

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas

Marvin H. Dukes, Presiding Judge

Case No. 2016-000767

JRC Properties, LLC Respondent,

v.

Dennis Corporation, a South Carolina Corporation,
and Daniel R. Dennis, III Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- 1. DID THE MASTER ERR IN AWARDING RESPONDENT ATTORNEYS FEES AND COSTS IN THE AMOUNT OF THIRTY-TWO THOUSAND ONE HUNDRED TEN AND NO/100 (\$32,110.00) DOLLARS?**
- 2. WAS THE MASTER'S ATTORNEY'S FEE AWARD EXCESSIVE AND NOT SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL?**

STATEMENT OF THE CASE

Respondent JRC Properties LLC (“JRC”) commenced this action against the Appellants Dennis Corporation, a South Carolina Corporation (“Dennis Corporation”) and Daniel R. Dennis, III, Individually for an alleged breach of an office lease dated January 31, 2008. (R. pp. 18 - 23). Respondent’s Complaint alleged causes of action for Breach of Contract, Conversion and Unfair Trade Practices. (R. pp. 20 - 22). Respondent’s Complaint sought recovery of damages against Appellants for back rent, late fees and money due and owing for alleged damages to the property. (R. p. 20, ¶ 20). Respondent’s Complaint also sought an award of attorney’s fees and costs. (R. p. 22, ¶ C). Appellants, then represented by Attorney Franklin J. Smith, Jr. of the Richland County Bar, timely answered. (R. pp. 24 - 26). Shortly after, the undersigned was substituted as counsel for Appellants. (R. p. 1).

The parties then engaged in written and oral discovery. The case was also unsuccessfully mediated. On September 22, 2015, the case was referred to Honorable Marvin H. Dukes, III, and Master-in-Equity for Beaufort County. (R. p. 12). The matter was heard before Judge Dukes on January 25, 2016. (R. p. 479). At the close of the Respondent’s case, counsel for Appellants moved to dismiss the Respondent’s entire case, as well as its causes of action for conversion and Unfair Trade Practices. (R. p. 309, l. 7 – p. 314, l. 2). Appellants also moved to dismiss any claims for damage to the premises on the grounds that Respondent had failed to offer any proof as to damages. Appellants also moved to dismiss any claim for attorney’s fees on the grounds that Respondent was not the prevailing party for purposes of recovery of attorney’s fees. (R. p. 314, l. 2 - p. 318, l. 4). Judge Dukes denied Respondent’s motions as to conversion. (R. p. 325, ll. 15 - 21). He

granted Appellants' motion as to Respondent's Unfair Trade Practices Cause of Action. (R. p. 325, ll. 22 - 24). Judge Dukes denied the Appellants' remaining motions. (R. p. 325, l. 25 – p. 326, l. 21).

At the close of testimony, the Respondent's counsel objected to any award of attorney's fees and renewed his motions made at the close of the Respondent's case. (R. p. 388, ll. 18 - 25). (R. p. 389, ll. 1 - 8). Judge Dukes granted the Respondent's motion with respect to the conversion causes of action. (R. p. 389, ll. 13 - 21). Judge Dukes informed the parties that the Respondent was entitled to an award of four month's rent and late charges. (R. p. 391, ll. 15 - 21). Judge Dukes expressed concerns as to the proof of damages for damages to the premises but did not rule on that issue at that time. (R. p. 390, l. 6 – p. 391, l. 14).

Judge Dukes requested briefing on matters pertaining to an award of attorney's fees. (R. p. 393, ll. 11 - 16). Appellants submitted a Memorandum to Judge Dukes. (R. pp. 489 - 495). Respondent also submitted a Memorandum of Law and also submitted copies of billing invoices or an *in camera* review. (R. pp. 480 - 487). (R. pp. 4 - 8).

