

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Hon. Dale Van Slambrook, Master-In-Equity

Case No. 2016-001307

BLUE CHIP MEDICAL
PRODUCTS, INC. ,

Respondent,

v.

ROBERT L. BONIFAY, JR.,
AIRUS MEDICAL
SERVICES, LLC and AIRUS
MEDICAL, LLC,

Appellants.

INITIAL BRIEF OF APPELLANTS

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN ENFORCING THE CONTRACT WHEN MATERIAL TERMS AS AMOUNT OF THE LOAN, INTEREST RATE AND REPAYMENT PLAN WERE NOT SPECIFIED WITHIN THE CONTRACT?
2. DID THE TRIAL COURT ERR IN ALLOWING COPIES OF A CHECK REGISTER (TRIAL EXHIBIT 2), CANCELLED CHECKS (TRIAL EXHIBIT 2A) AND THE LIST OF INVENTORY WITH ASSESSED VALUES (TRIAL EXHIBIT 4) TO BE ADMITTED INTO EVIDENCE AS AUTHENTIC DOCUMENTS WHEN THERE WAS INSUFFICIENT FOUNDATION LAID BY THE RESPONDENT?
3. DID THE TRIAL COURT ERR IN ALLOWING RONALD RESNICK TO TESTIFY AS TO THE AUTHENTICITY OF COPIES OF CHECK REGISTER (EXHIBIT 2), CANCELLED CHECKS (EXHIBIT 2A) AND THE LIST OF INVENTORY WITH ASSESSED VALUES (EXHIBIT 4) AS HE WAS NOT A QUALIFIED WITNESS WHO COULD TESTIFY REGARDING THE MODE OF PREPARATION OF THE RECORD, THUS HIS TESTIMONY WAS HEARSAY?
4. DID THE TRIAL COURT ERR IN PERMITTING RESPONDENT TO AMEND ITS' COMPLAINT DURING THE TRIAL IN ORDER TO INCREASE THE AMOUNT OF DAMAGES, AS THE ADMITTED DAMAGES (TRIAL EXHIBIT 4) WAS USED BY THE COURT TO SUBSTANTIALLY INCREASE THE JUDGMENT AMOUNT AGAINST APPELLANT, THEREBY PREJUDICING APPELLANT?

5. DID THE TRIAL COURT ERR BY NEGLECTING TO REDUCE THE JUDGMENT AWARD BY THE \$17,058.79 SETOFF?

STATEMENT OF THE CASE

On May 15, 2014, Respondent, Blue Chip Medical Products, Inc., filed a Summons and Complaint against Appellants, Robert L. Bonifay, Jr., Airus Medical Services, LLC, and Airus Medical, LLC. The Complaint alleged (1) Money Due on the Loan; (2) Breach of Contract; (3) Breach of Covenant of Good Faith and Fair Dealings; and (4) *Quantum Meruit*. The Appellants filed an Answer on June 17, 2014 and alleged a Counterclaim for Breach of Contract.

On August 8, 2014, Respondent filed a Motion to Dismiss the Counterclaim and a Motion to Strike Answer of Appellant. Appellant filed an Objection to Plaintiff's Motion to Strike Answer and Motion to Dismiss the Counterclaim. Respondent also filed a Motion for Attorney Fees.

A hearing was scheduled on October 24, 2014 before Hon. Kristi Harrington. Prior to entering the courtroom, Respondent's counsel advised Appellant's counsel that he had clerked for Judge Harrington. This case was called and Judge Harrington asked Appellant's attorney if she objected to this case being heard by Judge Harrington due to possible conflict of interest. Appellant's counsel did object and the hearing was continued.

This matter was transferred to the Berkeley County Master-In-Equity, Hon. Dale Van Slambrook.

On December 11, 2014, Respondent filed a Motion for Partial Summary Judgment. On December 16, 2014, Respondent filed a Motion to Compel Discovery. On January 13, 2015, Appellant filed Opposition to Respondent's Motion to Compel, Motion for Partial Summary Judgment and Respondent's Motion for Attorney Fees.

On February 4, 2015, Judge Van Slambrook denied Respondent's Motion to Dismiss the Counterclaim; granted Partial Summary Judgment against Appellant in the amount of \$17,058.79; and continued Respondent's Motion for Attorney Fees. Respondent's counsel withdrew his Motion to Strike Answer and his Motion to Compel Discovery. The Partial Summary Judgment was subsequently paid in full by Appellant after a Supplemental Hearing was held and an Order of Attachment was issued by the C

On February 14, 2015, the Court further ordered that "the Defendants shall be permitted to amend Defendants' pleadings to add an Offset claim with regard to the aforementioned \$17,058.79."

On February 20, 2015, Respondent filed an Answer to Appellant's Counterclaim.

On August 10, 2015, Respondent filed a Motion for Partial Summary Judgment to which Appellant filed an Affidavit in Opposition to Respondent's Motion for Summary Judgment on October 12, 2015.

