

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

CASE NO: 2013 CP 2305778

IN THE COURT OF COMMON PLEAS

CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

CJR Resources Inc vs. Commercial & Industrial Floors Inc

FEB 23 PM 3 08

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRPC;
 - SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed; Reversed; Remanded;
 - Other: _____

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Bankruptcy:
SC Court of Appeals

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 23rd day of February 2016, and a copy mailed first class this 23rd day of February 2016, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Cou
- Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

CJR Resources, Inc. f/k/a Ron's Building
Materials, Inc.,

Plaintiff,

v.

Commercial & Industrial Floors, Inc. and
Dabney Maides,

Defendants/Third Party Plaintiffs,

v.

Christopher M. Keel,

Third Party Defendant.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. NO: 2013-CP-23-05778

**ORDER DENYING DEFENDANTS'
MOTION TO ALTER OR AMEND**

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MAR 21 2016

SC Court of Appeals

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2016 FEB 23 PM 2 44

This matter came before the Court on Defendants' Motion to Alter or Amend the Court's December 16, 2015 Order granting summary judgment to Plaintiff CJR Resources, Inc. ("CJR") and Third Party Defendant Christopher M. Keel ("Keel") as to all claims alleged against them by Defendants Commercial & Industrial Floors, Inc. ("CIF") and Dabney Maides ("Maides") (collectively hereinafter "Defendants"), and also granting summary judgment in favor of CJR as to all of its claims against Defendants. That Order was entered following a hearing held on November 3, 2015; at which counsel for all parties were present and presented extensive argument on the underlying Motions for Summary Judgment filed by CJR and Keel. Based upon the entire record in this case, including the pleadings, memoranda, exhibits and deposition testimony submitted by the parties on the underlying Motions and Defendants' Motion to Alter or Amend, I make the following findings of fact and conclusions of law.

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PROCEDURAL BACKGROUND

CJR filed its Complaint on October 28, 2013, alleging that Defendants breached an Asset Purchase Agreement (hereinafter “the APA”) by failing to make all payments required thereunder and a related promissory note. Defendants filed their Answer and Third Party Complaint on December 18, 2013, denying CJR’s claims and alleging various claims against Keel based on the APA and a 2008 Employment Agreement between CIF and Keel. Specifically, Defendants claim Keel breached both agreements by competing with CIF and soliciting CIF’s clients, entered into the Employment Agreement by fraud and never intended to abide by the terms of the agreements. Keel filed his Answer and a Motion to Dismiss on March 26, 2014, denying all claims, arguing all claims were barred by the statute of limitations and asserting various counterclaims against CIF related to its failure to pay him all wages he was due. CIF filed its Answer on May 20, 2014, denying Keel’s counterclaims.

Following the close of discovery¹ in this case, Keel filed his Motion for Summary Judgment on September 25, 2015 and CJR filed its Motion for Summary Judgment thereafter on September 29, 2015. Both Motions were heard by the Court on November 3, 2015 and the Court entered an Order thereon, dated December 16, 2015, granting both Motions on grounds that (1) Defendants’ claims are barred by the statute of limitations and the limitations provision set forth in the APA at issue, (2) the restrictive covenants sought to be enforced against Keel are unenforceable as a matter of law and (3) Defendants cannot prove the essential elements of their claims. The Order also granted judgment to CJR on all of its claims against Defendants since Defendants admit to the underlying allegations of said claims and all of their defenses thereto rest on their claims against CJR and Keel, all of which fail as a matter of law.

¹ The Court entered a Consent Scheduling Order in this case on June 12, 2015, setting August 31, 2015 as the discovery deadline.

ANALYSIS

For all those reasons set forth below, Plaintiff's Motion to Alter or Amend the Court's December 16, 2015 Order should be denied.

1. **The Court's Order is supported by the evidence and arguments submitted to and considered by the Court as outlined in great detail in the Order.**

The Court's December 16, 2015 Order is supported by the evidence and arguments submitted to the Court at the November 3, 2016 hearing on CJR and Keel's Motions for Summary Judgment and in the parties' memoranda and exhibits filed prior thereto.

A. Statute of Limitations

The Court's ruling that Defendants' claims against Keel are barred by the applicable three year statute of limitations² is clearly supported by Defendants' own allegations and admissions that they knew or should have known of their claims against Keel in July of 2008, more than five years prior to Defendants bringing their claims against Keel. This includes Defendants' own allegation that Keel's alleged conduct was apparent "from the outset of Keel's employment" in 2008. Defendants offer no sufficient justification for their failure to act timely, but instead ask the Court to excuse that failure by way of an analogy, arguing that a party should not be barred from seeking recovery after being punched in the face just because his friend previously punched him in the face years ago before making up. However, that analogy is wholly inapplicable to the instant case where Defendants have not alleged separate and distinct "punches," but have, instead, sought to recover from ongoing conduct they expressly allege began in 2008. Regardless, analogy alone does not excuse Defendants' admitted failure to timely pursue their claims. The same is true of any argument by Defendants that the Court should disregard evidence that Defendants had actual knowledge of their claims more than three

² Defendants have conceded that the three-year statute of limitations is applicable.

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years prior to bringing them because Keel allegedly “stole” the document presented as evidence of said knowledge. Regardless of the merits of such claim, which has been directly disputed by Keel, such allegation in no way excuses the Defendants’ failure to timely pursue their claims against Keel and CJR.

