

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

CASE NO: 2013CP2305778

IN THE COURT OF COMMON PLEAS

CJR Resources Inc vs. Commercial & Industrial Floors Inc

RECEIVED

MAR 21 2016

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;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - 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: _____

SC Court of Appeals

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 DEC 16 PM 4 20

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 16th day of December, 2015, and a copy mailed first class this 16th day of December, 2015, 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 Court
- 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,

Defendant/Third Party Plaintiff,

v.

Christopher M. Keel,

Third Party Defendant.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

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

ORDER

RECEIVED

MAR 21 2016

SC Court of Appeals

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2015 DEC 16 PM 2 41

This matter comes before the Court upon the following motions: (1) Plaintiff CJR Resources, Inc.'s ("Plaintiff" or "CJR") Motion for Summary Judgment on all causes of action it has asserted against Defendants Commercial & Industrial Floors, Inc. ("CIF") and Dabney Maides ("Maides") and on all causes of action asserted against Plaintiff by CIF and Maides; and (2) Third-Party Defendant Christopher M. Keel's ("Keel") Motion for Summary Judgment on all causes of action asserted against Keel by Defendants/Third-Party Plaintiffs CIF and Maides.

A hearing on these motions was held on November 3, 2015. Present at that hearing were counsel for Plaintiff CJR Resources, Inc. ("CJR"), M. Stokely Holder, Esq. of Kenison, Dudley & Crawford, LLC; counsel for Defendant/Third-Party Plaintiffs, William R. McKibbon, Esq., and counsel for Third-Party Defendant, Courtney C. Atkinson, Esq. of Metcalfe & Atkinson, LLC. Based upon the entire record in this case, including the pleadings, the Memoranda, exhibits and deposition testimony submitted in support of the above-referenced motions, and the arguments

presented to the Court at the November 3 hearing, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Plaintiff CJR is a privately held South Carolina corporation that previously owned and operated Ron's Building Materials (hereinafter "the Business"), a business located in Greenville County whose primary business is the sale and installation of flooring materials. CJR is a family-owned business and Third Party Defendant Keel is one of the shareholders, together with his mother and father. Defendant CIF is also a South Carolina corporation, which was incorporated by Defendant Maides in 2008 for the purpose of purchasing the assets of the Business from CJR.

In July of 2008, CJR agreed to sell all of the Business's assets to CIF and Maides pursuant to an Asset Purchase Agreement (hereinafter "the APA"). Pursuant to the APA, CIF agreed to pay CJR the total purchase price of One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00) for the Business. Of the total purchase price, One Million Fifty Thousand Dollars (\$1,050,000.00) was to be paid at closing, with the remaining Two Hundred Thousand Dollars (\$200,000.00) to be financed by way of a promissory note, personally secured by Maides via an unconditional Guarantee of Payment (the "Personal Guarantee").

The APA contained both a non-compete clause and a non-solicitation clause. The non-compete clause covers the entire State of South Carolina and prohibits CJR and its shareholders from engaging in a "Competing Business," which is defined as the same business that "(CJR) is engaged in as of the Closing Date," for a period of five (5) years after closing of the APA. The APA's non-solicitation clause prohibits CJR and its shareholders from soliciting CIF's customers for a competing business, inducing customers to cease doing business with CIF and from hiring any employee of CIF for five years after "the Last Date of Employment."

As a material term of the APA, Keel was required to enter into an at-will employment relationship with CIF and to sign an Employment Agreement ("the Employment Agreement") with CIF, dated July 22, 2008, which was incorporated into the APA. Pursuant thereto, CIF agreed to pay Keel a base monthly salary along with other compensation and benefits. In addition to the APA's restrictive covenants referenced above, the Employment Agreement contains a separate non-compete provision¹, providing that, while employed by the Company and for five (5) years thereafter, Keel could not "become in engaged in, or render services for, any business that competes with the business in which Company is engaged...anywhere in the state of South Carolina." Otherwise, the Employment Agreement made clear that "[Keel]'s employment with [CIF] is 'at will' and may be terminated at any time by either Employee or Company".

The parties all acknowledge and agree that the original employment relationship between CIF and Keel was terminated by Keel in August of 2008 when Keel moved to Charleston, South Carolina. Accordingly, even assuming that any such obligations are enforceable as a matter of law, both the Employment Agreement's non-compete obligations as well as the APA's non-solicitation provision began to run in August of 2013 when the initial at-will employment relationship between CIF and Keel was terminated, whereas the non-compete obligations in the APA began to run on the July 2008 APA closing date.

In January of 2009, almost six (6) months after the original employment relationship between CIF and Keel ended, Keel decided to move back to Greenville and agreed to enter into a new employment relationship with CIF in consideration for CIF's new promise to eventually pay him an increased monthly salary of up to Eight Thousand Three Hundred Thirty-Three Dollars and Thirty-Three cents (\$8,333.33) (hereinafter "the 2009 Agreement"). At the time he

¹ Unlike the APA, the Employment Agreement does not include any non-solicitation language.

entered into this new agreement, Keel was not asked to and did not sign a written agreement containing any non-compete or non-solicitation obligations.

