

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2016-000584

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

v.

Commercial & Industrial Floors, Inc. and Dabney Maides.....Appellants,

v.

Christopher M. Keel.....Respondent.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT PROPERLY GRANT SUMMARY JUDGMENT ON APPELLANTS' CLAIM FOR BREACH OF DUTY OF LOYALTY ON GROUNDS THAT APPELLANTS CANNOT PROVE THAT KEEL ACTED AGAINST APPELLANTS' INTERESTS OR IN COMPETITION WITH APPELLANTS WHILE EMPLOYED BY APPELLANTS?
- II. DID THE LOWER COURT PROPERLY GRANT SUMMARY JUDGMENT ON APPELLANTS' CLAIM FOR BREACH OF CONTRACT ON GROUNDS THAT APPELLANTS CANNOT PROVE THAT KEEL BREACHED ANY AGREEMENT WITH APPELLANTS?
- III. DID THE LOWER COURT PROPERLY GRANT SUMMARY JUDGMENT ON APPELLANTS' CLAIMS FOR FRAUD IN THE INDUCEMENT AND BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT BECAUSE APPELLANTS FAILED TO PRESENT PROOF OF ANY BREACH AND/OR PROOF OF ANY FRAUD?
- IV. DID THE LOWER COURT PROPERLY RULE THAT THE NON-COMPETE AGREEMENT AT ISSUE IS UNENFORCEABLE?
- V. DID THE LOWER COURT PROPERLY RULE THAT APPELLANTS' CLAIMS ARE TIME-BARRED BY THE ASSET PURCHASE AGREEMENT'S LIMITATION PROVISION?
- VI. DID THE LOWER COURT PROPERLY RULE THAT ALL OF APPELLANTS' CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS?

FINAL BRIEF OF RESPONDENTS

STATEMENT OF CASE

This is an appeal of the Circuit Court's Order (R. pp. 5-19) granting summary judgment in favor of Respondents CJR Resources, Inc. ("CJR") and Christopher M. Keel ("Keel") on each and every claim alleged against them by Appellants Commercial & Industrial Flooring, Inc. ("CIF") and Dabney Maides¹ ("Maides") on the following grounds: (1) Appellants' claims are barred by the applicable statute of limitations and the limitations provision of the Asset Purchase Agreement at issue; (2) the contract on which all of Appellants' claims are premised is unenforceable as a matter of law; and (3) Appellants cannot prove the essential elements of every cause of action asserted against Respondents. That Order also granted summary judgment in favor of Respondent CJR as to each of its claims against Appellants on grounds that all of Appellants' defenses thereto rely on Appellants' own claims and evidence, all of which the Circuit Court ruled must fail as a matter of law.

Respondent CJR originally instituted this action by filing its Complaint on October 28, 2013, alleging that Appellants breached an Asset Purchase Agreement (the "APA") CIF entered into with CJR to purchase CJR's business, Ron's Building Supply (the "Business"), and a related promissory note personally guaranteed by Maides. (R. pp. 33-53.) Specifically, CJR claimed that Appellants failed to make all payments required under the APA and the promissory note. Appellants filed their Answer and Third Party Complaint on December 18, 2013, denying CJR's claims and alleging various counterclaims against CJR and third-party claims against Keel (one of the owners of CJR), including breach of contract, breach of contract accompanied by a fraudulent act, fraud in the inducement, breach of duty of loyalty

¹ Maides is the sole shareholder of CIF, a South Carolina corporation formed to purchase CJR's flooring business.

and for an injunction, all based on the APA and a related July 2008 Employment Agreement that contained a five year non-compete provision covering the entire State of South Carolina. (R. pp. 54-87.) Appellants claim Keel: (1) breached those agreements by competing with CIF and soliciting CIF's clients, (2) entered into those agreements by fraud and (3) never intended to abide by the agreements. Both Respondents filed Answers thereto on March 26, 2014, denying each of Appellants' counterclaims and all of the allegations in their third-party complaint. (R. pp. 88-93 and pp. 94-107.) Keel filed a Motion to Dismiss² that same day, arguing that all of Appellants' claims were barred by the statute of limitations. (R. pp. 111-112.) Keel also asserted various counterclaims against Appellants, including breach of contract as to both the APA and a 2009 Employment Agreement, violation of the South Carolina Wage Payment Act and defamation. (R. pp. 102-107.) On May 20, 2014, Appellants filed their reply, denying Keel's counterclaims. (R. pp. 108-110.)

