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APR 28 2017

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Cordell Maddox, Circuit Court Judge

Case No. 2017-000294

Alexander Pastene

Appellant,

v.

Marion R. McMillan and
Synergy Spine Center, PA

Respondents.

APPELLANT'S ANSWER TO RESPONDENTS' RETURN
OPPOSING MOTION IN RESPONSE TO ORDER OF DISMISSAL
BY SOUTH CAROLINA COURT OF APPEALS
FILED APRIL 4, 2017, RULES, 207 & 262 SCACR

In accordance to Rule 260 SCACR, *The Clerk shall remit the case to the lower court...**unless a motion to reinstate the appeal has been actually received by the court within fifteen (15) days of filing of the order of dismissal, the day of filing being excluded*** (Bolded for emphasis). The Appellant cooperated with the Clerk of Court's Office, amended misunderstandings, showed good cause, notified the Respondents, and demonstrated a desire to adjust to any and all of the regulations set by these Honorable Courts.

Conversely, since day one the Respondent and his attorney threw red herrings onto the instant case by filing a groundless countersuit for defamation—a clear sophism to the trained eye—and removed the case from Summary Court to Common Pleas to evade paying what he owes and a trial on the merits.

Moreover, the Respondent and his attorney manipulated procedure *ab initio* claiming default where none had occurred, against South Carolina law, and State of South Carolina policy, making every subsequent procedure since about September 12, 201~~4~~², moot, as in, should not count.

Specifically, the Appellant Answered the Respondents' Summons & Counterclaim within (1) one week, by timely notifying them and the court, see rubber stamp by the court acknowledging receipt of the Appellant's timely Answer enclosed herewith marked Exhibit 1.

Nonetheless, the attorney for the Respondent shrewdly evaded a jury trial on the merits by:

a. Filing a false notarized Affidavit stating that the Appellant was in default by failing to timely Answer Respondent's Counterclaim (which is not true), see copy enclosed herewith marked Exhibit 2;

b. Printing a false and misleading mailing address in the attorney's stationery that prompted the USPS to return the Appellant's Answer to the Counterclaim, see copy of Respondent's attorney false address marked Exhibit 3.

c. Failing to advise or apprise the USPS of the attorney's forwarding address.

The Appellants' notification did not cause prejudice to the Respondents, however, the Respondent used procedure to boycott the merits of the case at bar to avoid paying his debt.

First, the Appellant used religious excuses to terminate the first agreement between the parties, although Respondent subsequently entered into a new agreement with the Appellant where religion seemingly did not play a role; a contradiction.

Then, Respondent threatened and extorted the Appellant via email, before the South Carolina Attorney General, at a time when the Appellant was a patient of the Respondent (violation of doctor-patient relation) by falsely threatening the Appellant of having committed Medicaid fraud, which accusations that office found to be groundless; the Respondent's accusations may have been intentional, for, he knew that the Appellant had been left destitute after a Jasper County Court erroneously sold his land assessed at \$360,000, in a public auction (his source of retirement) while his case was

on appeal, oddly before these honorable courts.

Please note that despite the Appellant's decision to cut his losses and sue the Respondent in Magistrate Court, and the Respondent having been denied a Motion to Dismiss in Summary Court, see copy marked Exhibit 4, the Respondent shrewdly changed attorneys and removed the case to Common Pleas based on an illusory Defamation cause that was never supported by any evidence whatsoever!

Also, the Respondent and his attorney evaded interrogatories, although deposed the Respondent during a hearing in the Appellant's absence before Judge Cordell Maddox, who allowed it, despite having been fraught with untruths and inaccuracies.

Moreover, attorney David A. Wilson, abetted his client in his opprobrious and unreasonable endeavors for profit, whereas his unethical actions should be examined by proper South Carolina authorities.

The Appellant has been consistent in cooperating and conforming to South Carolina law and procedure, and despite minor errors and misunderstandings he has been keen in promptly correcting and amending, while pleads to reinstate.

