

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

) IN THE COURT OF COMMON PLEAS  
)  
) Civil Action No.: 2015-CP-23-04535

Controls for Automation, Inc.,  
Plaintiff,

vs.

Digital Management Solutions, Inc. and  
Communication Concepts, Inc.,

Defendants.

)  
)  
) **ORDER DENYING DEFENDANT**  
) **COMMUNICATION CONCEPTS,**  
) **INC.'S MOTION TO ALTER OR**  
) **AMEND**

) **RECEIVED**

) DEC 08 2017

) SC Court of Appeals

2017 NOV 22 AM 10:51  
CLERK OF COURT  
JAMES W. WILSON  
1000 W. BROADWAY  
COLUMBIA, SC 29201

THIS MATTER COMES BEFORE THE COURT on Defendant Communication Concepts, Inc.'s ("CCI") Rule 59(e) Motion for Reconsideration filed December 1, 2016. A hearing was held for the undersigned on February 2, 2017. Present at the hearing were Ian D. McVey, counsel for the Plaintiff, Burl Williams, Counsel for CCI, and Mitchell Byrd, counsel for Digital Management Solutions, Inc. ("DMS").

#### **BACKGROUND**

This action was commenced by Plaintiff on July 21, 2015 by the Plaintiff seeking to collect a debt against DMS. CCI was named as a party by virtue of the funds claimed due and owing by DMS from which Plaintiff sought repayment of its debt. DMS filed its Answer and Cross-claim against CCI on August 14, 2015 seeking payment and performance of the agreement between them. Both CCI's answer to the Complaint and Answer to the Cross-claim generally deny the allegations and assert various affirmative defenses.

On March 8, 2016, a mediation was held resulting, eventually, in a Settlement Agreement, the same being dated April 6, 2016. The Settlement Agreement was filed with the

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Clerk's office for Greenville County on April 15, 2016. After non-performance by CCI, Plaintiff filed a Motion to Compel Settlement on August 5, 2016. A hearing was held and the undersigned entered an Order Compelling Settlement on November 18, 2016. CCI filed the Motion to Alter or Amend currently before the Court on December 1, 2016. This order denying same follows.

### **LEGAL STANDARD**

Rule 59(e) of the South Carolina Rules of Civil Procedure is "substantially the Federal Rule" and provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." See Publisher's Notes to Rule 59, S.C.R.C.P. Courts construing the federal counterpart to Rule 59(e) have determined that a motion to alter or amend should be granted in limited circumstances "(1) to accommodate an intervening change in the law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." United States ex rel. Baker v. Westinghouse Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002), quoting Pacific Ins. Co. v. Am. Nat'l. Fire Ins., 148 F.3d 396, 403 (4th Cir. 1998); see also Unisun Ins. v. Hawkins, 342 S.C. 537, 542, 537 S.E.2d 559, 562 (Ct. App. 2000) ("In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive.") (citing Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987)). Additionally, it is well-settled that "a party cannot use a motion to reconsider to present an issue the party could have raised prior to judgment, but did not." Anderson Memorial Hospital, Inc. v. Hagen, 443 S.E.2d 399,400 (Ct. App. 1994); see also C.A.H. v. L.H., 434 S.E.2d 268 (1993).

### **ANALYSIS**

CCI presents two arguments for reconsideration: i) the Settlement Agreement requires the

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Court to order a damages hearing and not order specific performance, and ii) specific performance is improper. CCI presented both of these arguments at the hearing for Plaintiff's Motion to Compel Settlement. This Court has previously ruled that these arguments failed and that CCI should be compelled to perform under the terms of the Settlement Agreement. As set forth more fully below, nothing presented in CCI's Motion warrants the alteration or amendment of that Order.

I. This Court is not solely limited to ordering a damages hearing.

CCI first argues that Plaintiff is limited to requesting a damages hearing in the event of a default. The Court disagrees. A settlement agreement that meets the requirements of Rule 43(k), SCRCF shall be binding on the parties to the agreement. "A trial court has inherent jurisdiction to enforce settlement agreements entered before it." Kumar v. Third Generation, Inc., 324 S.C. 284, 289-90, 485 S.E.2d 626, 629 (Ct. App. 1995). General contract principles are used in the construction of a settlement agreement. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (Ct. App. 2009). Thus, to determine whether the Settlement Agreement required this Court to order a damages hearing, we look to the plain language of the Settlement Agreement.

Paragraph 8 of the Settlement Agreement states "if any party does not fulfill its obligations under this agreement and the dispute between DMS and CFA returns to litigation, DMS and CFA agree to waive their right to a jury trial and will proceed with a hearing solely as to the amount of damages."

Nothing in the plain language of the Settlement Agreement puts a requirement on this Court that the sole remedy this Court must use to enforce settlement is to order a damages hearing. The plain language of the Settlement Agreement merely requires DMS and CFA to waive their right to a jury trial and argue any disputes between them solely on the issue of

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damages. Plaintiff's request for a damages hearing, which can be made at any time after default, is separate and distinct from its request to compel specific performance of the Settlement Agreement.

Nowhere in the agreement did the parties contemplate this would be the sole and exclusive remedy. In fact, it seems clear to the court that the parties to the Settlement Agreement contemplated the possible enforcement of the agreement as paragraph 9 thereof provides as follows: "This constitutes an enforceable agreement pursuant to Rule 43(k) and 41, SCRPC and operates to end all litigation among the parties." Had CCI fulfilled its obligations under the Settlement Agreement, a damages hearing would be unnecessary. Therefore, the Court finds no reason to alter its judgment requiring CCI to perform under the Settlement Agreement.