In August 2014, Keel served Appellants with his first discovery requests. Having received no responses almost a year later, Keel was forced to file a Motion to Compel. Upon admission by Appellants that they owed discovery responses to Keel, the lower court filed a Consent Order on July 9, 2015, compelling Appellants to provide responses within 30 days. (R. pp. 3-4.) Appellants finally provided their discovery responses on August 9, 2015, producing no actual evidence of their claims, failing to provide all information requested and producing less than thirty pages of documents in support of their claims. Following the

² While Keel's Motion to Dismiss was ultimately denied, the lower court noted it was only being denied to give Appellants an opportunity for discovery. The lower court did have concerns that Appellants' claims could be barred by the statute of limitations. In fact, the lower court specifically noted in the Form 4 Order that the Motion was "denied with leave to raise the defense of the statute of limitations again when discovery has been completed."

deposition of CIF's owner, Maides, and the close of discovery³, Keel filed his Motion for Summary Judgment (R. pp. 113-115) on September 25, 2015, and CJR filed its Motion for Summary Judgment (R. pp. 116-119) on September 29, 2015. The lower court heard argument on both motions on November 3, 2015. (R. pp. 228-272.)

Having reviewed Respondents' Motions for Summary Judgment, read all submissions from the parties and heard extensive argument from all counsel at the hearing on November 3, 2015, the lower court filed an Order on December 16, 2015, granting Respondents' Motions for Summary Judgment on all claims alleged against them by Appellants and further granting judgment in favor of CJR on all of its claims against Appellants. (R. pp. 5-25.) The lower court's Order contained a lengthy analysis of the arguments and all of the testimony and other evidence submitted by the parties in support of their respective positions. Appellants then filed their Motion to Alter or Amend (R. pp. 203-264) on January 4, 2016, including new arguments and "evidence" not previously offered by Appellants, which the lower court denied pursuant to an Order dated February 23, 2016. (R. pp. 26-32.) The lower court, again, detailed the basis for its decision on Respondents' Motions for Summary Judgment and found that the evidence and arguments submitted by the parties on those Motions supported the lower court's previous decision.

ARGUMENT

- I. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT ON APPELLANTS' CLAIM FOR BREACH OF DUTY OF LOYALTY BECAUSE APPELLANTS CANNOT PROVE THAT KEEL ACTED AGAINST APPELLANTS' INTERESTS OR IN COMPETITION THEREWITH WHILE EMPLOYED BY APPELLANTS.

³ The lower court entered a Consent Scheduling Order in this case on June 12, 2015, setting August 31, 2015 as the discovery deadline. Regardless, Keel consented to the taking of his deposition by Defendants in October 2015 after the discovery deadline had already passed and after his Motion for Summary Judgment had already been filed.

Appellant argues that the lower court erred in granting Respondents' Motion for Summary Judgment on Appellants' claim against Keel for breach of duty of loyalty because the Affidavit of Appellant Maides (R. pp. 313-314) "indisputably" demonstrates that Keel was engaged in competing activities while employed by CIF. Specifically, Appellant argues that the following statements contained in the Affidavit prove such competition: (1) Keel bid on a job for Triangle construction, (2) Keel installed a Duradek job that CIF hoped to get and (3) CIF had several installers quit around the same time as Keel. Appellants assert that these unsupported statements "inferentially" required a denial of summary judgment as to Appellants' claim of breach of duty of loyalty against Keel. Despite Appellants' argument, and even if all statements in the Maides' Affidavit are taken as true, those statements alone are insufficient to prove that Keel was improperly competing with Appellants while employed by CIF. The lower Court was not required to make unsupported inferences based solely thereon, especially in light of Appellants' own repeated admissions they have no proof Keel engaged in competitive action while employed at CIF.