Respectfully submitted,

On this 25th day of April, 2017

David A. Wilson, Esq.
For Respondent
WILSON & ENGLEBARDT, LLC
200 Whitsett Street - Suite 100-B
Greenville, SC 29601
864-232-2329

Signed: _____



Alexander Pastene, Esq.
Appellant Appearing *pro se*
P.O. Box 22298
Hilton Head Is., SC 29925
843-605-5266

Exhibit 1

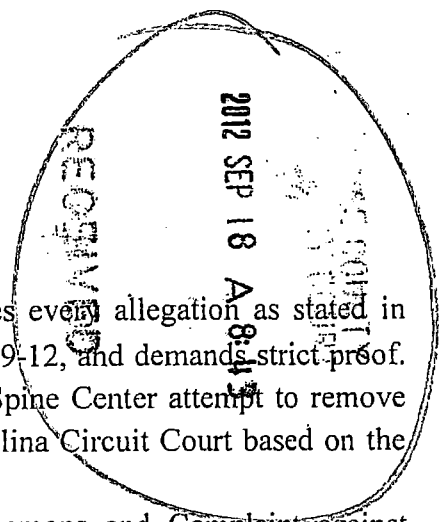
FILED OCOONEE, SC
IN THE STATE OF SOUTH CAROLINA
COUNTY OF OCOONEE
BEVERLY H. WHITFIELD
CLERK OF COURT

IN SENECA MAGISTRATE COURT
CIVIL ACTION NO: 2012-CV-3710-100244

Alexander Pastene
2012 OCT 11 PM 4 51

PLAINTIFF'S RESPONSE TO DEFENDANT'S
SUMMONS & NOTICE, ANSWER
AND COUNTERCLAIM

Plaintiff,
Vs.
Marion R. McMillan and Synergy
Spine Center of Seneca, S.C.
Defendants.



Comes now the Plaintiff Alexander Pastene, and denies every allegation as stated in defendants' Summons & Notice, Answer & Counterclaim of 8-29-12, and demands strict proof. Additionally, he opposes defendants McMillan's and Synergy Spine Center attempt to remove the instant case from Oconee's Summary Court's to South Carolina Circuit Court based on the following arguments:

1. That, on June 18, 2012, the Plaintiff filed his Summons and Complaint against defendants Marion R. McMillan and Synergy Spine Center in Magistrate's Court and not Circuit Court. That, On June 25, 2012, the defendants filed a Motion for Dismissal. On July 23, 2012 a hearing took place to resolve the legal arguments raised by the defendants. Then, on 8-7-12, the defendants filed two (2) jurisprudence cases concerning "meeting of the minds". On 8/16/12 the Magistrate Court denied the defendants' motion to dismiss.

That, according to Rules 7,8, et seq., SCRMC, Rule 12(a) (b) SCRCP et seq., the defendants' SUMMONS AND NOTICE and ANSWER AND COUNTERCLAIM dated August 29, 2012, was not timely filed, and although pleadings may be amended at any time before or during the trial or upon appeal, the allowance of the amendment applies only to promote "substantial justice" (Rule 14, SCRMC); not evade it as in the case at bar.

2. That, the amount demanded by the Plaintiff in the case at bar is \$7,500.00, and not \$25,000.00, which action falls within this Honorable Summary Court's jurisdiction as filed by the Plaintiff under the SCRMC.

3. That, according to the doctrine of *res judicata*, where identical parties or their privies, in identity of subject matter, adjudication of the issue in the former lawsuit exist, then in such a case the unsuccessful litigant is precluded from re-litigating the claims that were actually litigated and any which could have been litigated, see Ford v. Watson 282 SC 66, 316 SE 2d 429 (Ct App., 1987). Clearly, the defendants did not like this Honorable Court's proceedings and Order and now wish to remove it to another court to start the case over again.

4. That, based on the doctrine of Malicious Prosecution recognized by the Supreme Court of South Carolina (SCSC) as a cause of action for the prosecution of any ordinary civil action, which elements are: the institution or continuation of original judicial proceedings, either civil or

criminal; by or at the instance of the defendant; the termination of such proceedings in the plaintiff's favor; maliciousness in instituting such proceedings; want of probable cause resulting injury or damage; see Gaar v North Myrtle Beach Realty Co. 287 SC 525, 339, SE 2d 887 (Ct App 1986), and Cisson v. Pickens Savings & Loan Association, 258 SC 37, 186 SE 2d 822 (1972), wherefore the defendants' untimely answer and counterclaim should be denied.

Maliciousness on the part of the defendants has been ongoing since the Plaintiff demanded payment and the defendants responded by: first, defaming him with false accusations of insanity by the medical doctor he trusted; blackmailing the plaintiff to deter him from collecting and suing him; unfairly denying the Plaintiff's allegations despite an abundance of documentary evidence to the contrary; attempting to remove the case to another court using groundless counterclaims and false accusations to further deter and intimidate him. Moreover, the defendants' resolve to avoid paying the Plaintiff for services rendered, which they promoted, accepted and declared complete satisfaction are now paying fees to two attorneys to help them evade their obligations shows a quality of bad faith and viciousness that should be taken into account in deciding the case at bar, see C.A.N. Enters., Inc. v. S.C. Health & Human Serv. Fin. Comm'n., 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

5. That, this Honorable Court's Order of 8-16-12 denied the defendants' Motions to Dismiss, whereas the determination of intent to be bound depends not only on words but conduct as which must be determined in either a bench or jury trial.