On March 23, 2016, Judge Dukes entered his Order, awarding Respondent actual damages in the amount of Thirty-six Thousand Nine Hundred Fourteen and 50/100 (\$36,914.50) dollars and attorney's fees in the amount of Thirty-two Thousand One Hundred Ten and No/100 (\$32,110.00) dollars against both the Dennis Corporation and Daniel Dennis individually. This award consisted of four months of monthly rental, and interest. (R. p. 4). The Court awarded Respondent property damage in the amount of One Thousand Three Hundred Fifty and No/100 (\$1,350.00) dollars. (R. p. 6). Judge Dukes'

Order allows the Respondent the right to petition the Court for additional attorney's fees. (R. p. 7).

Appellants' appeal timely followed. (R. pp. 501 - 509). Subsequent to the filing of the Notice of Appeal, Judge Dukes issued an amended Form 4 Order vacating his prior judgement as to Daniel Dennis Individually. (R. p. 14 - 15).

FACTS

Appellant Dennis Corporation is an engineering firm with its principal place of business in Columbia, South Carolina. (R. p. 250, ll. 21 - 23). (R. p. 251, ll. 12 - 14). Dennis Corporation entered into an agreement with Beaufort County, South Carolina to manage its penny sales tax. (R. p. 339, ll. 21 - 23). Beaufort County requested that Appellant Dennis Corporation maintain office space in Beaufort County. (R. p. 339, ll. 21 - 25). As a result of this request, Appellant signed a lease for office space owned by Respondent located at 6 Buckingham Plantation Drive in Beaufort County for use as a field office. (R. p. 221, l. 24 – p. 236, l. 1). (R. p. 339, l. 17 – p. 340, l. 3). (R. pp. 397 - 413). The 3400 square foot office space included eight or nine offices, one conference room, two bathrooms and kitchen. (R. p. 254, ll. 14 - 18). (R. p. 255, ll. 1 - 5). At the time they entered into the lease agreement, the Appellant paid Respondent a security deposit consisting of one month's rent, or \$4,678.75. (R. p. 247, ll. 22 - 25).

Appellant maintained an office in Respondent's premises until January of 2011 when Beaufort County terminated its contract with Appellant. At the time of the termination, Beaufort County owed Appellant Dennis Corporation 1.5 million dollars. (R. p. 340, l. 24 – p. 341, l. 2). This unexpected termination had devastating consequences on

the Appellant's financial security and well-being. Appellant Dennis Corporation was unable to pay its bills and was nearly bankrupt. (R. p. 341, ll. 9 - 21).

In January of 2011, pursuant to the terms of the rental agreement, Appellant gave Respondent written notice, cancelling its contract for the Buckingham Plantation Drive space. (R. p. 221, ll. 4 - 14). (R. p. 340, ll. 9 - 15). (R. pp. 419 - 420). There is no issue with respect to the Appellant's right to cancel under the terms of the lease agreement or whether or not Appellant terminated pursuant to those terms. (R. p. 283, ll. 19 - 24). At the time of the cancellation, Appellants owed Respondent rent for October, November, December of 2010 and January of 2011. (R. p. 224, ll. 15 - 18). (R. p. 340, ll. 16 - 25). Appellants did not contest that they owed Respondent rent for October 2010 through January of 2011. (R. p. 340, ll. 19 - 22). Appellant did not pay the rent because it did not have the money to do so. (R. p. 340, ll. 16 - 22).

Appellant presented testimony that it left the premises in good condition without damage. (R. p. 331, ll. 11 - 22). (R. p. 332, l. 7 - p. 334, l. 12). (R. p. 343, l. 10 - p. 344, l. 7). Appellant denied that there was \$7,421.66 worth of damage to the property when they vacated the premises. (R. p. 346, ll. 20 - 25).

Appellant never denied that it owed four month's rent to Respondent. (R. p. 348, l. 14 - p. 349, l. 4). Appellant tried to resolve these issues with Respondent prior to the bench trial before Judge Dukes but was unable to do so. (R. 342, ll. 11 - 20).

STANDARD OF REVIEW

In a law case tried by the judge without a jury the standard of appellate review is limited to a correction of errors of law and a determination if there is any evidence to support the factual findings of the trial judge. *Cook v. Eller*, 298 S.C. 395, 380 S.E.2d.

853, (Ct. App. 1989); *Wigfall v. Fobbs*, 295 S.C. 59, 367 S.E.2d 156 (1988); *Patterson v. I.H. Servs. Inc.*, 295 S.C. 300, 368 S.E.2d 215 (Ct.App.1988)).

