THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE DOYET A. EARLY, III
CIRCUIT COURT JUDGE

CASE NO. 2016-000106

RECEIVED
APR 28 2016
SC Court of Appeals

Harold Raynor a/k/a Harold
Reynor and Michael Caldwell,

Respondents,

v.

Charles C. Byers, John T. Bakhaus,
Kurt Kasler and Kenneth Smith,

Appellants,

of whom

Charles C. Byers, John T. Bakhaus and Kenneth Smith are the Appellants,

---

INITIAL BRIEF OF APPELLANTS

Spencer Andrew Syrett SC BAR 05459
P.O. Box 7403
Columbia, SC 29202
803-765-2110
syrettlaw@sc.rr.com
Attorney for Appellants
Charles C. Byers, and John T. Bakhaus

Herbert W. Hamilton
P.O. Box 10940
Rock Hill, SC 29731
803-329-7607
Attorney for Appellant
Kenneth Smith

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF ISSUES ON APPEAL 1

The Trial Court erred in awarding attorney fees for services performed after the judgment was issued.

STATEMENT OF THE CASE 1

ARGUMENT 2

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (S.C., 1988) 2

Futch v. McAlister Towing of Georgetown, 335 S.C. 598, 518 S.E. 2d 591 (1999) 5

McDowell v. SCDSS 304 S.C. 359, 405 S.E.2d 830 (1991) 4, 5

Monarc v. Aris 188 Md. App. 377, 981 A.2d 822 Md. App. 2009) 3

Moseley v. Mosier, 279 S.C. 348, 306 S.E. 2d 624 (1983) 4

Renaissance Enterprises v. Ocean Resorts, 310 S.C. 395, 426 S.E. 821 (Ct. App. 1992) 4

Renaissance Enterprises v. Ocean Resorts, 96-UP-169 (Ct. App. 1996) 4, 5

Renaissance Enterprises v. Ocean Resorts, 326 S.C. 460, 483 S.E.2d 796 (Ct. App. 1997) 4

Renaissance Enterprises v. Ocean Resorts, 330 S.C. 13, 496 S.E.2d 858 (1998) 4, 5

Renaissance Enterprises v. Ocean Resorts, 334 S.C. 324 513, S.E.2d 617 (1999) 4,5

STATUTES

§15-39-310 2

§15-39-330 2

§15-39-480 2

§15-77-310 5

TREATISES

Restatement of Judgments §18 2, 4

STATEMENT OF ISSUE ON APPEAL

The Trial Court erred in awarding attorney fees for services performed after the judgment was issued.

STATEMENT OF THE CASE

On March 14, 2008, the Defendants, Charles C. Byers, John T. Bakhaus, Kurt Kasler, and Kenneth Smith, executed a Note in the amount of 250,000.00 to the Plaintiffs, Michael Caldwell and Harold Reynor. The note was due on March 1, 2009, without interest if paid on or before the due date.

The Defendants failed to pay the note when due. On April 3, 2009, the Plaintiffs commenced an action with a verified Complaint against the Defendants seeking judgment for $250,000.00, interest at the rate of eight (8.00%) per cent, the costs of the action, reasonable attorneys and other relief that the Court would deem proper.

The Defendants were served and made no responsive pleadings.

On August 24, 2009, the Plaintiffs filed a Motion for Entry of Default and for Default Judgment.

On September 15, 2009, the Court signed an Order Entering Default Judgment in the amount of $250,0000.00, interest in the amount of $9,535.20, costs of $482.34, and attorney fees in the amount of $960.00, for a total of $260,977.54.

The Plaintiffs sent an Execution to the Sheriff which was returned Nulla Bona. Plaintiffs then sought Supplementary Proceedings. Plaintiffs's attorneys claim to have conducted an extensive investigation into the Defendants' assets but it appears that most of the investigation was into the assets of Mr. Bakhaus and not the other debtors.

Over time, the Defendants have paid the principal amount of the judgment and some interest.

On October 14, 2015, the Plaintiffs filed a motion in which they sought an award of post-judgment attorneys fees. This motion was supported by an affidavit setting forth their time and expenses.

The Motion came to be heard before the Honorable Doyet A. Early, III on November 9, 2015.

On December 18, 2015, the Court issued its Order granting the Plaintiffs $90,365.80

in fees, costs and expenses.

Appellants, Charles C. Byers and John T. Bakhaus, served and filed their Notice of Appeal on January 20, 2016. Appellant Kenneth Smith served and filed his Notice of Appeal on January 20, 2016. The Appellants have elected to file a joint brief.

ARGUMENT

In appeals from the Circuit Court, this Court may correct errors of law. The Appellants assert that the award of post-judgment attorney fees for investigation and supplementary proceedings was an error of law.

The general rule is that attorney fees are not recoverable unless authorized by contract or statute. Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (S.C., 1988)

The Restatement on Judgments §18 provides

When a valid and final personal judgment is rendered in favor of the Plaintiff

1. The Plaintiff cannot thereafter maintain an action on the original claim or any part thereof, except he may be able to maintain an action on the Judgment and
2. In an action upon the judgment, the Defendant cannot avail himself of defenses he might have interposed or did interpose in the first action.

