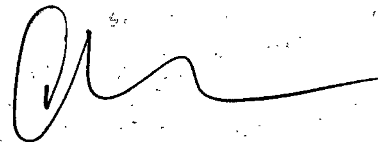
PROOF OF SERVICE
OF RESPONDENT'S FINAL BRIEF

I certify that I have served the Respondent's Final Brief by depositing a copy of it in the United States Mail, postage prepaid, on June 18, 2015, addressed to:

Scott F. Talley, Esquire
TALLEY LAW FIRM, PA
2500 Winchester Place, Suite 100
Spartanburg SC 29301
ATTORNEYS FOR APPELLANTS

June 18, 2015



Christy Ford Allen, Esquire
WILLS MASSALON & ALLEN LLC
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Charleston, South Carolina 29402
(843) 727-1144
and
Hannah R. Metcalfe, Esquire
METCALFE & ATKINSON, LLC
P.O. Box 1826
Greenville, SC 29602
ATTORNEYS FOR RESPONDENT