THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

RECEIVED
OCT 08 2015
SC Court of Appeals

Appellate Case No. 2014-002729

Vince Coates, , ... Respondent,

vs

Dorothy Renee Simchon, , ... Appellant,

AND

Bay Island Sportswear, Inc., Sam Simchon, Individually, ... Appellants

vs

Vince Coates, Individually, Xcentric Ventures, LLC, Edward Magedson and John or Jane Doe 1-7 and XYZ Company X-Z, Defendants,

OF whom Vince Coates, Individually is the ..... Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The Respondent adopts the Appellant's statement of the case with the following additional information. In the defamation action filed by Bay Island Sportswear, Inc. and Sam Simchon, the counterclaim filed by Vince Coates included a claim for defamation for statements made by Renee Simchon on the Ripoff Report. Mr. Coates alleged that Ms. Simchon, as an agent and servant of Bay Island Sportswear, Inc., defamed him by calling him a "career criminal" among other things. [1]

[1] A search of google.com for Vince Coates and Greenwood, SC shows the statement Ms. Simchon made against Mr. Coates is the second item listed. Website visited August 9, 2015. .

ARGUMENT

Question I

Should the trial court have required the Appellant to Comply with the spirit of the parties' settlement agreement?

The settlement announced on the record in this matter was not ambagious. Renee Simchon was to pay $4,500 and Mr. Coates was to request that any internet search engine block or remove his comments. Today, Mr. Coates still stands ready to sign a letter requesting that his comments be blocked or removed from any search engine data base. He is willing to fully comply with agreement. The trial judge has found that Mr. Coates is willing to fully comply with the agreement. He said "The plaintiff stands ready and willing to make the request consistent with the parties agreement as his counsel has informed the court." Rec. on App. @ 2.

Mrs. Simchon now insists that this request be in a form satisfactory to Mrs. Simchon. That was not the agreement. Ms. Simchon says that an internet provider will not honor a request. Two problems exist with this argument. If, at the time the settlement was announced, Mrs. Simchon did not know the internet providers would not honor a simple request, then she was simply negligent in failing to determine what was needed in order to accomplish her goal. Under those circumstances Mr. Coates should not be forced to do more than he agreed at the time of the settlement. If, however, Mrs. Simchon knew at the time the settlement was announced that a formal court order was required in which Mr. Coates would have to make certain admissions, then Mrs. Simchon was not honest with the court in that she knew a simple request would not be sufficient. Under the later circumstances, Mr. Coates also should not be

required to do more than was set forth in the record. The fact that Mrs. Simchon now claims she did not receive what she bargained for is not the fault of Mr. Coates. He is willing to do what he agreed to do.

At the hearing on June 4, 2014, the attorney for Ms. Simchon argued that "the only way to get a search engine indexes to remove it, and this was well known and discussed at the time of the resolution, is for there to be a finding of defamation." Rec. on App. at 127, 16-19. If such a requirement is so well known then the Appellant should have made such a notation on the record. He did not. He only agreed that Mr. Coates request that it be removed.

Appellant has argued that the agreement placed on the record called for a "half-hearted request. Br. of Resp. at 7. The agreement on the record makes no such reference. The fact that Mr. Coates is willing to sign a consent order requesting that the information be removed shows that he is willing to do more than give a "half-hearted request.

To rescind a contract the alleged mistake must be mutual. "Contracts may be rescinded based upon mutual mistake of fact upon which the contract is based. The mistake must be common to both parties and cause each to do what neither intended. " *Young v. Cooler*, 347 S.C. 362, 366, 555 S.E.2d 410, 412-13 (Ct. App. 2001)(citation omitted). Here the mistake was only as to one party. Mr. Henry, and the trial judge so found, stated on the record at the hearing below "I think the misunderstanding may be that they claim that Vince agreed to admit that he was guilty of defamation of character. And he never - - that never, ever came up." Rec. on App. at 125, ll3-7. In addition he stated "[B]ut there were never, ever any discussion between - - with me and none with Vince and me about Vince, at any point, admitting that he defamed anybody." Rec. on App. At 125, ll 18-21. The trial judge then made this finding of fact:

> You know, I think the settlement terms are clear, either you agree to it or you don't. But all this other removing it and lending assistance, but admitting defamation, there's a huge difference to me, lending assistance and defamation, I don't recollect that ever being said in my presence.
> Rec. on App. At 132, ll 3-10

The record when the case was settled and at the hearing on the motion to compel amply illustrates that Vince Coates was not required to make any admission as to liability. This finding of fact by the trial judge is supported by the evidence. He was only required to request that any search engine block or remove the comment. Mr. Coates stands willing to make such a request whether it be by letter or a consent order.

At the hearing on June 4, 2014, the attorney for Ms. Simchon argued that "the only way to get a search engine indexes to remove it, and this was well known and discussed at the time of the resolution, is for there to be a finding of defamation." Rec. On App. at 127, 16-19. If such a requirement is so well known then the Appellant should have made such a notation on the record. He did not. He only agreed that Mr. Coates request that it be removed.

