

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

**APPEAL FROM GREENVILLE COUNTY
Court Of Common Pleas**

The Honorable Charles B. Simmons, Jr., Master-in-Equity

Case No.: 2014-CP-23-01871

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JUN 09 2017

SC Court of Appeals

China Construction America of South Carolina, Inc..... Appellant/Respondent,

vs.

MS Production Solutions LLC a/k/a MSPS Steel Fabricators, Manfred Sprenger and Patricia
SprengerRespondents/Appellants

APPELLANT'S REPLY BRIEF OF APPELLANT/RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. RESPONDENT-APPELLANT MSPS DID NOT PROPERLY PRESERVE FOR APPELLATE REVIEW ITS ARGUMENTS REGARDING THE DATE OF BREACH OR THE SCRIVNERS ERROR IN THE AMENDED ORDER OF JUDGMENT.

STATEMENT OF THE CASE

Respondent-Appellant MS Production Solutions, LLC (“MSPS”) filed Respondent’s Initial Brief on May 17, 2017, received by Appellant-Respondent China Construction America of South Carolina, Inc. (“CCA”) on May 22, 2017. Appellant CCA files this Reply to Respondent MSPS’s Initial Brief.

ARGUMENT

I. RESPONDENT-APPELLANT MSPS DID NOT PROPERLY PRESERVE FOR APPELLATE REVIEW ITS ARGUMENTS REGARDING THE DATE OF BREACH OR THE SCRIVENER'S ERROR IN THE AMENDED ORDER OF JUDGMENT.

MSPS attempts to argue for the first time on appeal that the transfers from MSPS to Patricia Sprenger before the filing of the lawsuit are not subject to execution because of a minor typographical error in the Amended Order of Judgment. MSPS's argument is not properly before this Court, nor is it supported by the record. As a rule, where the record does not reflect a point has been raised or decided in the lower court, that point cannot be considered on appeal for the first time. Murphy v. Hagan, 275 S.C. 334, 271 S.E.2d 311 (1980); Anonymous v. State Board of Medical Examiners, 323 S.C. 360, 473 S.E.2d 870, 879 (Ct. App. 1996).

After MSPS failed to file a responsive pleading or appear at the damages hearing, an Amended Order of Judgment was entered against MSPS. (Amended Order of Judgment, R. p. __). Pursuant to the Order, CCA was awarded pre-judgment interest on the outstanding debt, which the court calculated from the date of the breach of the contract to the date of the judgment. Id. Specifically, the court ordered that "Plaintiff is entitled to interest on this debt at the contract rate of 8.75% annum, for a total interest of \$49,855.16 (August 12, 2014-November 17, 2014, 462 days at the per diem rate of \$107.97". (R. p. __) (emphasis added). The findings in the Amended Order of Judgment were based upon testimony and evidence presented by CCA at the damages hearing, at which MSPS chose not to appear. (R. p. __). Ignoring the fact that Order plainly states that the pre-judgment interest was calculated for a period of 462 days,¹ MSPS attempts to argue for the

¹Only 97 days of pre-judgment interest would have been awarded had the Court intended to award pre-judgment interest from August 12, 2014. It is clear the date in the Order is a scrivener's error. Generally, a clerical error is defined as a mistake in writing or copying. As applied to judgments and decrees, it is a mistake or omission by a clerk, counsel, judge or printer which is not the result of exercise of judicial function. As such this Court may correct mistakes or clerical errors in its

first time on appeal that the date of breach occurred on August 12, 2014 (over four months after the Complaint was filed) instead of August 12, 2013, insisting that it is now “the law of the case” that the date of breach occurred in August of 2014.

MSPS’s argument that it is the law of the case must be that MSPS breached its contract four months after the Complaint was filed is absurd, defies logic, and is contrary to the understanding of the parties throughout the supplemental proceedings as evidenced by the transcripts and the record in this case. MSPS ignores the fact that CCA filed its Motion to Execute and Set Aside Fraudulent Transfers on September 23, 2015, seeking to execute and set aside all fraudulent transfers to Manfred and Patricia after August 12, 2013 (the date of breach) through May 27, 2015 and included an index identifying the date and amount of each transfer. (R. p. ____).²

From the outset, it was clear to MSPS that CCA sought to set aside all transfers to Patricia Sprenger from the date of the breach forward, as the only defense MSPS offered as to the pre-lawsuit transfers was its argument that the transfers either represented repayments for undocumented loans or Manfred’s salary. This was also the Court’s understanding as evidenced by its Order joining Manfred and Patricia Sprenger as parties to the supplemental proceedings, finding that “Petitioner maintains the transfers to Patricia Sprenger from MSPS are in excess of \$282,600.00. *It appears that many of the transfers were not only made when it was clear to defendant of the pendency or threat of litigation, but after the lawsuit was actually filed.*”

own process or make it conform to the record, and there is no explicit time limit for the correction of clerical errors. Trotter v. Trane Coil Facility, 393 S.C. 637, 651, 714 S.E.2d 289, 296 (2011).

