

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

OLDCASTLE APG SOUTH, INC. D/B/A)
ADAMS PRODUCTS COMPANY AND)
OLDCASTLE APG NORTHEAST, INC.)
D/B/A FOSTER-SOUTHEASTERN,)

Civil Action No. 2014-CP-23-05031

Plaintiff, **RECEIVED**)

**ORDER DENYING DEFENDANT'S
MOTION FOR RELIEF OF
JUDGMENT AND REINSTATEMENT
TO TRIAL ROSTER**

v.)

OCT 20 2017)

DANIEL B. ALBERT, **SC Court of Appeals**)

Defendant.)

This matter comes before the Court pursuant to *pro se* Defendant's Motion for Relief of Judgment and Reinstatement to Trial Roster. The Court conducted a hearing on June 15, 2017, which was fully briefed by both parties before the hearing. Present at the hearing were Elizabeth M. McMillan, Esq., on behalf of Plaintiff, and Daniel B. Albert, *pro se*. Having fully considered the arguments by the parties in the briefs and at the hearing, the Court hereby **DENIES** Defendant's Motion for Relief of Judgment after reaching the following conclusions.

BACKGROUND FACTS

Plaintiff initiated this action by filing a Complaint on September 11, 2014, asserting claims for breach of contract, unjust enrichment, breach of guarantee, and quantum meruit against Defendant alleging that Defendant owed it \$127,212.13 for goods and services provided to Defendant and his companies for which he did not pay.

After discovery was conducted and numerous discussions were had regarding a settlement of this matter, Defendant agreed to enter into a confession of judgment for \$100,000 to end the litigation which he executed on May 16, 2016 ("Confession of Judgment"). The

Confession of Judgment states that Defendant obtained a judgment in a United States District Court case (the "Federal Case") in the amount of \$928,915.00 which judgment was on appeal. In the event Defendant received payment in the Federal Case, Defendant agreed to pay Plaintiff \$100,000. If within ten days after receiving payment in the Federal Case, Defendant failed to make a payment to Defendant, then Plaintiff would file the Confession of Judgment with the court. After executing the Confession of Judgment, Defendant requested a settlement agreement be signed by both parties. Plaintiff prepared a settlement agreement and release ("Settlement Agreement") to set forth the terms of the settlement and of the Confession of Judgment which was executed by all parties on May 23, 2016. Plaintiff then informed the court of the settlement and requested the case be removed from the trial roster. The case was removed from the immediate trial roster, but it remained an active case in the system and was subsequently scheduled for a status conference with the administrative judge for March 8, 2017.

On January 31, 2017, Defendant was awarded \$361,559.00 in the Federal Case. Defendant did not pay the \$100,000 settlement amount and the parties proceeded to the status conference on March 8. On March 9, 2017, Plaintiff made a formal demand for the \$100,000 agreed to in the Settlement Agreement and Confession of Judgment and informed Defendant that if payment was not received within ten days of the date of the letter, Plaintiff would file the Confession of Judgment with the Court. Defendant refused to pay the agreed upon settlement amount, and the Confession of Judgment was filed on May 5, 2017. Defendant argued to Plaintiff that because Plaintiff refused to file a stipulation of dismissal, Plaintiff had breached the Settlement Agreement and the Confession of Judgment was not valid. Defendant then proposed a new settlement agreement of \$75,000 and a declaration that the Confession of Judgment and Release were null and void. After Plaintiff declined to enter into a new settlement agreement,

Defendant filed a Motion for Relief of Judgment and For Reinstatement to Trial Roster on May 15, 2017.

In his motion, Defendant argued that the Confession of Judgment and Settlement Agreement were invalid because a stipulation of dismissal had not yet been filed. The Settlement Agreement contained paragraph 5 which states as follows: "Stipulation of Dismissal. The parties agree to enter into a Stipulation of Dismissal which will dismiss all claims and counterclaim in the Litigation." Defendant argued that because no stipulation of dismissal had been filed and through negligence, breach of contract, fraud, misrepresentation or other misconduct of Plaintiff, Defendant had been denied the benefit of his bargain. He asked this Court to rule that the Confession of Judgment was null and void, and without any continuing effect.

Plaintiff filed a Memorandum in Opposition to the Motion for Relief of Judgment denying and refuting Defendant's entitlement to relief from the Confession of Judgment, and both sides appeared at the hearing and presented arguments. Plaintiff argued that the Motion should be denied for the following reasons: (1) Defendant failed to honor the terms of the Settlement Agreement and pay the \$100,000 upon his receipt of that amount from the Federal Case, and, thus the Confession of Judgment was rightly entered; (2) Defendant could not establish the necessary grounds to repudiate the Settlement Agreement and the Confession of Judgment because he could not show that there was any evidence of fraud, mistake or misconduct by Plaintiff; (3) Defendant could not establish that the Settlement Agreement had been breached by Plaintiff because Plaintiff had no duty to file a stipulation of dismissal, especially since Defendant had refused to pay the \$100,000 once he received more than that amount from the Federal Case; and (4) Defendant could not establish the grounds for relief from

judgment pursuant to Rule 60, SCRCP, even if that Rule were applicable to the Confession of Judgment.

APPLICABLE STANDARD OF LAW

The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court. McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct.App. 2008).

When a party asserts grounds for relief because of fraud, misrepresentation, or other misconduct of an adverse party under Rule 60(b)(3), SCRCP, the movant must prove his entitlement by clear and convincing evidence. Chewning v. Ford Motor Co., 354 S.C. 72, 578 S.E.2d 605 (2003). A party asserting the fraudulent nature of a statement must demonstrate: (1) a representation; (2) the falsity of the representation; (3) the materiality of the representation; (4) knowledge of its falsity, or reckless disregard for its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of the falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. First Union Mortg. Corp. v. Thomas, 317 S.C. 63, 451 S.E.2d 907 (Ct.App. 1994).

CONCLUSIONS OF FACT AND LAW

Based on the filings of both parties and the arguments presented at the hearing, I make the following findings:

1. The Settlement Agreement is not ambiguous.
2. Based on the unambiguous language of the Settlement Agreement, Plaintiff was under no duty to file a stipulation of dismissal.
3. Defendant has failed to present sufficient evidence to show that the Plaintiff breached any terms of the Settlement Agreement.
4. Defendant has failed to present sufficient evidence to show that Plaintiff engaged in

negligence, fraud, misrepresentation or other misconduct that would relieve Defendant from his obligations under the Settlement Agreement and Confession of Judgment.

5. Defendant entered into a valid Settlement Agreement and Confession of Judgment and was obligated by their terms and cannot renegotiate the terms of those agreements under a pretextual argument that because no stipulation of dismissal had been filed he is not obligated by the terms of those agreements.
6. Defendant has failed to present sufficient evidence to establish that he is entitled to any relief under Rule 60, SCRCP.
7. The Confession of Judgment was validly entered by Plaintiff.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Relief of Judgment and Reinstatement to the Trial Roster is hereby denied and this case is stricken from the trial docket.

AND IT IS SO ORDERED.

Robin B. Stilwell, Judge
Thirteenth Judicial Circuit



Greenville Common Pleas

Case Caption: Oldcastle APG South Inc , plaintiff, et al vs. Daniel B Albert

Case Number: 2014CP2305031

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158

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