STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Carl Hawkensen and NGV Systems, LLC,

Plaintiff,

v.

Michael R. Kilbourne a/k/a Mike Kilbourne, Skygo, LLC, Skygo Fuel Systems, LLC, and AMBAC International Corporation,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2015-CP-40-01848

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on November 29, 2017 on Defendants' motion for summary judgment. Present before the Court were Matthew E. Cox, Esquire, counsel for Plaintiffs, and William E. Hopkins, Jr., counsel for Defendants.

This case involves a brief business venture between the parties in which they joined forces to develop a dual fuel technology to allow diesel engine vehicles, primarily large tractor truck engines, to run or operate on liquid or compressed natural gas without sacrificing performance. The difference in price between diesel fuel and natural gas is often times significant and can result in substantial savings for owners and operators. According to Defendant Kilbourne's sworn testimony, he has spent most, if not all, of his career working on and developing both the hardware and software for this dual fuel technology.

In January or February 2013, one of the parties approached the other about working together. While who approached whom is disputed, this is not a material fact. There was, however, a company - E.J. Madison Company of El Paso, Texas – that was

interested in purchasing kits for several of their trucks which contained Cummins ISX diesel engines.

On July 24, 2013, Plaintiff NGV Systems, LLC was formed. The members were Skygo, LLC (Kilbourne's company) ("Skygo") and BIA Energy Group, LLC ("BIA"), with BIA owning two-third (2/3) and Skygo owning one-third (1/3). BIA was owned by Carl Hawkensen and Ron Butler. On July 30, 2013, NGV entered into a contract with E.J. Madison for the dual fuel kits.

On August 5, 2013, NGV entered into a contract with Skygo to build the kits. As set forth in the August 5, 2013 Service Agreement, NGV agreed to pay Kilbourne a salary while he was building and developing the kits for the Cummins ISX engines. Plaintiff NGV only paid Kilbourne for August and September and then informed him it could no longer afford to pay him and terminated his contract in a written Contract Termination dated October 18, 2013.

Despite the Contract Termination, Kilbourne agreed to fulfill the contract for E.J. Madison and to equally divide any profits from the sale. On December 10, 2013, Hawkensen presented Kilbourne with a Membership Interest Redemption and Withdrawal Agreement. This document confirmed that NGV was redeeming the interest of both Kilbourne and Ron Butler, thereby withdrawing any interest they had in NGV Systems, LLC.

Also in December 2013, Kilbourne traveled to El Paso, Texas and installed the kits on the ten (10) trucks for E.J. Madison, fulfilled the contract, and confirmed all kits worked and the customer was satisfied. Kilbourne was paid by the customer and immediately delivered the money to attorney Rick Gleissner in Columbia, South Carolina, to hold in a

trust account pending the resolution of any disputes with Hawkensen. Hawkensen maintained he owned the kits which Kilbourne created, developed, built and installed on the Madison Cummins ISX engines, and Kilbourne asserted Hawkensen was only owed half the profits from the sale of the kits.

On February 24, 2014, Kilbourne entered into a Mutual Release and Settlement Agreement with Hawkensen in which Kilbourne agreed to pay Hawkensen one half of the profits from the lone contract ($71,863.00) and to give him the only copy of the software Kilbourne developed for NGV to make those kits work. Specifically, as per the Mutual Release and Settlement Agreement, Kilbourne testified he gave Hawkensen, through his attorneys, the *.SRZ (master) file, the *.DLL (delimiter) file, and the *.CAL (calibration) file. The Agreement and Release was prepared and presented to Kilbourne by Carl Hawkensen through his attorneys in Charlotte, North Carolina.

Kilbourne traveled to Charlotte, North Carolina to Oliff PLC, a large intellectual property law firm with offices in Alexandria, Virginia, St. Louis, Missouri, and Charlotte, North Carolina, to meet with an attorney named Padowithz Alce and their IT Department. It was actually the law firm's IT employees who downloaded and transferred the files onto an ECU for Hawkensen and confirmed Kilbourne did not retain a copy. These attorneys then confirmed Kilbourne's compliance with the Agreement and so notified Hawkensen. In return, Hawkensen released Kilbourne from any and all claims of any kind. Kilbourne then instructed his attorney (Gleissner) to pay Hawkensen from the trust account funds. Kilbourne has testified he fully complied with the Agreement, as confirmed by Hawkensen's own attorneys, and that Hawkensen had, and still has, the possession, ownership and all rights to the only copy of that software.

Later, E.J. Madison contacted Kilbourne and wanted some additional kits for other tractors. Kilbourne has testified under oath he developed the software and hardware, including blocks and wiring harnesses, for these truck engines from scratch and agreed to sell them to the company and that these kits are **NOT** the same kits as the ones developed previously for Madison and do not contain the same software or hardware.

After learning of the sale of the additional units to Madison, Hawkensen filed this action against Kilbourne, Skygo and Ambac, asserting six (6) causes of action: specific enforcement of the Settlement Agreement; injunction; declaratory judgment; damages for wrongful use of proprietary property; breach of contract accompanied by a fraudulent act; and interference with prospective contractual relations.