ARGUMENT

1. THE MASTER ERRED IN AWARDING RESPONDENT \$32,110.00 IN ATTORNEYS FEES.

The general rule in South Carolina is that attorney's fees are not recoverable unless they are authorized by contract or by statute. There is no right under the common law to attorney's fees. *Efco Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 635 S.E.2d 922 (2006); *Prevatte v. Asbury Arms*, 302 S.C. 413, 396 S.E.2d 642 (Ct.App.1990). Further, under South Carolina Law, attorney's fees and costs may only be awarded to the prevailing party. *Secklinger v. Vessel Excalibur*, 326 S.C. 382, 483 S.E.2d 775 (1997). As a general rule, the amount of attorney's fees to be awarded in a particular case is within the discretion of the circuit court. *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 385–86, 377 S.E.2d 296, 298 (1989). However, it is well settled under South Carolina Law that the damages award must be reasonable and supported by the evidence presented at trial. *Id.*; See also, *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296, 298 (1989).

The South Carolina Court has enumerated six factors for the court to consider when determining what constitutes a reasonable award of attorney's fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997); *Sexton v. Sexton*, 310 S.C. 501, 427 S.E.2d 665 (1993), appeal after remand, 321 S.C. 487, 469 S.E.2d 608 (Ct. App. 1996). Each of these factors must be met for the

reviewing Court to sustain a Lower Court's award of attorney's fees. *Seabrook Island Property Owners' Assn. v. Berger*, 365 S.C. 234, 616 S.E.2d. 431 (2005)

RESPONDENT WAS NOT THE "PREVAILING PARTY" AT TRIAL

The Respondent is not entitled to an award of attorney's fees as it was not the "prevailing party" at trial to justify and warrant an award of attorney's fees under South Carolina Law, certainly not an award of Thirty-two Thousand One Hundred Ten and No/100 (\$32,110.00) dollars. A prevailing party has been defined as, "... [t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered." *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (1964). A court determines the prevailing party by evaluating the degree of success obtained. *Commissioner, Immigration and Naturalization, et al. v. Marie Lucie Jean*, 496 U.S. 154, 110 S. Ct. 2316, 110 L.Ed.2d 134 (1990); *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990).

In the above-referenced case, evaluating the degree of success obtained (or not obtained) by Respondent, Respondent was not the prevailing party in this action. Respondent brought three separate causes of action against the appellant arising out of the January 31, 2008, lease agreement. (R. pp. 18 - 23). With respect to the First Cause of Action, the Respondent sought recovery against Defendants for back rents and late charges (rent for October 2010, November 2010, December 2010 and January 2010, with late charges assessed through November of 2013). (R. p. 20). Prior to the matter being tried, Appellant conceded that it owed the Respondent four months' rent, but denied that they owed any of the remaining amounts claimed by Respondent.

In addition to the claims asserted in its First Cause of Action, Respondent sought to recover damages to walls and carpet “beyond normal wear and tear” in the amount of approximately \$7,421.60 minus one month’s security deposit. (R. p. 247, ll. 18 - 21). Respondent also asserted a Second Cause of Action for Conversion and a Third Cause of Action for Unfair Trade Practices, seeking an award of treble damages and attorney’s fees. (R. pp. 21 - 22).

At trial, the Court awarded Respondent four months’ rent (which Appellant conceded it owed) minus the Defendants’ one month’s security deposit previously paid to the Respondent by the Appellant. (R. pp. 4 - 8). The Court rejected the Respondent’s claims that it was entitled to an award of damages to the property in the amount of \$7,421.60, informing the parties that Respondent had not established any amount of recovery over a potential recovery of \$1,100.00 (This amount was increased to \$1,350.00 in Judge Dukes Final Order. (R. pp. 5 - 6). Finally, the Court found for the Appellant with respect to the Respondent’s Second and Third Causes of Action. (R. p. 7).