Furthermore, to argue in her brief that "Search engines do not suppress content just because someone asks." refers to matter not in the record. Br. of Resp. at 8. There simply has been no factual presentation either at the time of settlement nor in the hearing below, what is the actual requirement of search engines. While counsel for Ms. Simchon made reference to the fact that search engines require a finding of defamation there was no such testimony at the June 4, 2014 hearing nor was this fact mentioned at the time the settlement was announced. Also, contrary to the position of the Appellant, the agreement did not contemplate any order by the court. The issues of an order was only raised at the June 4, 2014 hearing.

Question II

Did the trial judge err in enforcing the settlement agreement when the unambiguous terms of the agreement were placed on the record in compliance with Rule 43(k) of the South Carolina Rules of Civil Procedure?

The Appellant's reliance upon *Reed v. Associated Investments of Edisto Island, Inc.*, 339 S.C. 148, 528 S.E.2d 94 (Ct. App. 2000) is misplaced. As the Court of Appeals said in that case "Because it is clear from the record that the parties had a partial agreement as to the money to be paid in contemplation of a full settlement of the issues and the agreement was not admitted, the writing requirements of Rule 43(k) preclude enforcement of the settlement." Id. at 154, 528 S.E.2d 94, 97-98. In the case there was no agreement placed on the record pursuant to Rule 43(k). The settlement in that case was between the lawyers and not done in open court.

The South Carolina Court of Appeals has held " Even though the settlement agreement was not in writing, it complied with Rule 43(k) because it was made in open court and noted upon the record." *Cheap-O's Truck Stop, Inc. v. Cloyd,* 350 S.C. 596, 604, 567 S.E.2d 514, 517-518 (Ct. App. 2002).

Nor is *Ozyagcilar v. Davis*, 701 F.2d 306 (4th Cir. 1983) helpful to the Appellant. In that case the parties had as part of the agreement placed upon the record, a provision that if the parties could not agree, the district court would then resolve the issue. In holding the district court had no such authority, the Fourth Circuit said "However, it is clear that the district court only retains the power to enforce complete settlement agreements; it does not have the power to impose, in the role of a final arbiter, a settlement agreement where there was never a meeting of the parties' minds." *Id.* at 308. In the present case the lower court found that the settlement

agreement was not ambagious. He found that Mr. Coates was not required to admit that he defamed Ms. Simchon. The fact that the lower court, in an attempt to be helpful to the parties, suggested that a consent order be sent to the internet providers does not mean that the agreement did not involve a meeting of the minds.

The order of the lower court in denying the motion to alter or amend, could not have been clearer. The Court said "The parties' agreement did not include a requirement that the internet statement be removed only that the plaintiff 'request' the removal of the offending language by the internet provider. The plaintiff stands ready and willing to make the request consistent with the parties' agreement as his counsel has informed the court." Rec. on App. at 5. An unambiguous agreement was placed on the record in compliance with Rule 43(k) and the lower court issued an order enforcing the settlement. The ruling was proper.

Question III

Did the trial court err in dismissing the cases with prejudice?

This issue is moot. If the case is dismissed without prejudice neither party will be able to bring another action as the statute of limitations as to each cause of action has run. Whether the statute is three years under S. C. Code §15-3-530 or two years under S. C. Code § 15-3-550 for libel, slander or false imprisonment, neither party will be able to file another suit arising out of this action.

Regardless, the discussion between the parties shows that the clear intent was to dismiss the actions with prejudice as to all parties. This finding by the trial judge is supported by the record. The Appellant has not shown any purpose in having the action dismissed without prejudice.

Question IV

Should the trial court have provided alternative or supplemental relief in the event its order directed to internet service providers is held invalid?

The simple answer to this issue is the Appellants never bargained for nor ask for a consent order when the case was originally settled. They are not entitled to any order but now complain the order did not go far enough. In an effort to be helpful to Ms. Simchon, Bay Island Sportswear, Inc and Sam Simchon the court suggested that an order be issued directing that the posting be removed. Mr. Coates is willing to sign the consent order requesting that the posting be removed. Under any interpretation of the requirement in the settlement agreement that he request the posting be removed, the order satisfies that provision.

In addition, as the settlement agreement was never contingent upon the posting actually being removed, any problems that the Appellants may have removing the posting simply does not involve Mr. Coates. Once he signs either a letter or a consent order requesting the removal, he has completely fulfilled his obligations under the agreement.

CONCLUSION

For the foregoing reasons, this court should affirm the ruling of the lower court and require Dorothy Renee Simchon, Sam Simchon and Bay Island Sportswear, Inc. to comply with the settlement they agreed upon.

October 1, 2015

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

Oct 5th, 2015

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on October 5, 2015, she did deposit in the United States Mail with proper postage affixed thereto a copy of the Final Brief of Respondent in the

above case addressed to Edward S. McCallum, III, P.O. Box 148, Greenwood, SC 29648, and J. Walker Coleman, IV, Julius H. Hines, 134 Meeting Street, Suite 200, Charleston, SC 29401.

SWORN to and Subscribed

Sandy Traynham

before me this 5 day

of October, 2015.

Mary Jane Harter (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22