II. Specific Performance was an appropriate remedy.

CCi further argues that Specific Performance is not warranted in this situation. Again, the Court disagrees. "A trial court has inherent jurisdiction to enforce settlement agreements entered before it." Kumar v. Third Generation, Inc., 324 S.C. 284, 289-90, 485 S.E.2d 626, 629 (Ct. App. 1995). Plaintiff's Motion to Compel the terms of the Settlement Agreement is properly before the Court. "In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or had been and remains able and willing to perform his or her part of the contract." Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 290-91 (2000). Specific performance is appropriate if no adequate remedy exists at law. Time Warner Cable v. Condo Servs., Inc., 381 S.C. 275, 284, 672 S.E.2d 816, 820 (Ct. App. 2009).

In the present case, Plaintiff brought a motion in equity to compel performance, not an action at law to construe a contract against CCI. The litigation is over pursuant to the agreement of parties. Further, the plain language of paragraph 9 of the Settlement Agreement indicates that such a remedy was contemplated by the parties. This Court found in its judicial discretion that the equitable remedy for specific performance was warranted. Additionally, this Court found that there was a valid settlement agreement under Rule 43(k), SCRCP. Further, this Court found that the Settlement Agreement had been partly carried into effect because DMS shipped the first trailer as required under the Settlement Agreement and CCI accepted it. Thus, the Court found that DMS and Plaintiff have performed their initial obligations under the Settlement Agreement and were ready, willing and able to perform the remainder of the terms of the Settlement Agreement. Therefore, requiring CCI to comply with its obligations under the Settlement Agreement is appropriate, and the Court sees no reason to alter its initial order compelling settlement.

CCI argues that specific performance is not warranted because Plaintiff has an adequate remedy at law in the form of obtaining a judgment against DMS. The Court is unmoved by this argument. As set forth more fully below, Plaintiff's remedy related to obtaining its judgment against DMS is separate and distinct from the right to require CCI to perform as it promised to do in the Settlement Agreement. Therefore, the Court finds CCI's argument lacks merit and compelling performance under the Settlement Agreement was warranted.

III. Mark Mills' Declaration.

Prior to the hearing on CCI's Motion, CCI submitted a declaration of Mark Mills, President of CCI. This declaration which is in the form of an affidavit of Mr. Mills which offers reasons as to why CCI should not be required to perform under the Settlement Agreement. This

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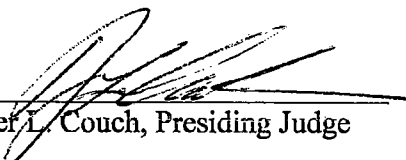
declaration was not submitted with CCI's motion and is therefore an attempt by CCI to supplement its Motion to Alter or Amend. This is impermissible under the South Carolina Rules of Civil Procedure. See Rule 6(d), SCRPC ("When a motion is to be supported by affidavit, the affidavit shall be served with the affidavit.") Therefore, this Court does not take into consideration the matters set forth in the declaration.

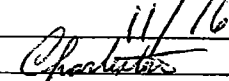
To the extent that CCI argues that it should be admitted because it is new evidence not available at trial, nothing in its motion or, for that matter, the declaration sets forth that this evidence was not available at trial and therefore, I find any such argument to the contrary fails.

**CONCLUSION**

Based upon the foregoing, the Court denies CCI's motion to alter or amend.

IT IS SO ORDERED.

  
\_\_\_\_\_  
Roger L. Couch, Presiding Judge

  
\_\_\_\_\_, 2017  
\_\_\_\_\_, South Carolina

FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF GREENVILLE  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2015CP2304535

Controls For Automation Inc 2017 NOV 22 AM 10:53	Digital Management Solutions Inc	Communication Concepts Inc
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PLAINTIFF(S) Submitted by:	DEFENDANT(S) Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):
  - Rule 12(b), SCRPC;
  - Rule 41(a), SCRPC (Vol. Nonsuit);
  - Rule 43(k), SCRPC (Settled);
  - Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):
  - Rule 40(j) SCRPC;
  - Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other: \_\_\_\_\_
- STAYED DUE TO BANKRUPTCY
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
  - Affirmed;
  - Reversed;
  - Remanded;
  - Other:

**RECEIVED**  
 DEC 08 2017  
 SC Court of Appeals

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.  
 Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

11/22/2017

Date

For Clerk of Court Office Use Only

This judgment was entered on **November 22, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **November 22, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

**Ian Douglas McVey** PO Box 1473 Columbia, SC  
29202-1473  
**Langdon Cheves III** PO Box 1509 Greenville, SC 29602

**Mitchell K. Byrd Sr.** 114 Amber Drive Greenville, SC 29607  
**Burl F. Williams** PO Drawer 10648 Greenville, SC 29603  
**Digital Management Solutions Inc** 1200 Woodruff Road B15  
Greenville, SC 29607

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**ATTORNEY(S) FOR THE PLAINTIFF(S)**

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**ATTORNEY(S) FOR THE DEFENDANT(S)**

**Court Reporter**

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**Paul B. Wickensimer** Greenville County Clerk Of  
Court - Clerk of Court

**Court Reporter:**

**E-Filing Note:** In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

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**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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