After a money judgment is awarded and the execution to the Sheriff is returned unsatisfied, the creditor has the right to pursue an examination of the debtor before a circuit judge, special referee or Master in Equity. §15-39-310.

The judgment creditor has the right to subpoena witnesses and compel testimony §15-39-330.

The Court has the power to award witness fees, disbursements and $30.00 in costs §15-38-480.

There is no provision for an award of attorney fees in the statutes providing for an examination of the debtor.

The judgment creditors have not argued that there is any statutory right to an award of attorneys fees.

If then, there is a right to attorney fees, it must arise from the provision of the contract. The Note states

> In the event of default in the payment of this note, and if it is placed in the hands of an attorney for collection, the undersigned agree to pay all costs of collection, including a reasonable attorneys fee.

The Appellants admit that the note went into default and that it was placed in the hands of attorney for collection. That attorney obtained a judgment that included an award of attorney fees.

The Appellants assert that once the judgment was issued, the contractual provisions of the note merged into the judgment. Restatement of the Law of Judgments §18. Because the contractual provisions merged into the judgment and there is no statutory right to attorney fees for post-judgment collection activities, the award of fees was an error of law.

The award of a judgment is a significant event in the life of a debt. A judgment entitles the creditor to avoid further litigation on the validity of the debt. Res Judicata may be pleaded as an absolute bar to any further litigation of the merits of the claim.

A judgment creditor is entitled to the recognition and enforcement of the judgment in every other state of the United States under the full faith and credit clause of the U.S. Constitution. The Respondents have in fact sought to enforce the judgment against one of the Defendants in the Commonwealth of Kentucky. Their efforts there resulted in additional payment on the debt.

The judgment creditor has the right to pursue the assets of the debtor based on a amount which is now liquidated. The statutes provide for interest to be earned on the judgment even if the original debt was not entitled to interest because it was unliquidated or if the debt instrument did not provide for interest.

None of these rights accrue until the amount of the claim is reduced to judgment.

As a consequence of obtaining these rights, the judgment creditor waives further action on the original debt.

The issue of merger was addressed by the Maryland court in Monarc v. Aris 188 Md. App. 377, 981 A.2d 822 Md. App. 2009). In Monarc, the parties had resolved their disputes in a Settlement Agreement. Thereafter, Monarc sued on the Agreement and recovered a judgment in Virginia for damages and attorney fees based on the agreement.

It then sought to enforce the judgment in Maryland and to obtain an award of additional attorney fees. The Court refused to award additional fees. relying on the Restatement, it found that the attorney fees provision merged into the judgment and that there was no specific language in the Agreement which provided that the provision for fees survived the entry of judgment.

The South Carolina Court faced an analogous issue in Moseley v. Mosier, 279 S.C. 348, 306 S.E. 2d 624 (1983). In Moseley, the Court addressed the effect of issue of Family Court decrees on settlement agreement. The Court had previously used "words of art" to address the issues as whether or not an agreement was merged into a subsequent decree which incorporated but did not merge the agreement. At issue was whether the agreement could be enforced as a contract in Circuit Court or by the contempt power of the Family Court. The Court wholeheartedly adopted the concept of merger. It required the parties to unambiguously state that they were opting out of enforcement by contempt and must also unambiguously state if they were opting out of the ability of the Court to subsequently modify their agreement.

The only case cited in support of the Respondents position is Renaissance Enterprises v. Ocean Resorts 310 S.C. 395, 426 S.E. 821 (Ct. App. 1992), 326 S.C. 460, 483 S.E.2d 796 (Ct. App. 1997), 330 S.C. 13, 496 S.E.2d 858 (1998), 334 S.C. 324 513, S.E.2d 617 (1999).

Renaissance has a somewhat convoluted history which limits its persuasiveness.

In Renaissance I, the Court of Appeals upheld an arbitration award in the amount of $69,566.73.

In Renaissance II, the Court of Appeals issued an Unpublished Opinion concerning issues not relevant to this appeal.

In Renaissance III, the Court dealt primarily with issues regarding the accrual of interest after a deposit of an amount into Court and addressed the issue of attorney fees in a cursory manner. The Court noted that the Appellant's "entire argument consists of four sentences asserting the award of any fee was erroneous because the Respondent failed to establish its entitlement to such fees incurred in a supplemental proceeding." The Court then cited the contract providing for attorney fees for collection and cited McDowell v.

SCDSS 304 S.C. 359, 405 S.E.2d 830 (1991).

It does not appear that the Appellants argued the issue of merger. McDowell is a case concerning attorney fees under a statute §15-77-310. This is not a case involving attorney fees under a statute and McDowell does not turn on the issue of merger. The holding in McDowell is irrelevant to the issue before the Court.

In Renaissance IV, the Supreme Court vacated an unpublished opinion of the Court of Appeals (96-UP-169 (Ct. App. 1996) which was Renaissance II. An Opinion which is vacated has no force or effect.

In Renaissance V, the Supreme Court reversed Renaissance III and found that a deposit into Court does not stop the accrual of interest under Rule 67, SCRCP. Rule 67 does not provide for the cessation of interest on the debt.