B. Unenforceability of Restrictive Covenants

The Court properly ruled that the restrictive covenants sought to be enforced against Keel are unenforceable as a matter of law as they are not narrowly tailored as to time and geographic scope as required by South Carolina law. As noted in the Court’s Order, five years is longer than typically enforced in South Carolina and a restrictive covenant that prevents an individual from working anywhere in the entire State of South Carolina is also overly broad. As specifically noted in the Order, the South Carolina Supreme Court has specifically held that “(a)ny covenant should have been limited to the area where he worked...(and) (e)xtending it to the entire State rendered it unenforceable.” *Oxman v. Sherman*, 239 S.C. 218, 122 S.E.2d 559 (1961). Despite Defendants’ arguments otherwise, language contained in the covenants as to the reasonableness of their scope, does not cure these defects in the covenants at issue. Likewise, and despite Defendants’ suggestion that the Court reform the covenants in question, any such argument must also fail as the South Carolina Supreme Court has specifically rejected “blue-penciling” of restrictive covenants to cure such defects. *Poynter Inves., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 587 (2010).

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C. Complete Lack of Evidence as to Defendants' Claims

As to the Court's ruling that Defendants were unable to meet their burden of proof in pointing to the existence of evidence sufficient to overcome summary judgment on their claims against Keel and CJR³, the Court properly considered Defendants' own repeated testimony and admissions that Defendants do not have evidence to prove all essential elements of such claims. As outlined in great detail in the December 6, 2015 Order, Defendants' own testimony makes it clear that they have no direct proof of their claims against Keel and CJR but, instead, rely on their "beliefs" about Keel and his alleged conduct. However, speculation alone is insufficient to meet Defendants' burden or proof in overcoming summary judgment.

The same is true in regard to the "summary" of the evidence and of testimony offered now by Defendants for the first time. This document is nothing more than unsupported commentary, without any actual evidence or testimony attached, and continues to offer nothing more than speculation and unsupported beliefs, which the Court has already noted is insufficient for purposes of overcoming a motion for summary judgment. Accordingly, such new commentary should not be substituted for the Court's well-reasoned decision on the extensive evidence and testimony properly presented to the Court at the November 3 hearing in this matter and in the materials filed prior thereto.

2. APA's limitation period applies to all claims against Keel.

Defendants' argument that the one-year limitations period set forth in the APA does not apply to all of Defendants' claims because that provision only applies to certain claims, including those related to (1) a covenant or obligation to be performed or complied with prior to the Closing Date; and (2) a representation or warranty, also fails. Defendants' Third Party

³ Defendants have conceded that all of their claims against CJR rest on their allegations about Keel.

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Complaint clearly alleges conduct on the part of Keel relating back to representations made in connection with the execution of the APA and the July 2008 Employment Agreement. Specifically, Defendants' allege that Keel never intended to abide by his contractual obligations to CIF, that he made false representations to Defendants in regard thereto and that he made certain promises in connection with execution of the APA and Employment that he never intended to abide by. Accordingly, all such claims fall within the second category of claims covered by the APA's one-year limitation provision and were required to have been brought within that period of time. Regardless, and even if it were determined that the APA's one year claims limitation does not apply to all claims alleged against Keel, such claims are still barred by the applicable three-year statute of limitations as noted in the December 16, 2015 Order.

3. Defendants' financial difficulties and indebtedness to Wells Fargo are irrelevant.

In a footnote included in their Motion to Alter or Amend, Defendants note both their indebtedness to Wells Fargo in the amount of \$700,000.00 for financing they obtained to purchase the business at issue and the fact that Wells Fargo is threatening collection action against Defendants thereon. In so noting, Defendants seem to ask the Court to consider the financial condition of Defendants in taking the extraordinary remedy of reversing the Court's December 16, 2015 Order. However, the Court is not persuaded by any such suggestion as Defendants' finances bear no relevance to the issue of whether the Court properly ruled in granting summary judgment against Defendants on grounds that (1) Defendants cannot meet their burden of proof, (2) the restrictive covenants sought to be enforced are unenforceable as a matter of law, and (3) Defendants' claims are time-barred pursuant to the applicable statute of limitations and the limitation period set forth in the APA.

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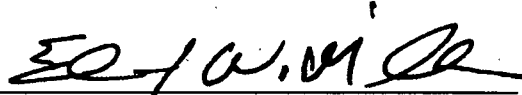
4. The Court's Order properly cited *Oblachinski*.

Despite Defendants' assertion otherwise, the Court properly cited *Oblachinski v. Reynolds*, 391 S.C. 557, 706 S.E.2d 844 (2011) as standing for the proposition that summary judgment is properly granted where a party cannot meet its burden of proof as to each essential element of the causes of action alleged by that party. At issue in *Oblachinski* was the trial court's grant of summary judgment on grounds that the plaintiff had failed in its burden of proof as to every essential element of its claim for negligence against the defendant. In considering that issue and applying the summary judgment standard under Rule 56, the South Carolina Supreme Court upheld the trial court's grant of summary judgment and, in so doing, specifically noted that said grant of summary judgment was proper because the plaintiff had failed to prove "an essential element" of its negligence claim – namely that defendant owed any duty to the plaintiff.

CONCLUSION

For all those reasons set forth above, the Court hereby denies Defendants' Motion to Alter or Amend the Court's December 16, 2015 Order.

AND IT IS SO ORDERED.



Judge Edward W. Miller
Thirteenth Judicial Circuit

Date: 2/23/16
Greenville, South Carolina