² CCAs Motion to Execute and Set Aside provides as follows: “After commencing these supplemental proceedings, Petitioners discovered that ***from at least August 2013, the date of Defendant’s breach, to May 20, 2015***, the owner of MSPS, Manfred Sprenger, wrote numerous checks to his wife, Patricia Sprenger, totaling in excess of \$282,600.00.” (R. p. ____). (emphasis added).

(emphasis added) (Order, Dec 23, 2015, p. 2). MSPS did not move to amend or correct the December 23, 2015 Order.

At the final hearing on CCA's Motion to Execute and Set Aside Fraudulent Transfers, CCA provided the court with an updated index of transfers through December 2015, evidencing a total of \$361,393.84 in transfers from MSPS to Manfred and Patricia after MSPS breached its contract with CCA, and CCA moved to execute on the same. (Pl. Ex. 1, tab 3). By that time, CCA had already deposed Manfred Sprenger and Patricia Sprenger regarding the pre-lawsuit transfers, engaged in written discovery, and offered bank records pre-dating the Complaint to the Court. MSPS presented oral arguments as to why it contended CCA was not entitled to execute on the \$361,393.84 in transfers. (Hearing Tran. March 2, 2016). Notably, MSPS did not argue that MSPS did not breach its contract in 2013³ or that the scrivener's error in the Amended Order of Judgment precluded CCA from recovering transfers that occurred prior to the filing of the Complaint. MSPS's failure to raise this issue before the trial court leaves it unpreserved for appeal.

It is well settled that, for the purpose of the Statute of Elizabeth, "it is only necessary that the debt should be been in existence or the right of action have accrued at or before the time of the transfer." Albertson v. Robinson, 371 S.C. 311, 317-18, 638 S.E.2d 81, 84 (2006). Here, the right of action accrued when MSPS breached its contract with CCA. Likewise, interest accrues at the time a sum certain becomes due, which was awarded to CCA as of August 12, 2013. It is clear from the Record that all relevant times, MSPS did not contest CCA's position that the date of breach occurred in August 2013 as evidenced by the Amended Order of Judgment. As a rule, points of law, theories, issues and arguments not brought to the attention of the lower court need not be,

³ Regardless, MSPS's failure to file a responsive pleading or appear until the commencement of supplemental proceedings precluded MSPS from arguing as to the merits of CCA's breach of contract claim. CCA obtained an Order of Default and an Order of Judgment against MSPS as to the allegations and causes of action in the Complaint.

and ordinarily will not be, considered by a reviewing court, as they cannot be raised for the first time at that late stage. Therefore, MSPS's argument as to the pre-Complaint transfers to Patricia Sprenger fails as a matter of law. To the extent this Court is inclined to entertain MSPS's new defense theory, CCA requests the Court correct the clear scrivener's error regarding the date of breach and direct the circuit court to correct its records to reflect this change.

CONCLUSION

For the reasons stated above and in Appellant's Initial Brief of Appellant-Respondent, this Court should reverse the lower court's holding that CCA cannot recover the post-judgment fraudulent transfers to Manfred Sprenger and the pre-lawsuit transfers to Patricia Sprenger and direct the lower court to enter a judgment against Manfred Sprenger and Patricia Sprenger for the same. Furthermore, the lower court erred when it failed to rule the Master-In-Equity for an order directing Bank of America to deliver to CCA all funds on deposit in MSPS's corporate bank account and for a judgment to be entered in favor of CCA against Manfred Sprenger and Patricia Sprenger in the amount of \$361,393.84.

Respectfully submitted,

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June 9, 2017

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court Of Common Pleas

The Honorable Charles B. Simmons, Jr., Master-in-Equity

Common Pleas Case No.: 2014-CP-23-01871
Appellate Case No.: 2016-1787

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Patricia Sprenger Respondents

PROOF OF SERVICE

I, Katie Gjennestad, of Bruner, Powell, Wall & Mullins, LLC, attorneys for the Appellants, do hereby certify that on this 9th day of June 2017, I served the **APPELLANT'S REPLY BRIEF OF APPELLANT/RESPONDENT** upon the Respondent's attorney of record by depositing a copy of the same in U.S. Mail, first class, postage prepaid and addressed as follows:

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June 9, 2017


Katie Gjennestad

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June 9, 2017

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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SC Court of Appeals

Re: China Construction America of S.C., Inc. v. MS Production Solution, LLC
Appellate Case No.: 2016-1787
C/A No.: 2014-CP-23-1871
Our File No.: 9-948.131

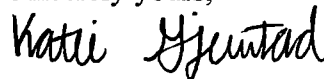
Dear Ms. Kitchings:

Enclosed for filing please find the **APPELLANT'S REPLY BRIEF OF APPELLANT/RESPONDENT**. Also enclosed please find the Proof of Service evidencing that the Appellant's Reply Brief Of Appellant/Respondent was served on J. Falkner Wilkes, Esquire, attorney for the Respondent/Appellant.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

With my kindest regards, I am

Sincerely yours,



Katie Gjennestad
Legal Assistant to Caitlin C. Heyward, Esq.

CCH/kg

Enclosures

cc: J. Falkner Wilkes
Mike Watson, China Construction