A hearing was held on October 27, 2015 and the Court ordered that Respondent's Motion for Partial Summary Judgment be denied.

The Court found that "this case arises out of a contract dispute between the parties. Based upon the arguments of counsel of Plaintiff's attorney, Yancey McLeod, Esq., Defendants' attorney, Karen DeJong, Esq., the pleadings and supporting documentation, I hereby find in the light most favorable to the non-moving party and there exists at least a scintilla of evidence in favor of the non-moving party, therefore genuine issues exist as to material facts.

Pursuant to the terms of the written agreement dated November 9, 2010, Plaintiff agreed to loan an unspecified amount of money to Defendants in exchange for a four year exclusive right to sell Defendants' therapy beds. Defendant acknowledges the existence of the loan but has disputed the exact amount. The precise loan amount was not specified in the parties' contract and no documentation was presented unequivocally establishing such amount. Further, the Defendant has disputed Plaintiff's claim amount. Therefore, a genuine issue of material fact exists as to this claim.

THEREFORE, IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED." (Bold Print Added)

On November 6, 2015, Respondent filed a Motion to Alter/Amend the October 27, 2015 Order. Appellant filed Opposition to Respondent's Motion to Alter or Amend Judgment. At a hearing on February 19, 2016, the Court denied Respondent's Motion to Alter/Amend the October 27, 2015 Order.

On March 30, 2016, Appellant filed an Amended Counterclaim asking that the payment of \$17,058.79 be setoff from any possible award of damages to Respondent. The Court had previously ordered that Appellant would be allowed to file this Amended Counterclaim.

On April 11, 2016, Respondent filed an Answer to Appellant's Amended Counterclaim.

A Bench Trial was held on April 11, 2016 with a final Order filed on May 18, 2016. The Court ruled that in addition to Respondent's issuance of a \$60,000.00 non-refundable payment to Appellant, Respondent also loaned the Appellant the sum of \$327,773.00. The Court concluded that Respondent had presented "indisputable" evidence of that total loan amount by including its Check Register and the cancelled checks (**Trial Exhibits 2 and 2A**) and that the \$327,773.00 is due and owing. The Court further ruled that Respondent was "entitled to recover an additional \$97,618.50" based

upon its' list of unusable inventory which was admitted into evidence as **Trial Exhibit 4**". Total award to the Respondent was \$425,391.50.

Notice of Appeal was filed by the Appellant on June 30, 2016.

STANDARD OF REVIEW

An action to construe a contract is an action at law. Pruitt v. S.C. Med. Malpractice Liability Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). Likewise, "[a]n action for breach of contract seeking money damages is an action at law." R & G Constr., Inc., v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 430, 540 S.E.2d 113, 117 (Ct.App.2000). When reviewing a judgment made in a law case tried by a master without a jury, the appellate court will not disturb the master's findings of fact unless the findings are found to be without evidence reasonably supporting them. See Karl Sitte Plumbing Co., Inc. v. Darby Dev. Co. of Columbia, Inc., 295 S.C. 70, 77, 367 S.E.2d 162, 166 (Ct.App.1988). However, "[a] reviewing court is free to decide questions of law with no particular deference to the trial court." Hunt v. S.C. Forestry Comm'n, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct.App.2004).

ARGUMENTS

- I. THE TRIAL COURT ERRED IN AWARDING \$425,391.50 TO RESPONDENT WHEN MATERIAL TERMS SUCH AS AMOUNT OF THE LOAN, INTEREST RATE AND REPAYMENT PLAN WERE NOT SPECIFIED WITHIN THE CONTRACT.

The Court ruled that Appellant owed Respondent the total sum of \$425,391.50 after hearing testimony and reviewing evidence at trial. However, the Agreement between the parties stated in Paragraph 6(c) that the loan amount was "TBD" (to be determined), thus creating confusion regarding the true loan amount. See Outline of Agreed Terms dated November 9, 2010 attached hereto as **Exhibit A**. The parties could not agree on the loan amount thus necessitating the ensuing lawsuit. "A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct" Stanley Smith & Spns v. Limestone College, 283 S.C. 430, 433, 322 S.E.2d 474, 477 (Ct. App. 1984). In order for a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement, Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005).

The parties obviously did not have a meeting of the minds because there was no specific repayment terms within the agreement. The loan amount, interest rate and payment plan were material terms of the contract. Therefore, the Court should have ruled that the contract was unenforceable.

II. THE TRIAL COURT ERRED IN ALLOWING RONALD RESNICK TO TESTIFY AS TO THE AUTHENTICITY OF A CHECK REGISTER (TRIAL EXHIBIT 2), CANCELLED CHECKS (TRIAL EXHIBIT 2A) AND THE LIST OF INVENTORY WITH ASSESSED VALUES (TRIAL EXHIBIT 4) AS HE WAS NOT A QUALIFIED WITNESS WHO COULD TESTIFY REGARDING THE MODE OF PREPARATION OF THE RECORD, THUS HIS TESTIMONY WAS HEARSAY.

