

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

RECEIVED
JUL 14 2016
SC Court of Appeals

Case No. 2016-000106

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

Respondents,

v.

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

Defendants.

of whom

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

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

The Trial Court properly interpreted the contract entered into by the parties and was correct in awarding post-judgment attorney's fees and costs in accordance with the prior decisions of this Court.

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 Raynor. (R. p. 13) The note was due on March 1, 2009, without interest if paid on or before the due date. The Note also included an attorney's fees provision, which stated:

“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 hereby agrees to pay all costs of collection, including a reasonable attorney's fee. Charles C. Byers and John T. Bakhaus guarantee this obligation”.

The Defendant's 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%) percent, the costs of the action, reasonable attorney's fees, and other relief that the Court would deem proper. (R. p. 7)

The Defendants were served and made no responsive pleadings.

On August 24, 2009, the Plaintiffs filed a Motion for the Entry of Default Judgment in the amount of \$250,000.00, interest in the amount of \$9,535.20, costs of \$482.34, and attorney's fees in the amount of \$960.00, for a total of \$260,977.54. (R. p. 14)

The Plaintiffs sent an Execution to the Sheriff, which was returned Nulla Bona. Plaintiffs then sought Supplementary Proceedings. Plaintiffs' initial attorney, now The Honorable M. Anderson Griffith, filed the initial paperwork in Richland County and began the supplemental

proceeding process on behalf of the Plaintiffs. On October 7, 2014, Plaintiffs signed a contingency contract with Kevin N. Molony and Robert J. Harte to proceed with the collections process.

Plaintiffs then filed supplemental proceedings in York County, South Carolina and Beaufort County, South Carolina and continued the efforts to collect in Richland County, South Carolina. Hearings were conducted in York County against Defendant Kenneth Smith, in Beaufort County against Defendant Charles C. Byers, and in Richland County against Defendant John T. Bakhaus. Plaintiffs located real property owned by Defendant John T. Bakhaus in Lexington, Kentucky. Plaintiffs hired the Billings Law Firm out of Lexington, Kentucky after domesticating the judgment in Kentucky.

On October 29, 2015, the Plaintiffs filed a motion in which they sought an award of post-judgment attorney's fees. (R. p. 27) This motion was supported by an affidavit setting forth Plaintiffs' counsels time and expenses, as well as an affidavit submitted from Paul Simons, a local attorney, which stated the fees were reasonable in his opinion. (R. p. 39)

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. (R. p. 2)

From October 14, 2014 until the Order Awarding Plaintiffs Attorney's fees was filed on December 18, 2015, Plaintiffs' counsel initiated and conducted eight (8) separate hearings throughout the above-referenced counties in an attempt to satisfy the judgment, in addition to The Motion hearing on November 9, 2015. (R. p. 26)

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 elected to file a joint brief.

ARGUMENT

Respondents assert that the Trial Court properly interpreted the contract between the parties and awarded reasonable post-judgment attorney's fees in accordance with prior opinions of this Court.

In Renaissance Enterprises v. Ocean Resorts, 326 S.C. 460, 483 S.E.2d 796 (S.C. App., 1997), the Court of Appeals was asked to determine whether the Master erred in granting attorney's fees for supplemental proceedings when the parties had contracted for the award of attorney's fees in their original contract. Id at 469. Subsequent to the Circuit Court approving an arbitration award in favor of Renaissance, Renaissance filed and conducted supplemental proceedings to collect on the outstanding debt owed by Ocean Resorts. Id at 462. The original contract between the parties provided, in part, "[i]f arbitration and/or litigation shall become necessary, [Renaissance] shall be entitled to recover from [Ocean Resorts], reasonable attorney's fees . . . and all other costs of such arbitration and/or litigation." Id. at 469.

Three years after the Circuit Court approved the arbitration award entered in favor of Renaissance, Renaissance filed the Motion for Attorney's fees. Id at 462. After reviewing the language of the contract between the parties, the Court ruled,

"[t]he contract between the parties clearly provided for the recovery of reasonable attorney's fees for necessary litigation. The supplemental proceeding was brought to collect on the debt owed pursuant to the contract. We find no reason that the agreement would not encompass fees incurred in this supplemental proceeding, brought in order to determine the amount due from the underlying proceeding" Id at 469.

In the footnotes of the opinion, The Court of Appeals clearly ruled a legal right exists in this State to collect contracted-for post-judgment attorney's fees. Id at 470. The footnote provided,

in part,

“[w]hile we recognize the decision of this court reverses some of the master’s rulings which were favorable to Renaissance, Ocean Resorts does not challenge the amount awarded or request redetermination of fees in light of the beneficial results obtained. Ocean Resorts only challenges Renaissance’s legal right to any such fees” (emphasis added) Id.

In the present case, a judgment was entered on August 4, 2009 in favor of Plaintiffs. Plaintiffs then initiated supplemental proceedings in an attempt to collect on the outstanding debt. The debt owed to Plaintiffs was not satisfied before the supplemental proceedings were initiated, and as in Renaissance, the parties’ contract clearly provided for the award of attorney’s fees during the collections process.