The order in Renaissance V preceded the decision in Futch v. McAlister Towing of Georgetown, 335 S.C. 598, 518 S.E. 2d 591 (1999). In Futch, the Court held that an Appellate Court need not address remaining issues when disposition of a prior issue is dispositive. The decision in Renaissance V can be seen as dispositive of the right to seek post-judgment attorney fees and need not have been ruled on by the Court.

CONCLUSION

The Court should find that the note merged into the judgment and reverse the award of post-judgment attorney fees.

Herbert W. Hamilton
P.O. Box 10940
Rock Hill, SC 29731
803-329-7607
Attorney for Appellant
Kenneth Smith

Spencer Andrew Syrett SC BAR 05459
Attorney for the Appellant
712 Richland Street Suite E
P.O. Box 7403
Columbia, SC 29202
803-765-2110
FAX 803-765-9950

April 26, 2016

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
APR 28 2016
SC Court of Appeals

APPEAL FROM AIKEN COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE DOYET A. EARLY, III
CIRCUIT COURT JUDGE

2016-000106

Harold Raynor a/k/a Harold Reynor and Michael Caldwell,

Plaintiffs-Respondents,

v.

Charles C. Byers, John T. Bakhaus, Kurt Kasler and Kenneth Smith,

Defendants,

of whom

John T. Bakhaus and Charles C. Byers are Appellants,

Appellants.

PROOF OF SERVICE

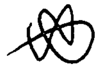
I certify that I have served the Appellants' Initial Brief and Designation of Matter on the Respondents, Harold Raynor a/k/a Harold Reynor and Michael Caldwell, by depositing a copy of it in the United States Mail, postage prepaid, on April 27, 2016, addressed to the attorneys of record:

Kevin Nicklaus Molony
237 Barnwell Ave. NW
Aiken, SC 29801
803-648-0706
Attorney for Respondents

Robert J. Harte
P.O. Box 1959
Aiken, SC 29802-1959
803-648-0853
Attorney for the Respondents

Spencer Andrew Syrett SC BAR 05459
P.O. Box 7403
Columbia, SC 29202
803-765-2110
syrettlaw@sc.rr.com
Attorney for the Appellants
John T. Bakhaus and
Charles C. Byers

April 27, 2016



SPENCER ANDREW SYRETT
ATTORNEY AT LAW
712 RICHLAND STREET
SUITE E
COLUMBIA, SOUTH CAROLINA
29201-2300
803-765-2110

RECEIVED
APR 28 2016
SC Court of Appeals

EMAIL TO:
SYRETTLAW@SC.RR.COM

REPLY TO:
POST OFFICE BOX 7403
COLUMBIA, SC 29202
FAX: 803-765-9950

April 27, 2016

The Honorable Jenny Abbott Kitchens
Clerk of the Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Byers, et al v. Raynor, et al
20167-000106

Dear Ms. Kitchens:

Enclosed you will find Appellants' Initial Brief and designation for filing with the Court. I have also enclosed the appropriate proof of service.

Very Truly Yours,

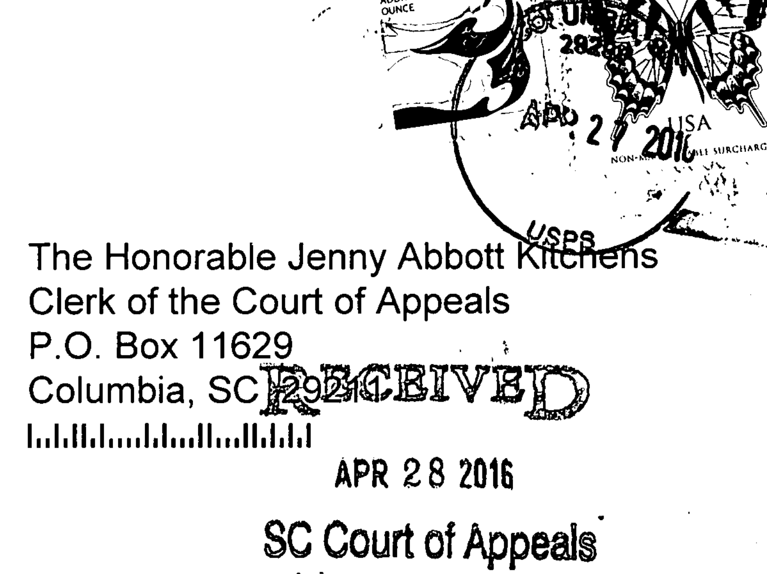
Spencer Andrew Syrett

SAS/ss

cc:
Robert J. Harte, Esq.
P.O. Box 1959
Aiken, SC 29802-1959

Kevin Nicklaus Molony, Esq.
237 Barnwell Ave. NW
Aiken, SC 29801

SPENCER ANDREW SYRETT
ATTORNEY AT LAW
712 RICHLAND STREET
SUITE E
POST OFFICE BOX 7403
COLUMBIA, SOUTH CAROLINA 29202



The Honorable Jenny Abbott Kitchens
Clerk of the Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
APR 28 2016
SC Court of Appeals