Keel was employed by CIF pursuant to the new 2009 Agreement from January of 2009 until resigning on May 31, 2013. Keel resigned at that time because CIF did not continue paying Keel the agreed upon monthly salary of Eight Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents (\$8,333.33) and unilaterally decided it would only pay Keel Two Thousand Six Hundred Forty-Two Dollars (\$2,642.00) per month, less than a third of the agreed upon monthly amount. CIF notified Keel of the intended decrease in his pay on May 31, 2013, but made the decrease in his pay retroactive for two weeks prior such that the decrease in pay was reflected in the paycheck Keel received on June 1, 2013 for the two prior weeks. CIF has never paid Keel the difference in pay for work he performed for CIF prior to June 1, 2013. Additionally, and immediately prior to Keel's resignation on May 31, CIF also refused to pay, and has to date never paid, Keel the full commissions he earned prior to that date.

Following Keel's resignation on May 31, 2013, CIF ceased making the required payments due to CJR under the APA and related promissory note. Despite additional demand by CJR to Maides for the same payments pursuant to the Personal Guarantee, Maides has also failed to make the payments.

PROCEDURAL HISTORY

CJR instituted this action by filing its Complaint on October 28, 2013, alleging that CIF breached the APA by failing to make all payments required under the APA and related promissory note, and alleging that Maides failed to make all such payments as required by the Personal Guarantee. CIF filed its Answer, Counterclaim, and Third Party Complaint on December 18, 2013, denying CJR's claims and counterclaiming against Plaintiff for breach of contract and fraud in the inducement. The Defendants agree that all of CIF's counterclaims

against the Plaintiff, as well as all of CIF's defenses against Plaintiff's claims, rely on the same evidence CIF has in support of its third-party claims against Keel.

CIF's third-party claims against Keel were for breach of contract as to the APA, breach of contract as to the Employment Agreement, breach of duty of loyalty, promissory estoppel, fraud in the inducement, breach of contract accompanied by fraudulent act, and injunctive relief. In essence, CIF asserts that Keel breached the Employment Agreement by competing with CIF, and that Keel entered into the Employment Agreement by fraud because he never intended to abide by the terms of the Employment Agreement or work for the benefit of CIF; rather, he intended to "surreptitiously ... start another business venture of his own" and "complete with CIF and to engage in conduct designed to defeat the intent of the APA, the intent of the Employment Agreement, for the sole benefit of himself in competition with CIF."

CIF Answer, Counterclaims and Third-Party Claims.

Keel filed his Answer on March 26, 2014 along with a Motion to Dismiss, pursuant to Rule 12(b)(6), denying all of CIF's claims and arguing that all such claims were barred by the statute of limitations. Keel also asserted various counterclaims against CIF, including breach of contract as to both the APA and the 2009 Employment Agreement, violation of the South Carolina Wage payment act for failure to pay all wages owed and failure to provide mandated notice of change in pay, and defamation. On May 20, 2014, CIF filed its Answer thereto, denying each counterclaim asserted against it by Keel. At the hearing thereon, the Honorable Robin B. Stillwell denied Keel's Motion to Dismiss so as to allow the parties additional time to conduct more discovery on the issue of when Defendants' alleged claims against Keel began to run and further flesh out what Judge Stillwell recognized on the record to be a potentially troublesome issue for the Defendants.

In August of 2014, Keel served CIF with his first discovery requests. When CIF failed to respond, Keel filed a Motion to Compel and, thereafter, upon admission by CIF that it owed discovery responses to Keel, the Court filed a Consent Order, dated July 9, 2015, compelling CIF to provide responses to Keel's discovery requests within thirty (30) days of entry of the Consent Order. CIF provided its responses with all alleged evidence in support of its claims against Keel, almost a year after being served with Keel's discovery requests, on August 9, 2015. Thereafter, CIF's owner, Defendant Dabney Maides, was deposed on August 19, 2015 before the August 31, 2015 discovery deadline set forth in the Consent Scheduling Order that was entered in this case on June 12, 2015. Keel consented to being deposed and was deposed on October 1, 2015 despite the fact that the discovery deadline set forth in the Consent Scheduling Order had already passed. Discovery in this matter was complete prior to the hearing at issue on the motions now before the Court.

STANDARD OF REVIEW

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. S.C. R. Civ. P. 56(c); *see also Sumter Dairies, Inc. v. J.C. Pelfrey*, 268 S.C. 437, 234 S.E.2d 490 (1977). Rule 56(c) provides that a trial court may grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Robinson v. Est. of Harris*, 389 S.C. 360, 367, 698 S.E.2d 801, 805 (2010). Summary judgment is appropriate where "plain, palpable and undisputed facts exist on which reasonable minds cannot differ." *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984), *citing Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976). Summary judgment serves the important function of expediting "disposition of cases which do not require the services of a fact