

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable J.C. Nicholson, Jr., Circuit Court Judge
Case No. 2015-CP-10-942

Robin S. Forman, as Personal
Representative of the Estate of
Burton J. Apat,

Respondent,

v.

National Dental Systems, LLC
d/b/a DentalSmart,

Appellant.

RESPONDENT'S INITIAL BRIEF

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SC Court of Appeals

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I. STATEMENT OF ISSUE ON APPEAL

- A. Whether National Dental Submitted Admissible Evidence Which Created A Genuine Issue of Material Fact With Regard To The CBC Claim?
- B. Whether National Dental Was Denied a Full and Fair Opportunity to Conduct Discovery?

II. STATEMENT OF THE CASE

This case involves a business loan agreement entered into on or about 5 January 2013, between the Appellant, National Dental Systems, LLC d/b/a DentalSmart, (“National Dental”) and the Respondent, Burton J. Apat (“Apat”). On 2 March, 2016, Mr. Apat’s Estate sued National Dental alleging it had breach two of the Loan Agreement’s provisions: one requiring National Dental to repay the loan (the “Loan Claim”) and the other requiring National Dental to pay for construction work performed by CBC on its premises and as required by the Agreement (the “CBC Claim). (*Compl.* ¶¶ 19-30). Apat sought declaratory and injunctive relief, as well as actual damages and attorney’s fees. (*Compl.* ¶¶ 5-6). In its Answer and at the summary judgment hearing, National Dental admitted that the \$100,000 loan has not been repaid (*Answer*, ¶ 7).

On 9 June 2016, Apat moved for summary judgment on the grounds that the Agreement is unambiguous and the Court need not look beyond its four corners to determine its meaning and therefore summary judgment is appropriate. Apat further moved for summary judgment as to the contract payment obligation of National Dental to CBC in the amount of \$56,654.12 – the CBC Claim.

The Circuit Court heard Apat’s motion on 3 August, 2016. (*Order*, p.1). By written order, dated 17 August, 2016, the Circuit Court granted Apat partial summary judgment in the amount of \$56,654.14 on the CBC Claim. (*Order*, p.3; *SCRCP Form*

ACF Order I, p.1). On 8 September, 2016, National Dental moved for reconsideration (*Recon. Mot.*, pp. 1-2). The Circuit Court denied National Dental's motion on 19 September, 2016. (*SCRCP Form ACF Order II*, p.1). This appeal followed.

III. STATEMENT OF FACTS

This case involves a short term, high risk business loan agreement entered into on or about 5 January 2013, between the Appellant, National Dental Systems, LLC d/b/a DentalSmart, ("National Dental") and the Respondent, Burton J. Apat ("Apat"). The principal amount of the loan was \$100,000, as memorialized in the written one page Loan Agreement ("The Agreement"). The Agreement contained a provision requiring that National Dental make certain payments to CBC as part of the Agreement. The Agreement was drafted by the President of National Dental, Brian Schleifer. (*Schleifer Aff.* ¶ 4). Schleifer and RJ Adolphi signed on behalf of the borrower, National Dental. Burton Apat signed as the lender. The Agreement also delineated the term of the loan as 30 days. The Agreement provided that the interest for the 30 day term is \$15,000. The Agreement further indicated that "if the loan is not repaid in 30 days, the Interest is doubled to \$30,000." The Agreement then states "Interest shall accrue in 30 days increments." The Agreement also contains a named third party beneficiary, Complete Building Corporation ("CBC"). The Agreement requires that "...the CBC payments shall be made in full in two (2) equal payments with the second payment within 60 days."

After the Agreement was signed, National Dental received \$100,000.00 in loan proceeds from Apat. (*Compl.* ¶ 8, *Answer* ¶ 5; *Apat Aff.* ¶ 18; *Schleifer Aff.* ¶7). National Dental made two \$15,000 interest payments, but to date, has made no other interest

payments, has not repaid any of the \$100,000 principal, nor has National Dental paid the \$56,654.12 due to CBC.

At the summary judgment hearing in this case, National Dental introduced only the Affidavit of Brian Schleifer. Mr. Schleifer's affidavit made no mention of Complete Building Corporation nor did it mention the CBC payments. The Circuit Court heard oral argument from both parties regarding the Loan Claim and the CBC Claim. The Court denied Plaintiff's Motion for Summary Judgment as to the Loan Claim, but found that "[National Dental] did not dispute, by way of the submission of admissible evidence, that it owed CBC the sum of \$56,654.12 as alleged in [Mr. Apat's] motion and supported by an affidavit." (*Order*, p.2). The Circuit Court, held, as a matter of law, that (a) the CBC provision was a separate and independent covenant, distinct from the covenant to repay the \$100,000 loan, (b) the CBC provision was unambiguous and could be read from the four corners of the loan agreement, and (c) no genuine issue of material fact existed as to National Dental's "breach of the CBC covenant, or as to the amount owed CBC." (*Order*, pp. 2-3).