South Carolina law recognizes a cause of action for breach of the duty of loyalty when an employee works to compete against the employer while still working for the employer. See *Foreign Acad. & Cultural Exch. Servs. v. Tripon*, 394 S.C. 197, 205, 715 S.E.2d 331, 335 (2011), citing *Lowndes Prods., Inc. v. Brower*, 259 S.C. 322, 335-39, 191 S.E.2d 761, 767-70 (1972) (finding that key employees who contacted and met with investors and customer of current employer to start a competing company, left without notice, and leased space and ordered materials to build manufacturing equipment were guilty of disloyalty to employer). However, the burden is on the party alleging such a breach to prove that the employee acted against the employer's interests or in competition therewith while

still employed by the employer. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C 598, 518 S.E.2d 591 (1999). As correctly noted by the lower court in its December 16, 2015 Order, there is absolutely no evidence that Keel ever acted against Appellants' interests or in competition with Appellants while employed by Appellant CIF.

While Appellants allege and argued to the lower court that Keel breached his duty of loyalty to CIF by competing against CIF while still employed by CIF, the lower court properly found that Appellants cannot prove any such conduct and have admitted that they have no evidence that Keel acted in competition with CIF or against its interests while employed by CIF. When directly asked at his deposition whether he could "specifically point to anything that would prove that (Keel) was competing with (CIF)," Maides answered "I don't know that I have anything." (R. p. 192, lines 14-23.) Likewise, Maides acknowledged that Appellants have no proof that Keel acted against CIF's interests or that he never intended to work for the benefit of CIF. Rather, and when asked about that particular allegation, Maides testified "I would think that was probably a pretty strong statement there," before admitting that he wouldn't agree with any such allegation. (R. p. 193, lines 3-10.) Instead, Maides testified that Keel was making money for CIF, that he wanted to keep Keel as an employee for that reason and that "he was working for (CIF)." (R. p. 183, lines 2-12, p. 184, lines 4-6, p. 193, lines 15-23 and p. 200, lines 14-25.) Notably, Maides admitted at his deposition that the main basis for his claim for breach of duty of loyalty was the fact that CIF was not asked to submit bids for various jobs. (R. p. 197, lines 17-25 and p. 198, lines 1-10.) However, and when asked if that belief was based on mere speculation, Maides responded "Yes." (R. p. 198, lines 11-14.) The lower court properly ruled that speculation alone is not enough to meet Appellants' burden of proof on their claim for breach of duty of loyalty.

Appellants now wish to overcome the admitted lack of evidence of Keel's alleged breach of loyalty by pointing to allegations contained in the Maides Affidavit. However, the Maides Affidavit directly contradicts Maides' previous testimony and should be disregarded for that reason alone. Even if properly considered, the statements in the Maides Affidavit are entirely speculative in nature and fail to prove that Keel competed with CIF while employed by CIF. As for the alleged bid made to Triangle Construction, Appellants have presented no evidence that Keel's bid was submitted to the detriment of CIF. As for the Duradek job, Maides previously testified that although it "looked like" Keel was competing by installing Duradek on a project outside of his work for CIF, nothing prohibited Keel from doing outside work providing services that CIF does not provide. (R. p. 185, lines 12-18, p. 186, lines 11-25 and p.187, lines 9-13.) Maides even admitted in his testimony that CIF was not licensed to install Duradek at the time Keel did so. *Id.* Finally, the mere fact that certain installers quit their employment with CIF is wholly insufficient to show any improper conduct or competitive action on the part of Keel without any direct evidence that Keel was the reason or that he induced them to do so. Therefore, Appellants cannot meet their burden of proof on their claim for breach of the duty of loyalty.

II. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT ON APPELLANTS' CLAIM FOR BREACH OF CONTRACT BECAUSE APPELLANTS CANNOT PROVE THAT KEEL BREACHED ANY AGREEMENT WITH APPELLANTS.

Appellants argue that the lower court erred in granting Respondents' Motions for Summary Judgment as to Appellants' claim for breach of contract. Specifically, Appellants argue that the lower court improperly failed to find that the same allegations contained in the Maides Affidavit, referenced above, constitute evidence of breach of contract and resulting damages. However, the Maides Affidavit is entirely conclusory in nature and directly

contradicts Appellants' previous express admissions that they lack proof of any breach by Keel or resulting damages. Therefore, Appellants' arguments based on the Maides Affidavit must fail, and the lower court properly considered that fact in granting summary judgment.

To survive a motion for summary judgment on a claim for breach of contract, a party alleging that claim must point to the existence of actual evidence sufficient to prove each and every one of the following elements: (1) a binding contract entered into by the parties, (2) breach of that contract and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962). As properly determined by the lower court, Appellants cannot meet that burden in the instant action because they have not and cannot point to any actual evidence to prove (1) that Keel breached the agreements at issue or (2) that Appellants suffered any damages as a direct and proximate result of any such alleged breach by Keel. (R. pp.18-19.)