Under the common law of South Carolina, a prevailing party has no right to recover attorney’s fees. Duke Power Co. v. South Carolina Public Service Commission, 284 S.C. 81, 326 S.E.2d 395 (1985). In the absence of a common law right, the plaintiff must plead either a contract or a statute to receive enhanced damages or attorney’s fees. Hegler v. Gulf Insurance Co., 270 S.C. 548, 243 S.E.2d 443 (1978).

In the present case, the parties clearly entered into a valid contract. The clear language of the contract at issue provides, in part,

“[i]n 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 hereby agrees to pay all costs of collection, including a reasonable attorney’s fee.” (R. p. 13)

The contract entered between the parties is clear and unambiguous. The parties contracted for an award of attorney’s fees in the event the Defendants default in the payment of the note. The contract clearly provides that the Defendants will pay all costs of collection, including a reasonable attorney’s fee, upon the default of the Defendants. Read as a whole, the contract in no way limits

the ability of the Plaintiffs to recover attorney's fees in supplemental proceedings.

Black's Law Dictionary defines the term, "all," as meaning, "each or every." <http://thelawdictionary.org/all>. Further, Black's Law Dictionary defines the term, "collection," as meaning, "a process for recovering delinquent amounts owed." <http://thelawdictionary.org/collection/>. Applying the clear meaning of the terms entered into by the parties, it is clear that attorney's fees were contracted for, and the obligation of the Defendants to pay such reasonable fees extended to each and every action the Plaintiffs were required to initiate to recover the delinquent amount owed, including supplemental proceedings.

Furthermore, the fees requested by Plaintiffs are reasonable. (R. p. 35, line 16) Plaintiffs filed their Affidavit of Attorney's fees and Costs on November 4, 2015, which outlined the services performed and costs incurred by counsel throughout the collection process. (R. p. 27) The Affidavit of Paul Simons, Jr., Esq. further illustrated the reasonableness of the attorney's fees awarded. (R. p. 39)

The Defendants suggested Moseley v. Mosier, 279 S.C. 348, 306 S.E. 2d 624 (1983) was analogous to the issues raised in their appeal. In Moseley, the Supreme Court adopted a rule in domestic matters, allowing parties to contract so that the court may never modify the terms of their separation agreement. The Moseley decision allowed the parties to contract out of the family court's continuing jurisdiction, should they decide to do so. In essence, the Supreme Court's decision in Moseley applied contract law to domestic matters, specifically separation agreements, and allowed parties to enter into binding contracts which remained in full effect after the Final Divorce Decree was entered.

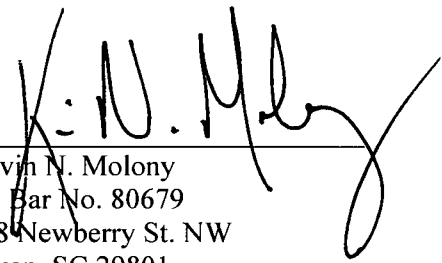
Domestic cases subsequent Moseley continued to illustrate the Supreme Court's willingness to allow parties to enter into contracts which are enforceable after the Final Divorce

Decree is entered. In Degenhart v. Burriss, 360 S.C. 497, 602 S.E.2d 96, 98 (Ct. App. 2004), the Supreme Court ruled, “[o]nce an alimony agreement that specifically disallows modification is approved by the court and merged into a judicial order, it is binding on the parties and the court and is not subject to modification.” Id at 500-01.

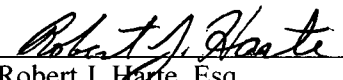
These cases illustrate the ability of parties to enter into binding contracts, which remain in full force and effect after a final order of the court is issued. In the present case, the parties contracted for the award of reasonable attorney’s fees for the collection of the judgment amount. The contract provision obligated the Defendants to pay a reasonable attorneys fee, and it survived the issuance of the Default Judgment. The requested for and awarded fees are reasonable based on the Affidavits filed by Plaintiffs. Finally, the decision in Renaissance, as it relates to the award of post-judgment attorney’s fees arising out of a contract, relates directly to the present case.

CONCLUSION

Based on the decision of this Court in Renaissance, the unambiguous language of the contract, and the reasonableness of the awarded fees and costs, the Court should affirm the Trial Court’s Order granting Plaintiffs Attorney’s fees and Costs.



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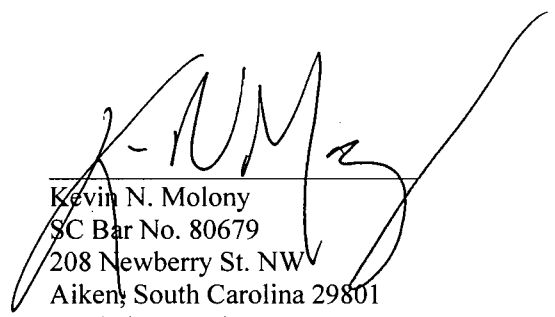
Appellants,

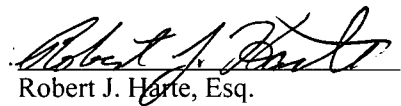
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CERTIFICATE OF COUNSEL

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


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CERTIFICATE OF SERVICE

I certify that on this date I served a copy of the **Final Brief of Respondents and Designation of Matter to be Included in the Record on Appeal** to the Appellants attorney by depositing in the U.S. Mail with sufficient postage affixed, addressed as follows:

Herb Hamilton, Esq.
130 East Main Street
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13 July, 2016
Date


Signature



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