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NOV 15 2016

SC Court of Appeals

STATE OF SOUTH CAROLINA

COUNTY OF Horry

CAPTAIN'S HARBOUR AND  
RACQUET CLUB HOMEOWNERS  
ASSOCIATION, INC.,

Plaintiff,

vs

BERALD W. JONES,

Defendant

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO. 2014-CP-26-7617

ORDER

FILED NOV 12 AM 9:05

This matter came before the Court on February 17, 2016 for consideration of Plaintiff's Motion for Summary Judgment, as well as Defendant's Motion for Summary Judgment. Both parties were represented by counsel at the hearing and were afforded the opportunity to present oral arguments. The Court also considered Plaintiff's Memorandum of Law and documents presented to the Court during the hearing. Following consideration of the evidence before the Court, I find Defendant's argument, that he is entitled to indemnification under the Property Management Agreement between the Plaintiff and ACE Management, is unavailing, and therefore, Plaintiff is entitled to recover those funds Defendant used from Plaintiff's operating account, including applicable interest and costs. Therefore, Plaintiff's Motion for Summary Judgment is GRANTED and Defendant's Motion for Summary Judgment is DENIED.

STANDARD OF REVIEW

Pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure, summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for

EXHIBIT  
A

summary judgment, "the court must view the facts and inferences therefrom in a light most favorable to the nonmoving party." *Aravis v. Dunbar*, 316 S.C. 263, 265, 449, S.E.2d 495, 496 (Cl. App. 1994). "A party opposing a properly supported Motion for Summary Judgment, however, may not rest on the mere allegations or denials of its pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact. Thus, the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment." *Dickert v. Metropolitan Life Insurance Company*, 306 S.C. 311, 313, 411, S.E.2d 672, 673 (Cl. App. 1991), *reversed in part on other grounds*, 311 S.C. 218, 428, S.E.2d 700 (1993).

#### FINDINGS

In this case, Plaintiff seeks to recover from Defendant for conversion of funds from the Plaintiff's operating account. Jones, without authorization from Plaintiff, used Plaintiff's funds to pay for personal criminal defense legal fees and personal medical bills following physical altercations on July 7, 2014 that led to his arrest. At the time, Jones was an employee of ACE Management ("ACE"), the property management company for Plaintiff's regime pursuant to a management agreement ("the Agreement"). Jones claims he was entitled to use the Plaintiff's funds under the terms of the Agreement.

In October of 2012 Plaintiff entered the management agreement with ACE "for the orderly and uniform administration, operation, maintenance, and management of the Association and for the promotion, preservation, and the protection of property values in the regime." The parties to the Agreement are identified in the first paragraph of the Agreement:

THIS AGREEMENT, made and entered into this 1<sup>st</sup> day of October 2012, by and Between Captains Harbour and Racquet Club Homeowners Association, a nonprofit corporation organized and existing under the laws of South Carolina, hereinafter called "The Association" and American Contracting Engineers, PA, a Corporation organized and existing under the laws of Delaware and doing business as (dba) ACE Management hereinafter called "The Manager".

The Agreement outlined the responsibilities and duties ACE owed to Plaintiff and contained an indemnity provision, upon which Defendant relies to justify his use of Plaintiff's operating account funds. The indemnity provision in the Agreement states:

#### VI. HOLD HARMLESS

A. Section III, Item B (4): The Association shall indemnify the Manager from any claims, demands, judgments or suits that may be brought against or incurred by the Manager by reason of the Manager's recommendations unless such acts shall be caused by said Manager's gross negligence or willful misconduct.

B. Section III, Item D: The Association specifically agrees and shall indemnify the Manager from any claims demands, judgments or suits or damages that may be brought against or incurred by the Manager by reason of Manager's role in assisting the Board with regard to the services set forth in this Section III, Item D. Manager agrees to use Manager's best efforts to investigate and recommend qualified, reputable subcontractors; however Manager shall not be responsible for any nonperformance, negligence or any loss or damages resulting from the provision of these services unless such acts shall be caused by said Manager's gross negligence or willful misconduct.

C. General: Including Items A and B above, the Manager shall not be liable to the Association and/or its Members for any loss or damage caused by acts of the Manager unless said acts constitute gross negligence, and said Association and its Members, do hereby agree to indemnify and save harmless the Manager from any such liability for all damage, costs, and expense (including attorney fees incurred by the Manager in defending legal action), arising from any injury to any person or property in, about and in connection with the Association, its Common

Elements, Limited Common Elements, and Dwellings, from any cause whatsoever, unless such injury shall be caused by said Manager's gross negligence or willful misconduct.

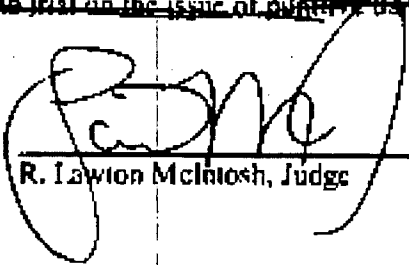
The plain language of the Agreement identifies the parties to the contract as Plaintiff and ACE. Defendant is not a party to the Agreement, and therefore, is unable to claim contractual indemnification in this case.

CONCLUSION

Plaintiff is entitled to damages from the Defendant in the amount of: \$12,788.80, representing the money converted from Plaintiff's operating account for Defendant's personal use, pre-judgment interest beginning September 1, 2014 of \$1,847.71, and costs involved in instituting this action of \$1,684.63. Therefore, the total actual damages Defendant owes Plaintiff

are \$16,321.14. ~~and this case will proceed to trial on the issue of punitive damages.~~ *This issue of punitive damages was not addressed at the hearing.* (RLM)

IT IS SO ORDERED.

  
\_\_\_\_\_  
R. Lawton McIntosh, Judge

This 7 day of April, 2016  
Anderson, South Carolina

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FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014-CP-26-7617

NOV 15 2016

SC Court of Appeals

Captain's Harbour and Racquet Club Homeowners  
Association, Inc.

Jerald W. Jones

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for :  Plaintiff  Defendant  
or  
 Self-Represented Litigant

DISPOSITION TYPE (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.  See Page 2 for additional information.
- 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

2016 OCT 4 AM 8:52

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. (formal order to follow)  Statement of Judgment by the Court.

ORDER INFORMATION

THE COURT DENIES DEFENDANT'S MOTION FOR RECONSIDERATION. INASMUCH AS IDENTICAL GROUNDS WERE ARGUED AT PREVIOUS HEARING THE REQUEST FOR A HEARING ON THIS MOTION IS DENIED. THE COURT NOTES THAT DEFENDANT'S MOTION FOR RECONSIDERATION WAS NOT PROVIDED TO THE COURT UNTIL AUGUST 25, 2016. PLAINTIFF'S COUNSEL TO PREPARE A FORMAL ORDER.

This order  ends  does not end the case.  
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

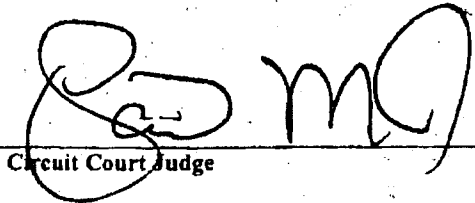
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.





Circuit Court Judge

2155  
Judge Code

9-1-16  
Date

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

\_\_\_\_\_  
\_\_\_\_\_

ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
\_\_\_\_\_

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

**Court Reporter:**

\_\_\_\_\_

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

Copy of Order  
filed 10-4-16 mailed to all  
parties not in default on 10-11-16  
initials     *fw*