In regard to the Employment Agreement and APA, Appellants allege in a nonspecific and conclusory fashion that "Keel breached the APA by violating Article VII of the APA relating to Noncompetition, Nonsolicitation, and Nondisparagement." (R. p. 58.) Appellants also allege, in a likewise conclusory fashion, that "Keel breached the (Employment Agreement) both during and after his period of employ...in competing with CIF." (R. p. 58.) When directly asked upon what evidence such allegations were based, CIF's owner testified that it previously "*looked like* (Keel) was in competition" with CIF [emphasis added]. (R. p. 185, lines 7-11.) However, Appellants have submitted no actual proof of any such competition or solicitation and admit that they do not have any. CIF's owner testified that, although it "looked like" Keel was violating the Agreement by installing Duradek on a project outside of his work for CIF in 2013, nothing in either the ADA or the Employment

Agreement prohibited Keel from providing services that CIF did not or could not provide. (R. p. 185, lines 12-18, p. 186, lines 11-25 and p.187, lines 9-13.) Even if the non-compete provisions were enforceable, Keel's installation of the Duradek project in 2013 would not have been prohibited competition, because CIF was not licensed to install it at the time.

Appellants have also admitted that, despite their claims and various allegations that Keel breached the APA by soliciting CIF's customers, Appellants have no actual proof of any such solicitation. When directly asked "(d)o you have proof that Mr. Keel solicited any of those customers," CIF's owner responded "(w)ell, I don't have – no, I don't have anything other than to say that *we believe* he has done jobs for them" [emphasis added]. (R. p.196, lines 4-20.) Regardless, the lower court properly found that Appellants' beliefs, without actual proof, are based on mere speculation, which is insufficient for Appellants to survive summary judgment as to the alleged breach of the contract. (R. p. 19.)

The lower court also properly found that Appellants cannot meet their burden of presenting actual evidence of damages suffered as a direct and proximate result of any breach of contract by Keel. While Appellants claim that CIF's business suffered due to Keel's alleged conduct, CIF's owner has admitted that CIF has no actual proof that Keel is the actual or proximate cause of any loss of business suffered by CIF. Instead, CIF's owner has repeatedly testified that CIF's claimed downturn in business may simply have been the result of economic recession that began in the fall of 2008. (R. p. 188, lines 6-25.) Specifically, CIF's owner testified that CIF, like most construction businesses at the time, was hit by the recession and that some of CIF's lower sales, including those attributed to Keel, were the result of that recession. (R. p. 181, lines 8-13, p. 182, lines 14-22, p. 188, lines 6-25.) CIF's owner also admits that he is merely speculating that Keel is the reason CIF no longer has any

of its predecessor's "legacy customers" and has not been asked to bid on certain jobs. (R. p. 194, lines 20-25, p. 195, lines 1-20, p. 197, lines 22-25 and p. 198, lines 1-14.) Again, the lower court properly found that such speculation, without supporting evidence, is insufficient to meet CIF's burden of proof that any damages suffered by CIF are the direct and proximate result of any act by Keel.

III. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT ON APPELLANTS' CLAIMS FOR FRAUD IN THE INDUCEMENT AND BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT BECAUSE APPELLANTS FAILED TO PRESENT PROOF OF ANY BREACH AND EXPRESSLY ADMITTED LACK OF EVIDENCE OF ANY FRAUD.

Appellants argue that the lower court erred in granting Respondents' Motion for Summary Judgment on Appellants' claims for fraud in the inducement and breach of contract accompanied by a fraudulent act. Appellants argue that the record evidences behavior from which fraud can be inferred and that Keel allegedly "stole" a legal bill. However, as set forth in great detail in the lower court's December 16, 2015 Order, Appellants cannot meet their burden of presenting clear and convincing evidence of any fraudulent act on the part of Respondents.