According to Ronald Resnick's testimony, he was the president of Respondent Blue Chip Medical and his company employed roughly about fifty (50) employees, between sales force, accounting, customer service, shipping and manufacturing, See Trial Transcript, Page 14, Lines 9-15. The Court admitted copies of the company check register (Trial Exhibit 2), cancelled checks (Trial Exhibit 2A) and list of inventory with assessed values (Trial Exhibit 4) attached hereto collectively as **Exhibit B**. Mr. Resnick testified as to how much money was loaned based upon these exhibits and how much the inventory had been worth. Appellant's counsel objected to Mr. Resnick testifying as to the authenticity of these documents because they were prepared by the Respondent's accounting firm and the cancelled checks did not have Appellant's signature nor deposit stamps on the back of the checks, Trial Transcript, Page 23, Line 7 to Page 31, Line 5. Mr. Resnick testified that the Trial Exhibit 2A was from accounting which shows "all the checks, what they were for -loans, purchases, travel expense, freight expenses, and a variety of different issues". Trial Transcript Page 22, Line 16 to Line 21. With regard to Trial Exhibit 4, Mr. Resnick testified that his controller, Carol Wynne, prepared the list of inventory with assessed value, cut all the checks and made decisions for the company when Mr. Resnick is travelling, Trial Transcript Page 85, Line 13 to Page 87, Line 20.

Carol Wynne was not in the courtroom. No one from accounting was in the courtroom. Mr. Resnick should not have been allowed to authenticate and testify about these exhibits. His statements constituted hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and is inadmissible unless it falls under one of the enumerated exceptions. Rule 801(c) & 802, South Carolina Rules of Evidence. This situation does not fall under the business exceptions to hearsay. Mr. Resnick had no personal knowledge of any transactions before he prepared for trial.

III. THE TRIAL COURT ERRED IN PERMITTING RESPONDENT TO AMEND ITS' COMPLAINT DURING THE TRIAL IN ORDER TO INCREASE THE AMOUNT OF DAMAGES, AS THE ADMITTED DAMAGES (EXHIBIT 4) WAS USED BY THE COURT TO SUBSTANTIALLY INCREASE THE JUDGMENT AMOUNT AGAINST APPELLANT, THEREBY PREJUDICING APPELLANT

The Court allowed the Respondent to amend his Complaint that was filed May 15, 2014 during the trial on April 11, 2016. Respondent was permitted to add an additional claim of damages in the amount of \$97,618.50 which allegedly represented the cost of the unusable inventory that it purchased from Appellant, Trial Exhibit 4.

Appellant was given no oral or written notice from Respondent's counsel that Respondent would seek to add additional damages to its' lawsuit at rial. Amendments of pleadings are controlled by Rule 15, SCRPC. Under this rule, a party may amend his pleading by leave of the court and "leave shall be freely given when justice so requires and does not prejudice any other party". Rule 15(a), SCRPC. The prejudice envisioned in Rule 15 is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. Pool v. Pool, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998).

Appellant has been prejudiced by the lack of notice and Trial Exhibit 4 was introduced into evidence, with Appellant's objections, as Mr. Resnick did not have personal knowledge of the inventory and in fact, admitted that Carol Wynne prepared this inventory, Trial Transcript Page 85, Line 13 to Page 87, Line 20. The Court ordered that Appellant pay the \$97,618.50 to Respondent based solely upon Trial Exhibit 4.

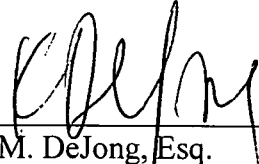
IV. THE TRIAL COURT ERRED BY NEGLECTING TO REDUCE THE JUDGMENT AWARD BY THE \$17,058.79 SETOFF.

The Court did not offset its' judgment by the setoff of \$17,058.79 as set forth in its' Order dated February 2, 2015.

CONCLUSION

The Appellant respectfully requests that copies of the Check Register, Cancelled Checks and List of Inventory be declared inadmissible evidence at the trial as Mr. Resnick had not personally prepared these documents, pursuant to his own testimony and Mr. Resnick did not have Carol Wynne or anyone from accounting in the courtroom so that Appellant's counsel could question her/him on the proof of the handwritings and the entry of the information. For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,



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Dated: January 2, 2017

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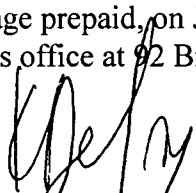
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SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Initial Brief on Blue Chip Medical Products, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on January 4, 2017, addressed to its' attorney of record, Yancey McCleod, Esq., at his office at 92 Broad Street, Charleston, SC 29401.

January 4, 2017


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