Wherefore, the Plaintiff pleads with this Honorable Court that, the defendants' captioned "Summons & Notice" & "Answer & Complaint" is dismissed with prejudice and the defendants are found in default; the bench trial on October 15, 2012, at 10am in Magistrate's Court, Seneca, S.C. is confirmed; it awards compensatory and punitive damages plus fees and costs given the defendants' willfulness and malice; so, that justice can be done between the parties.

Respectfully submitted,



Alexander Pastene
Plaintiff, appearing *pro se*
P.O. 22298
Hilton Head Is., S.C. 29925
843-227-2695

On Hilton Head Island, S.C.
On this 12th day of September, 2012

EXHIBIT 2

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS

Case No.: 2012-CP-37-00902

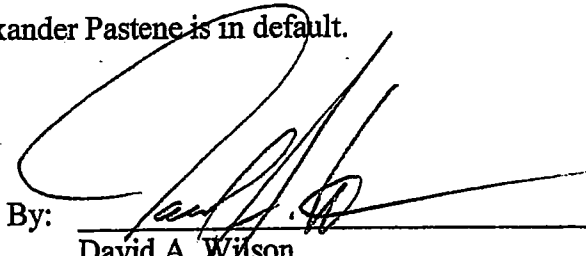
Alexander Pastene,
Plaintiff,

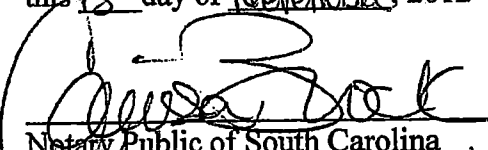
v.

Marion R. McMillan and Synergy Spine
Center, P.A.,
Defendants.

**AFFIDAVIT OF DEFAULT AS TO
DEFENDANT'S COUNTERCLAIMS**

PERSONALLY appeared before me David A. Wilson, who, being duly sworn, states that he is the Attorney for the Defendants and that the Summons and Notice, Answer and Counterclaim were served on the Plaintiff by regular mail on September 6, 2012 making the Answer to the Counterclaim due on or before October 11, 2012. ~~More than thirty-five (35) days have elapsed since the service of the Summons, Notice and Counterclaim, exclusive of the date of service, and no Answer, Notice of Appearance or other response to the pleading has been served upon him as required by the Summons and Notice in this action.~~ Additionally, the Alexander Pastene is not a member of the military service. Accordingly, the Plaintiff Alexander Pastene is in default.

By: 
David A. Wilson
200 Whitsett Street, Suite B
Greenville, South Carolina 29601
(864) 232-2329
Attorney for Defendants

Sworn to and subscribed before me
this 13th day of November, 2012

Notary Public of South Carolina
My Commission Expires: 11/8/2011

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 NOV 14 A 11:41

August 30, 2012

The Honorable M. Todd Simmons
Magistrate's Court
207-A East North 1st Street
Seneca, SC 29678

**RE: Alexander Pastene v. Marion R. McMillan and Synergy Spine Center, P.A.
Case No.: 2012CV3710100244**

Dear Judge Simmons:

Enclosed please find the original and three copies of the Summons and Notice and Answer and Counterclaim in the above-referenced matter along with the original and three copies of the Affidavit of Service upon the Plaintiff. Please return the filed copies to me in the enclosed self-addressed stamped envelope.

Additionally, as our Counterclaims are in excess of the jurisdictional limit for Magistrate's Court, please transfer this matter to Circuit Court. If the court requires a more formal motion for the transfer, please let me know and I will be happy to file one.

Respectfully,



David A. Wilson

DAW/ccb

Enclosures

Cc: Dr. Marion McMillan
Alexander Pastene

STATE OF SOUTH CAROLINA)
)
 COUNTY OF OCONEE)
)
 ALEXANDER PASTENE,)
)
 Plaintiff,)
)
 vs.)
)
 MARION MCMILLAN AND)
 SYNERGY SPINE CENTER, P.A.,)
 Defendants.)
 _____)

IN THE MAGISTRATE'S COURT

2012CV3710100244
CIVIL CASE NUMBER

ORDER

CERTIFIED TRUE COPY
JUDGE M. TODD SIMMONS

This matter comes before the Court upon the filing of a Motion to Dismiss by the Defendants. A hearing was held on the matter on July 23, 2012 at 1:34 p.m. Both parties were present and the Defendants were represented by attorney Gruber Sires.