As to their claim for breach of contract accompanied by a fraudulent act, Appellants bear the burden of proving: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Rotec Servs. v. Encompass Servs.*, 359 S.C. 467, 470, 597 S.E.2d 881, 883 (Ct. App. 2004). Appellants cannot prove any breach of contract, as addressed in greater detail above. Appellants also cannot prove, by clear and convincing evidence, either a fraudulent act or fraudulent intent of Keel in regard to the agreements at issue. As noted by the lower court, CIF's owner specifically and expressly admitted at his depositions that he

has no evidence at all to prove that Keel's alleged breaches were committed with any fraudulent intent or by any fraudulent act. CIF's owner directly acknowledged that Keel did work for the benefit of CIF and that he wanted to retain Keel as an employee because he was, in fact, "making money for the company." (R. p. 183, lines 2-12, p. 184, lines 4-6 and p. 188, lines 21-25.) This directly contradicts Appellants' allegations that Keel never acted for the benefit of CIF and never intended to satisfy his obligations under the agreements.

In regard to their claim for fraud in the inducement to enter a contract, Appellants again bear the burden of proving through actual evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Additionally, a claim involving fraud requires proof by clear and convincing evidence and, thus, more than a mere scintilla of evidence must be presented to withstand a motion for summary judgment. *Id.*

As properly found by the lower court, Appellants have not and cannot meet their heightened burden of proof on their claim for fraud in the inducement because they cannot establish, as a most basic requirement, that any representation made by Keel was false or that Keel had knowledge that any statement he made was false. Appellants allege that Keel "represented to (CIF) that (he) would not engage in competitive practices of solicitation of customers, contacts, or competing business" and that "Keel knew such representations were false or made such representations with reckless disregard for their truth or falsity." However, CIF's owner acknowledged, when specifically asked what proof Appellants have

of those allegations, that Appellants actually have no such proof. In fact, when specifically asked if he had any direct proof of fraud on the part of Keel, Maides expressly stated “(n)o, I don’t know that there’s any proof of fraud, you know, other than, you know, the things we’ve talked about.” (R. p. 199, lines 7-12.)

Appellants now wish to overcome their previous admissions to complete lack of evidence of fraud relating to the agreements at issue by arguing that such fraud is proven by Respondent Keel’s alleged theft of a legal bill. Appellants admittedly have no proof that Keel stole a legal bill. In addition, the theft of a legal bill, even if true, is entirely irrelevant to the issue at hand and is insufficient to prove fraud or fraudulent intent on the part of Keel in regard to the two agreements at issue.

IV. THE LOWER COURT PROPERLY RULED THAT APPELLANTS’ NON-COMPETE AGREEMENTS ARE UNREASONABLE UNDER SOUTH CAROLINA LAW AND, THEREFORE, UNENFORCEABLE AS A MATTER OF LAW.

The lower court properly ruled that the non-compete agreements⁴ sought to be enforced against Keel are unenforceable as a matter of law because they are not narrowly tailored as to time and geographic scope. The lower court also properly declined to modify or “blue pencil” the agreements.

For a restrictive covenant to be enforceable in South Carolina, an employer seeking enforcement must demonstrate that it is “(1) necessary for the protection of the legitimate interest of the employer; (2) reasonably limited in its operation with respect to time and place; (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; (4) reasonable from the standpoint of sound public policy; and (5)

⁴ While Appellants argue, for the first time in their Initial Brief, that the two non-compete agreements are different, the terms contained in both provisions are essentially the same and employ the same temporal and geographic limitations.

supported by a valuable consideration.” *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 42, 455 S.E.2d 2d 707, 708 (Ct. App. 1995). Such covenants are to be strictly construed against employers and, if a restrictive covenant is deficient in even one of the above-listed respects, it must fail as a matter of law. *Id.*

The non-compete provision Appellants seek to enforce provides that, while employed by the Company and for five years thereafter, Keel could not “become 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” [emphasis added]. (R. p. 163.) Applying the *Faces* criteria, the lower court properly held that said provision, when construed strictly against CIF, is not reasonably tailored in regard to time and geography and is, therefore, unenforceable. First, the five-year period goes at least two years beyond what South Carolina courts have generally considered as reasonable. *See Rental Uniform Serv. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983) (holding three-year non-compete enforceable in noting that “a limitation of two or three years, may not be obnoxious in the context of a noncompetition agreement”); *see also Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961) (upholding two year non-compete as reasonable). Second, the provision is overly broad as to geographic scope because it covers the entire state of South Carolina. The South Carolina Supreme Court has expressly noted 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).

