

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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Appeal From The Charleston County  
Court of Common Pleas  
Honorable J. C. Nicholson, Circuit Court Judge  
Civil Action No.: 2016-CP-10-1022

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MAY 11 2017

**SC Court of Appeals**

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

Respondent,

v.

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

Appellant.

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**APPELLANT'S INITIAL REPLY BRIEF**

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The Appellant, National Dental Systems, LLC, d/b/a DentalSmart ("National Dental"), respectfully submits this Initial Reply Brief in response to the Initial Brief of Respondent, Robin S. Forman, as Personal Representative of the Estate of Burton J. Apat ("Mr. Apat").

## **ARGUMENT AND CITATION OF AUTHORITY**

**A. The Schleifer Affidavit Submitted By National Dental In Opposition To The Motion For Summary Judgment Presented Admissible Evidence Refuting The CBC Claim.**

The affidavit of Brian Schleifer (the "Schleifer Affidavit") submitted by National Dental in opposition to Mr. Apat's motion for summary judgment presented admissible evidence to refute the claim that, pursuant to the terms of the Loan Agreement, National Dental is required to pay for construction work performed by Complete Building Corporation ("CBC") on its premises (the "CBC Claim"). Specifically, the Schleifer Affidavit presented evidence supporting National Dental's assertion that the Loan Agreement expressly limited the right of recovery after default to a 6% percent no-liability, equity-only interest in National Dental. (*Schleifer Aff.*, paras. 9-13).

The Circuit Court's conclusion that National Dental did not dispute the CBC Claim by way of the submission of admissible evidence ignores both the facts and the law. National Dental's assertion, supported by the Schleifer Affidavit, that the Loan Agreement only provided a single remedy upon default of its terms necessarily negated and contradicted Mr. Apat's claim of a separate remedy for enforcement of the Loan Agreement's CBC provision. (*Opp. Memo.*, p. 2; *Schleifer Aff.*, paras. 11-13; *Recon. Mot.*, p. 2; Tr. 8, lines 15-24; Tr. 14, lines 19-23). The Circuit Court's ruling was factually unsupported because National Dental, via the Schleifer Affidavit, clearly disputed the inferences and/or conclusions which could reasonably be drawn from the Loan

Agreement's terms regarding the CBC Claim.<sup>1</sup> (*Schleifer Aff.*, paras. 11-13). Additionally, the Circuit Court's apparent disregard of the Schleifer Affidavit in granting summary judgment on the CBC Claim was improper as a matter of law.<sup>2</sup>

**B. The Circuit Court's Grant Of Summary Judgment On The CBC Claim Was Premature Because National Dental Demonstrated The Need For Further Discovery.**

The Circuit Court's grant of summary judgment on the CBC Claim was premature because it deprived National Dental of a full and fair opportunity to engage in and complete discovery when National Dental had demonstrated the existence of genuine issues of fact.<sup>3</sup> Not only did National Dental state in its Brief in Opposition to Summary Judgment and again in its Motion for Reconsideration that summary judgment was inappropriate because material issues of fact existed, including the parties' intent with respect to the terms of the Loan Agreement and the remedies available thereunder, (*Opp. Memo.*, pp. 3, 6; *Recon. Mot.*, p. 2), but, as a matter of law, National Dental's assertions

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<sup>1</sup> See *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (“[National Dental] [was] only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment”). See also *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (even in situations where “there is no dispute as to evidentiary facts, but only as to conclusions or inferences to be drawn there from, summary judgment should be denied”) (*quoting Nelson v. Charleston County Parks & Recreation Comm'n*, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct.App. 2004)):

<sup>2</sup> See *Higgins v. Medical University of South Carolina*, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct.App. 1997) (holding that, when ruling on a motion for summary judgment, the trial judge must consider all of the documents and evidence within the record, including affidavits).

<sup>3</sup> See *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (in South Carolina, summary judgment “must not be granted until the opposing party has had a full and fair opportunity to complete discovery”). See also *Hook v. Rothstein*, 275 S.C. 187, 189, 268 S.E.2d 288, 289 (1980) (reversing the circuit court's grant of summary judgment where the record established that issues existed which must be determined by a trier of fact and explaining that “[the South Carolina Supreme Court] has often noted that summary judgment is appropriate only where it is perfectly clear that no genuine issue of fact is involved”).

at the hearing on the motion for summary judgment were sufficient to establish the need for further discovery.<sup>4</sup> (Tr. 6, lines 7-8; Tr. 10, lines 7-9; Tr. 11, lines 4-14).

### **CONCLUSION**

Based upon the foregoing arguments and citation of authority, the Appellant, National Dental Systems, LLC d/b/a DentalSmart, respectfully requests this Court of Appeals to reverse the Circuit Court's grant of partial summary judgment and remand this matter back for a trial on the merits.

Respectfully submitted:

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11 May 2017

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<sup>4</sup> See *Schmidt v. Courtney*, 357 S.C. 310, 318, 592 S.E.2d 326, 317 (Ct. App. 2003) (holding that the circuit court's grant of summary judgment was premature where, even though the appellant had not requested a continuance to complete discovery, it was clear from the hearing transcript that the judge was aware of the appellant's desire to obtain further discovery).

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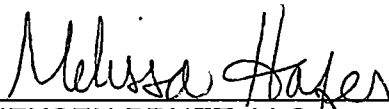
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I hereby certify that on 11 May 2017, I served one copy each of the **Appellant's Initial Reply Brief** submitted by the Appellant, National Dental Systems, LLC, d/b/a DentalSmart, on the following via the United States Mail, postage pre-paid, and addressed as follows:

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May 11, 2017

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SC Court of Appeals

The Honorable Jenny A. Kitchings  
Clerk of Court  
1220 Senate Street  
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**Re: *Robin S. Forman, as personal representative of the Estate of  
Burton J. Apat vs. National Dental Systems, LLC d/b/a DentalSmart  
Appeal from the Charleston County Court of Common Pleas  
Case Action No. 2016-CP-10-1022  
Appellate Case Tracking No. 2016-002130***

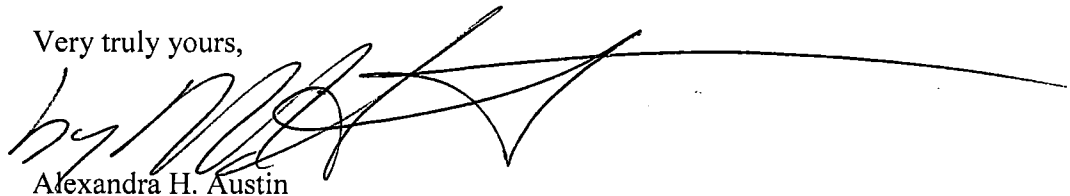
Dear Madam Clerk:

Enclosed for filing are an original and one (1) copy of Appellant's Initial Reply Brief in the above-referenced matter. Also enclosed is our check in the amount of \$25 for the filing fee. At your convenience, please return a clocked copy in the envelope enclosed.

By copy of this letter, I am hereby serving same upon opposing counsel and the Clerk of Charleston County Court of Common Pleas.

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

Very truly yours,



Alexandra H. Austin

AHA/tj

Encs.

cc: Mark A. Mason, Esquire  
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The Honorable Julie J. Armstrong

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