At controversy in this matter is the existence or non-existence of a contract between the parties. Specifically, the Plaintiff claims he has an oral contract with the Defendants wherein he agreed to provide marketing services in exchange for a fee. While the Defendants admit there were discussions of a business relationship between the parties, the Defendants assert that there is no contract and that all actions of the Plaintiff were gratuitous in nature. Specifically, the Defendants' Motion to Dismiss is based upon two theories. The first is that the agreement must be in writing as required by the uniform commercial code. The second is that there was never a meeting of the minds between the parties, and no contract was ever finalized or entered into by the parties. During the hearing the undersigned ruled that the uniform commercial code does not apply to this controversy as the alleged contract was for services and not goods. The second issue regarding the "meeting of the minds" was taken under advisement and both parties submitted additional briefs, affidavits, and case law in support of their respective positions. This Order addresses the second issue raised by the Defendants in their Motion to Dismiss.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267 (Ct.App.2004). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. Gaskins v. Blue Cross-Blue Shield of South Carolina, 271 S.C. 101 (1978); Moore v. Palmetto State Life Insurance Co., 222 S.C. 492 (1952). If agreement is manifested by words, the contract is said to be express. Thomas v. Lomax, 82 Ga.App. 592 (1950). If it is manifested by conduct, it is said to be implied. Dowling v. Charleston & W.C. Ry. Co., 105 S.C. 475 (1913). In either case, the parties must manifest a mutual intent to be bound. Hughes v. Edwards, 265 S.C. 529 (1975); Shealy v. Fowler, 182 S.C. 81 (1936). Without the actual agreement of the parties, there is no contract. Edens v. Laurel Hill, Inc., 271 S.C. 360 (1978).

MTS
1 8/16/12

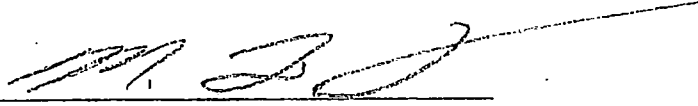
There is no doubt in this controversy that there were negotiations that occurred that could have led to a contract. The question is whether or not there was a mutual intent to be bound. The answer to that question can possibly be answered through not only the determination of the words exchanged between the parties, but also the conduct of the parties. Without commenting on the weight of evidence in favor of the non-moving party, there is some evidence which may indicate that the parties intended to be bound by an agreement. There is no doubt that conduct and words from both parties were exhibited which support the positions of both parties. When viewing the evidence presented and the inferences derived therefrom in the light most favorable to the Plaintiff, there exists a question as to whether there was a meeting of the minds between the parties. This question must be determined by the ultimate finder of fact either through a bench trial or a jury trial.

Based upon the forgoing:

IT THEREFORE ORDERED that ~~the Defendants' Motion to Dismiss is DENIED,~~ and

IT IS SO ORDERED!

August 16, 2012
Seneca, South Carolina



M. TODD SIMMONS
CHIEF MAGISTRATE

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Trial Court Case No. 2012CP3700902 - Cordell Maddox, Circuit Court Judge

Case No. 2017-000294

Alexander Pastene

Appellant,

v.

Marion R. McMillan and
Synergy Spine Center, PA

Respondents.

PROOF OF SERVICE

I certify that on today's date April 25, 2017, I have served the Appellant's Answer to Respondents Return of April 2017, on Marion R. McMillan by depositing a copy of it in the United States Mail, postage prepaid, on April 20th, 2017, addressed to his attorney of record, David A. Wilson, 200 Whitsett St. Suite 100B, Greenville, SC 29601.

Signed: _____

Alexander Pastene, Esq.
Appellant Appearing *pro se*
P.O. Bix 22298
Hilton Head Is., SC 29925
843-605-5266

David A. Wilson, Esq.
For Respondent
WILSON & ENGLEBARDT, LLC
200 Whitsett Street - Suite 100-B
Greenville, SC 29601
864-232-2329

Alexander Pastene
10 BOX 22298
Hilton Head Is.
SC 29925



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SC Court of Appeals

South Carolina Court of Appeals
Clerk of Court

ATTN: MS. EMILIA SMITH
MS. V. Clair Aden

P.O. BOX 11629 - 1220 SENATE ST.

Columbia, SC ~~29209~~ 29211

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