IV. ARGUMENT AND CITATION OF AUTHORITY

A. National Dental Failed to Present Any Admissible Evidence To Refute The CBC Claim

The Schleifer Affidavit, upon which National Dental relies, makes absolutely no mention of the CBC Claim. (*See, Schleifer Aff.*).¹ The Circuit Court correctly concluded that National Dental "did not dispute, by way of the submission of admissible evidence"

¹ "Error! Main Document Only. Where the appellant relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under this rule, to grant summary judgment, if, under the facts presented by the respondent, he was entitled to judgment as a matter of law." *Garrett v. Reese*, 262 S.C. 327, 329, 204 S.E.2d 432, 433 (1974) (quoting, *Cisson v. Pickens S. & L. Ass'n*, 258 S.C. 37, 186 S.E.2d 822)

that the CBC Claim was owed to Complete Building Corporation. The Schleifer Affidavit addressed only the Loan Claim. National Dental provided no other evidence by way of Affidavit or otherwise to refute the CBC Claim. Apat, on the other hand, introduced the Affidavit of Victor Apat in support of its Motion for Summary Judgment which provided the exact amount of the debt relative to the CBC construction work. (*See, Apat Aff.*) Nothing in the Schleifer affidavit addressed the CBC Claim nor did National Dental seek to introduce any other admissible evidence to refute the CBC Claim. Accordingly, the Circuit Court properly concluded that National Dental “did not dispute, by way of the submission of admissible evidence” that the CBC Claim was owed to Complete Building Corporation.

B. National Dental Failed to Argue Before the Circuit Court That It Needed to Engage in Discovery to Refute the CBC Claim

In its appeal, National Dental now argues that it should be afforded the opportunity to conduct discovery as to the CBC Claim. National Dental did not raise its need for discovery in Defendant’s Brief in Opposition to Summary Judgment, in the Schliefer Affidavit nor in Defendant’s Motion to Reconsider. (*See, Def. Brief in Opp.*; *See, Scheilfer Aff.*; *See, Recon. Mot.*). The Circuit Court correctly granted Partial Summary Judgment as to the CBC Claim as a matter of law, however in any event, Appellant failed to raise its claim that discovery was not complete before the Circuit Court.² Accordingly,

² “The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989); *Osborne v. Adams*, 338 S.C. 82, 525 S.E.2d 268 (Ct.App.1999). An abuse of discretion occurs when the trial judge’s ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support. *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565 (1987); *Osborne, supra*.

We note initially that Bayle did not move for a continuance in which to pursue further discovery. Therefore, this issue is not preserved for review on appeal. *See Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E.2d 495 (1992)(stating whether court erred in granting summary judgment while appellants had motion to compel outstanding was not preserved when appellants failed to move for a continuance and did not request motion for summary judgment be held in abeyance until after ruling on

the Circuit Court's granting of Partial Summary Judgment as to the CBC Claim was not premature.

V. CONCLUSION

Based upon the foregoing arguments, evidence in the record and citation of authority, the Respondent, Robin S. Forman, as Personal Representative of the Estate of Burton J. Apat, respectfully requests that this Court affirm the Circuit Court's grant of partial summary judgment in the amount of \$56,654.14 on the CBC Claim.

Respectfully Submitted

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discovery motion); *Pryor v. Northwest Apartments, Ltd.*, 321 S.C. 524, 469 S.E.2d 630 (Ct.App.1996)(holding that issue as to whether judge erred in granting summary judgment because discovery requests were outstanding was not preserved where appellant did not ask court to continue case so discovery could be completed).

Bayle did not present argument regarding the necessity for additional discovery until after the motion for summary judgment had **743 been granted. DOT briefly addressed the discovery issue in anticipation of Bayle's response to its motion for summary judgment. This is insufficient to preserve the issue for review. See 4 C.J.S. *Appeal & Error* § 219 (1993)(“As a general rule, the objection in the trial court must have been made by the party who urges the error in the appellate court.”). *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742–43 (Ct. App. 2001)

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I, Salah H. Hibri, Esquire, hereby certify that on 1 May, 2017, I served one copy of **Respondent's Initial Brief**, submitted by the Respondent, Robin S. Forman, as Personal Representative of the Estate of Burton J. Apat, on the following via United States Mail, postage pre-paid, and addressed as follows:

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Salah H. Hibri, Esquire

Mount Pleasant, South Carolina
1 May 2017

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VIA UPS OVERNIGHT

The Honorable Jenny Abbott Kitchings
Clerk of Court
SOUTH CAROLINA COURT OF APPEALS
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Columbia, SC 29211

RE: Robin S. Forman, as Personal Representative of the Estate of Burton J. Apat, v. National Dental Systems, LLC d/b/a DentalSmart

Civil Action No.: 2016-CP-10-1022 (Honorable J.C. Nicholson, Jr. - Charleston County)
MLF File No: 16-010

Dear Mrs. Kitchings:

Enclosed herewith for filing with the Court of Appeals, please find an original and two (2) copies of Respondent's Initial Brief and Proof of Service in the above-referenced appeal.

If you have any questions, please do not hesitate to contact me.

With kind regards, I remain

Yours very truly,

THE MASON LAW FIRM, P.A.



Salah H. Hibri

SHH/

Enclosures as stated

CC: All counsel of record

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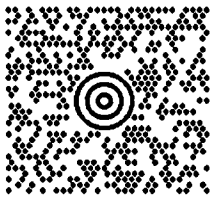
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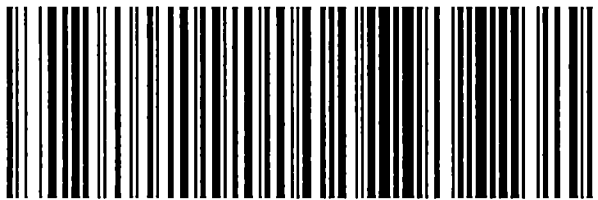
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