Evaluating the degree of success obtained by the Respondent, it is patently obvious that the Respondent was not the prevailing party for purposes of its suit against Appellant. The Court awarded Respondent the four (4) month’s rent that Appellant already conceded was due. With respect to the claimed amount for damage to the property, the Lower Court awarded Respondent a figure far less than the figure claimed at trial. Finally, the Court found for Appellant with respect to the Conversion and Unfair Trade Practices causes of action. Therefore the Respondent is not the “prevailing” party under South Carolina Law for purposes of an award of attorney’s fees and costs in this action and is not entitled to an award of attorney’s fees and costs.

2. THE AMOUNT OF ATTORNEYS FEES AWARDED TO RESPONDENT IS EXCESSIVE AND NOT SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL.

Even if the Respondent is entitled to an award of attorney's fees and costs as the "prevailing party" (which the Appellant asserts it is most definitely not), applying the applicable factors for the Court to consider in awarding attorney's fees and costs, the Respondent failed to establish its entitlement to \$32,110.00 in attorney's fees based on a professional rate of \$300.00 an hour under the relevant factors set forth under South Carolina Law.

First, the Respondent's counsel failed to present any evidence of a fee agreement with the Respondent. At trial, Respondent's counsel testified that his copy of the fee agreement was, "...probably in my office, my file somewhere." (R. p. 382, l. 21 – p. 383, l. 1). Respondent's counsel testified that he was familiar with Rule 1.5(b) which requires fee agreements to be in writing. (R. p. 383, ll. 2 - 4). Further, while the Court's Order discusses an *in camera* review of invoices, no mention is made of any review of a fee agreement by the Court. (R. pp. 6 - 7). Therefore, the award of any attorney's fees and costs to the Respondent is erroneous and improper under South Carolina Law.

Even if an award of attorney's and costs is not erroneous, the amount of attorney's fees and costs awarded to Respondent is excessive under the factors set forth by the South Carolina Courts in evaluating attorney's fees and costs. *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997); *Sexton v. Sexton*, 310 S.C. 501, 427 S.E.2d 665 (1993), appeal after remand, 321 S.C. 487, 469 S.E.2d 608 (Ct. App. 1996).

a. Nature, Extent, and Difficulty of Services Required

This case arose out of an alleged breach of a lease agreement. It was not a complex case and was never designated as one. The amount of written discovery engaged in by the parties was not unusual for litigated matters. Respondent's counsel testified that in addition to the Summons and Complaint, he served Interrogatories and Request to Admit. (R. p. 383, 9 - 12). (R. p. 384, ll. 3 - 5). Respondent's counsel testified that he wrote approximately 10-15 letters. (R. p. 384, ll. 13 - 16). There were only two depositions taken in this case - the depositions of Defendant Dan Dennis as a fact witness, and also as a Rule 30(b) (6) designee of the Dennis Corporation. These depositions were taken on the same day in Columbia, South Carolina and took approximately five (5) hours. (R. p. 383, ll. 13 - 22). Respondent's counsel filed a Motion for Summary Judgment which was argued via telephone. (R. pp. 217 - 219). The case was also mediated. Mediation took approximately a half day. (R. p. 384, ll. 17 - 19). At trial, Respondent's counsel produced an affidavit, without any attached billing records, that all of his pre-trial activity resulted in attorney's fees and costs in the amount of \$28,810.00. (R. p. 385, ll. 13 - 18). This figure did not include any fees and costs for trial.

The case was tried in less than one day with three witnesses being called to testify. (R. pp. 212 - 395). The issues and causes of action in this case were not extraordinary difficult or novel. While this case contained a number of contested issues, it did not contain contested issues beyond the realm of the expected. The nature, extent and difficulty of this case and the services required do not justify an award of approximately of the claimed attorney's fees at trial of \$28,110.00, much less the additional \$4,000.00 awarded at trial for a total attorney's fees and cost award of \$32,110.00.

b. Time and Labor Devoted to Case

In support of its claim for attorney's fees, the Respondent submitted an affidavit to the Court claiming both attorney's fees already incurred as well as future attorney's fees. The affidavit contained no breakdown showing work actually done by Respondent's counsel. No actual bills were attached to the affidavit. (R. pp. 416 - 418). No evidence was presented at trial that this amount was either charged to Respondent or paid by Respondent to its attorney. Further, there was no hourly breakdown of the rate used to calculate the requested figure requested at trial or the \$32,110.00 ultimately awarded by Judge Dukes. (R. pp. 416 - 418). Using the \$300.00 an hour rate claimed for future damages, this figure would constitute approximately 100 hours of work on this case. It was impossible to tell from the affidavit what counsel for Respondent's counsel did for approximately one hundred hours. The recitation of work performed contained in the Plaintiff's Memorandum of Law does not justify 100 hours of legal work.