The first five claims are all based and rely upon one factual assertion: that Kilbourne did not, in fact, comply with the Settlement Agreement. The Settlement Agreement provides, in pertinent part, that Kilbourne was required to give to Plaintiffs all hardware and software developed for or on behalf of NGV. Specifically, Kilbourne was required to give to Plaintiffs "all software files and/or programs;

(1) that make up the system whether installed or uninstalled and whether contained or not contained on the computer and ECU delivered pursuant to this agreement, specifically the *.DLL, *.CAL, and *SRZ files, including all of the functions, system services, and other hardware, system preferences, and/or other configuration files; and

(2) developed for, by, or on behalf of NGV between July 24, 2013 and December 12, 2013 including all of the functions, system services, and other hardware, system preferences, and/or other configuration files.

Kilbourne has testified both via affidavit, and in a deposition, that he complied fully with the Agreement and returned the only copy of the software to Hawkensen's attorneys. Kilbourne has further testified that the dual fuel kits he sold to E.J. Madison after the

termination of the parties' agreement were not the same as those he developed for NGV during the timeframe established in the Agreement. Plaintiffs attached to their memorandum in opposition to Defendants' motion pertinent testimony from Kilbourne's deposition. Kilbourne denied that any of the three files identified in the agreement were the same used to develop the kits for Madison and that even the hardware, such as wiring harnesses, were different. Therefore, the burden is now on Plaintiffs to dispute this testimony and create a genuine issue of material fact.

The only evidence in the record to support Plaintiff's claims is an affidavit of Carl Hawkensen filed on August 31, 2015. No other testimony or affidavits have been submitted or filed on behalf of Plaintiffs in support of their claim that Kilbourne did not, in fact, turn over all the software developed during the timeframe and either kept a copy or used it to develop the new kids for Madison. In his Affidavit, Hawkensen testified as follows:

> 25. Kilbourne met with my former attorneys and downloaded the files he purported to be the source code, but the files never worked.
>
> 26. I took them to have them evaluated by others and they confirmed that the source codes and algorithms that were developed for NGV by Michael Gorski and Jason Tarp were incomplete and not completely downloaded to NGV.
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> 27. That is the basis for this Complaint.
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> . . . .
>
> 32. Plaintiffs attempted to confirm that the technology had been transferred, and sent the ECU to various experts to determine the same.
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> 33. Plaintiffs were informed that not all of the information and technology had been transferred, specifically the source code, algorithms for all components.

Thus, Hawkensen readily admits the sole basis for his lawsuit comes from other people and what they have told him about the software Kilbourne turned over. Hawkensen does not claim to have any firsthand knowledge of the matter but relies on what others have told him. In the more than two and one-half years since this affidavit, however, Plaintiffs have failed to produce a single affidavit or testimony from any of the "experts" to whom he sent the software and purportedly informed him not everything had been turned over. Plaintiffs have presented no direct evidence that Kilbourne did not fully comply with the Agreement. Plaintiffs cannot rely on inadmissible hearsay evidence to withstand summary judgment. *See* Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."); *Hall v. Fedor,* 349 S.C. 169,175, 561 S.E.2d at 654, 657 (Ct. App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence."); *Id.* at 175-76, 561 S.E.2d at 657 (holding in a case involving the grant of summary judgment, the appellants' deposition testimony concerning what another individual told him constituted hearsay and was inadmissible to refute a motion for summary judgment).

Without this hearsay or admissible testimony, Plaintiffs have nothing on which to rely to establish their claims other than the allegations stated in the Second Amended Complaint. "Assertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact."); *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) ("To survive summary judgement, the evidence presented must amount to more than mere

speculation and conjecture." (Hearn, J., concurring in part and dissenting in part)); *Strickland v. Madden,* 323 S.C. 63, 68, 448 S.E.2d 581 (Ct.App.1994) ("[A]n adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgement motion, but must set forth specific facts showing there is a genuine issue for trial.").

Since Plaintiffs have utterly failed to present any admissible evidence that Kilbourne has breached or otherwise failed to comply with the Settlement Agreement, the Court is compelled to grant Defendants' motion for summary judgment as to the first five claims.

Regarding Plaintiffs' claim for intentional interference with prospective contractual relations, in order to prevail Plaintiffs must establish "(1) the defendant intentionally interfered with plaintiffs' potential contractual relations; (2) for an improper purpose or by improper methods; and (3) causing injury to the plaintiffs." *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 26, 395 S.E.2d 179, 180 (1990). Hawkensen's affidavit, again the only evidence submitted by Plaintiffs in opposition to Defendants' motion, makes no mention whatsoever of any potential contracts with which Defendants interfered, any improper purpose or improper methods of interference with any potential contracts, or any damages attributable to any purported interference.[1] Again, with no evidence establishing any of the elements of the claim, the Court is compelled to grant Defendants' motion with regard to this claim as well.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' motion for summary judgment is hereby granted as to all claims.

[1] Hawkensen's affidavit makes no reference at all to Defendant Ambac International Corporation, much less any reference to any alleged misconduct or tortious conduct.

AND IT IS SO ORDERED!

RE Hood

Robert E. Hood
Circuit Court Judge, Fifth Judicial Circuit

Columbia, South Carolina
December 19, 2017