In an effort to overcome the complete unenforceability of the restrictive covenants at issue, Appellants argue that the non-compete provisions are “different” simply because one is contained in the APA and the other in an Employment Agreement. Appellants then take the

position that the non-compete provision in the APA does not fail because such provisions related to the sale of a business can have longer time limitations than non-compete provisions contained in traditional employment agreements. However, the South Carolina Supreme Court has long recognized that even when ancillary to the sale of a business, a non-compete provision “must be reasonably limited as to *time and territory*.” *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 71, 119 S.E.2d 533, 542 (1961) [emphasis added]. Even if the lower court in this case found that five years was a reasonable time limitation (which it declined to do), it still properly found the geographic limitation was not reasonable in light of *Oxman*.⁵

Finally, Appellants argue that, to the extent the lower court properly determined the non-compete provisions are unenforceable, the lower court should have modified the provisions to make them reasonable under South Carolina law. However, 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). This is well-settled law in South Carolina, and language contained in an agreement about the parties’ intent does not have the ability to override it.

V. THE LOWER COURT PROPERLY RULED THAT APPELLANTS’ CLAIMS ARE TIME-BARRED BY THE ASSET PURCHASE AGREEMENT.

Appellants argue that the lower court erred in holding that Appellants’ claims are time-barred by the one-year limitation provision contained in the APA at issue because that provision allegedly only relates to “representations and warranties made within the APA itself.” Appellants’ argument fails, however, because they ignore Section 8.7 of the APA,

⁵ *Oxman* holds that a non-compete agreement covering all of South Carolina is unreasonable and, therefore, unenforceable as a matter of law.

which applies the limitations provision broadly to “any matter related to (the APA).” (R. p. 292.)

Article VIII of the APA is titled “Indemnification; Remedies.” Under Section 8.1 of the APA, it states in pertinent part that:

All representations, warranties, covenants and obligations in this Agreement and Ancillary Documents⁶ and any other certificate or document delivered pursuant to this Agreement shall survive the Closing, only to the extent provided in Section 8.4(a) and (b) [emphasis added].

(R. p. 290.)

Section 8.4 of the APA is titled ‘Time Limitations and Notice of Claim’ and states, in pertinent part:

(a) Seller and Shareholder will have liability (*for indemnification or otherwise*) with respect to *any breach* of (i) a covenant or obligation to be performed or complied with prior to the Closing Date or (ii) *a representation or warranty, only if on or before one (1) year after the Closing Date, Buyer shall provide Seller and Shareholder with a written notice indicating that Buyer is making a claim against the Seller or Shareholder as permitted under this Agreement and specifying the factual and legal basis for such claim in reasonable detail and the amount of such claim* [emphasis added].

(R. p. 291.)

Section 8.7 of the APA is titled “*Exclusive Remedy*” and states, in whole: “The indemnification provisions set forth in this Article VIII *shall be the sole and exclusive basis for a monetary remedy of Buyer with respect to any matter related to this Agreement*” [emphasis added]. Section 8.10 of the APA states, in pertinent part: “in no event will Seller or Shareholder be liable for any incidental, consequential or punitive damages.” (R. p. 292.)

⁶ The definition of “Ancillary Document” in the APA specifically incorporates the Employment Agreement.

As the lower court properly ruled, the APA provides that any claims brought by Appellants against Respondents related to the APA had to be brought pursuant to the provisions of Article 8. The provisions of Article 8 also provide that the claims brought by Appellants against Respondents had to be brought only after providing Respondents written notice of the claims within one (1) year of the July 2008 APA closing date. Appellants' claims against Respondents were not filed until December 18, 2013, and there is nothing in the record establishing or otherwise evidencing that Appellants ever provided any written notification of their claims to Respondents prior to July 2009 (the deadline for bringing any claims related to the APA). Therefore, the lower court properly ruled that all claims brought by Appellants against Respondents are time-barred by the provisions of the APA.

VI. THE LOWER COURT PROPERLY RULED THAT EACH AND EVERY ONE OF APPELLANTS' CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

Finally, Appellants argue that the lower court erred in holding that all of Appellants' claims were barred by the applicable statute of limitations because the Maides Affidavit sets forth ongoing breaches by Keel that allegedly occurred in 2013. However, this argument also fails for two reasons: (1) Appellants' own Third Party Complaint acknowledges that the alleged breaches began in 2008, that Appellants had knowledge of said breaches at the time they allegedly began and that Appellants failed to bring any claims thereon until more than five (5) years later (R. pp. 56-57); and (2) the Maides Affidavit directly contradicts Maides' previous testimony.