The conclusionary affidavit submitted by Respondent's counsel was legally insufficient. *See Griffith v. Griffith*, 332 S.C. 630, 644, 506 S.E.2d 526, 534 (Ct. App. 1998) (noting that conclusory information of time expended and hourly rate charged is insufficient to provide the evidentiary basis necessary to support an award of attorney's fees.) *See also Johnson v. Johnson* 288 S.C. 270, 341 S.E.2d 811 (Ct. App. 1986). It did not and does not provide the Court with any basis to evaluate the actual time spent in this case and to make the necessary factual findings to support an award of attorney's fees. It does not justify such an excessive award of attorney's fees in this case.

The Court justified this award by referring to an *in camera* review of, "...invoices spanning more than two years for legal services provided to the Plaintiff." (R. pp. 6 - 7).

However, these invoices were not made part of the record in this case. In addition, the fact that Respondent agreed to pay these charges or was charged these fees by its counsel does not make those fees reasonable or recoverable. *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997).

This amount is excessive based on the nature of this case. Although the undersigned submits that the Respondent is not entitled to any award of attorney's fees, the figure claimed at trial, and the \$32,110.00 awarded by the Court is not supported by any evidence before the Court and is patently excessive and erroneous.

c. Professional Standing of Counsel and Fee Customarily Charged for Similar Services

At trial, the Respondent's counsel testified that he has been a member of the bar for approximately sixteen (16) years. (R. p. 387, ll. 17 - 19). He testified that since that time he had tried "three or four" jury trials. (R. p. 387, ll. 20 - 22). The undersigned brought the Court's attention to the fact that he has been a member of the South Carolina Bar for over two times that figure, had tried approximately 1800 jury trials and his hourly rate and the rate he is charging his client in this case is below the \$300.00 an hour claimed by the Respondent. (R. p. 387, ll. 22 - 24). Further, there is no evidence beyond the assertions and representations of Respondent's counsel that \$300.00 an hour is the fee customarily charged in the locality for similar legal services. Respondent's counsel submitted no other proof in this regard. The only evidence presented as to the reasonableness of this rate came from the Respondent's counsel who clearly has an interest in the Court's award of a high hourly rate.

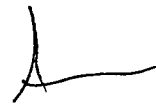
d. Beneficial Results Obtained

As set forth above, the Appellant contends that the Respondent was not the prevailing party. Respondent's recovery was far less than the amount claimed throughout litigation and at trial. An award of attorney's fees based on those circumstances is not warranted, especially when the amount of attorney's fees claimed was nearly equal the amount of actual damages awarded by the Court in this case and, in light of Judge Dukes' provision that Respondent can petition the court for additional attorney's fees, my even exceed the actual damages award in this case. (R. p. 7). Therefore, the results obtained by Respondent's counsel on behalf of his client do not justify an award of approximately \$32,110.00 in attorney's fees in this case.

CONCLUSION

For the reasons set forth above, the undersigned submits the award of attorney's fees in this case was excessive and not based upon the evidence presented at trial. The Master erred as a matter of law in awarding Respondent attorney's fees and costs in the amount of \$32,110.00 and his Order awarding Respondent attorney's fees and costs in the amount of \$32,110.00 is clearly erroneous and should be reversed by this Court.

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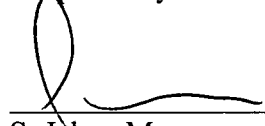
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CERTIFICATE OF COUNSEL

The undersigned counsel for Appellants certifies that the Final Brief of Appellants
complies with Rule 211(b) SCAR.

Respectfully submitted,



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