Each and every one of Appellants' claims against Respondents, as expressly pled by Appellants, relate back to the Employment Agreement signed between Appellant CIF and Respondent Keel in July of 2008. Specifically, Appellants claim that Keel breached the

agreements by competing with CIF and soliciting its clients, that Keel entered into the agreements by fraud and that Keel never intended to abide by the terms of the agreements. (R. pp. 56-60.)

South Carolina's three-year statute of limitations, providing that an action upon a contract must be brought within three years from the date the action accrues, applies to all of CIF's claims. S.C. Code Ann. § 15-3-530(1) (2013). Pursuant to the discovery rule, an action accrues on the date that the aggrieved party either discovered the breach or should have discovered the breach through the exercise of reasonable diligence. *Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985). The lower court properly applied the three-year statute of limitations to all of Appellants' claims against Respondents in finding that all such claims accrued when Appellants discovered or should have reasonably discovered Keel's alleged breaches of the agreements at issue.

As properly determined by the lower court, a plain reading of Appellants' Third Party Complaint clearly demonstrates that all of their claims against Respondents accrued in 2008 and that Appellants have acknowledged that they either discovered or should have reasonably discovered the alleged breaches of the Employment Agreement by Keel in 2008, more than five years prior to the filing of Appellants' claims against Respondents. Specifically, Appellants allege that a material term of the Employment Agreement was Keel's "promises and obligations to use (his) contacts and customer base for the benefit of CIF," but that "*from the outset* of Keel's employment, it became clear that Keel did not intend to lend his expertise of contacts and customer base for the benefit of CIF [emphasis added]." (R. p. 56.) Since Keel's employment with CIF began in July of 2008, Appellants' pleadings and

testimony acknowledge that it knew or should have known of Keel's alleged breaches of the agreements at issue in 2008.⁷ Since Appellants did not bring their claims against Respondents until more than five years later, in December of 2013, the lower court properly ruled that all of Appellants' claims are now barred by the statute of limitations.

In an attempt to overcome their complete failure to timely act on any claims they felt they had against Respondents, Appellants try to now argue that alleged ongoing breaches by Keel in 2013 re-set the clock on the statute of limitations. Appellants use the Maides Affidavit as support for this argument.

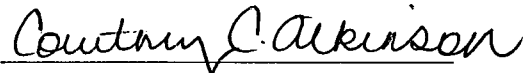
However, and as properly noted by the lower court in its February 23, 2016 Order denying Appellant's Motion to Alter or Amend, the breaches that are alleged to have been committed by Keel in 2013 are not separate and distinct conduct from the alleged wrongful conduct that Appellants acknowledge they knew of in 2008. (R. pp. 26-32.) Rather, such conduct is merely a continuation of the alleged conduct that Appellants argue began in 2008, for which Appellants failed to timely pursue any remedy against Respondents. Therefore, Appellants' argument fails.

CONCLUSION

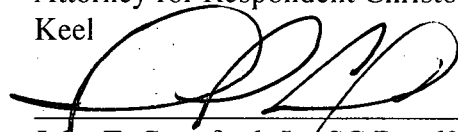
For all of the reasons set forth above, Respondents respectfully request that this Court deny Appellants' appeal in this matter and affirm the lower court's December 16, 2015 Order granting Respondents' Motions for Summary Judgment.

⁷ Evidence was also submitted to show that Appellants sought legal counsel in regard to Keel's employment in August of 2010. Even if that date were accepted as the discovery date, Appellants' claims were still not filed until more than three years later and would still be time-barred.

Respectfully submitted,



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Greenville, South Carolina
August 26, 2016

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2016-000584

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

v.

Commercial & Industrial Floors, Inc. and Dabney Maides.....Appellants,

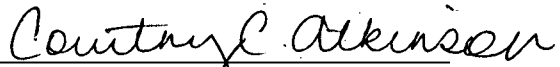
v.

Christopher M. Keel.....Respondent.

CERTIFICATION

I hereby certify, pursuant to Rule 211(b), that the Final Brief of Respondent to be contains no matter which is irrelevant to the appeal.

August 26, 2016


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