

IN THE NINTH JUDICIAL CIRCUIT COURT
APPEAL FROM COURT OF COMMON PLEAS FOR CHARLESTON COUNTY

Case No. 2015-CP-10-6615
(Appellate Case No. -2017-001532)

BOUCHELLE INCORPORATED,

Appellant,

vs.

CHARLESTON WRECKING, INC. and
MICHAEL C. GOLEMIS,

Respondents.

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SC Court of Appeals

APPELLANT'S AMENDED INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT AS TO THE RESPONDENT MICHAEL C. GOLEMIS IN THE FACE OF EVIDENCE THAT THERE EXISTED GENUINE ISSUES BETWEEN PLAINTIFF AND DEFENDANT GOLEMIS?

II. DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' MOTION TO STAY AS TO DEFENDANTS IN THIS MATTER SO THAT A SEPARATE ACTION AGAINST RESPONDENTS' INSURANCE COMPANIES COULD BE DETERMINED FIRST?

STATEMENT OF THE CASE

On December 8, 2015, Appellant Bouchelle Incorporated, a general contracting company, filed a Summons and Complaint against the Respondent Charleston Wrecking, Inc. and its' owner, Respondent Michael Golemis for negligence, breach of contract, piercing the corporate veil and attorney fees. See Complaint, p. 1-5.

In the Complaint, Appellant alleged that it was hired by owners of 7350 Industry Drive, North Charleston, S.C. to reconstruct the commercial building. Included in the contract between the parties were plans to demolish a rear building located behind the main building. Said buildings shared one wall.

Appellant entered into a contract with Respondents wherein Respondents would demolish the rear building, in accordance with the parties' contract, applicable building codes and industry standards.

Despite Appellant's warnings to Respondent Golemis and contrary to their contract, on July 14, 2015, Respondent Golemis and his crew partially demolished the shared wall between the rear building and the main building, thereby causing severe structural damage to the shared wall and main building.

Appellant's reconstruction work was immediately halted while Appellant stabilized the shared wall and further work was significantly delayed. As a result of Respondents' actions, Appellant was damaged and was required to expend large sums of money to repair, correct and replace the shared wall and main building, along with other costs.

For a First Cause of Action, Appellant alleged Negligence as to all Respondents; in its' Second Cause of Action, Appellant alleged Breach of Contract as to all Respondents; as its' Third Cause of Action, Appellant alleged Piercing of the Corporate Veil and as its' Fourth Cause of Action, Appellant sought Attorney Fees and Costs. See Complaint, p. 4-11.

On February 1, 2016, Respondent Charleston Wrecking, Inc. filed an Answer wherein it admitted that it had entered into a contract with Plaintiff for demolition services for property located at 7350 Industry Drive, North Charleston, S.C. but denied the remaining allegations of Appellant's Complaint. See Answer, p. 1-4.

Also in its' Answer, Respondent Charleston Wrecking, Inc. alleged as a Second Defense that the Paragraph 16.7 of the contract between Appellant and Respondent Charleston Wrecking, Inc. provided that mediation of disputes was a condition precedent to any form of binding dispute resolution including this action, and that Appellant failed to comply with Paragraph 16.7 of the contract so therefore, this action should be dismissed.

As a Third Defense, Respondent Charleston Wrecking, Inc. alleged that pursuant to Paragraph 13 of the contract between Appellant and Respondent Charleston Wrecking, Inc., Appellant waived consequential damages as described in Paragraph 13 of the contract and therefore, any evidence of such damages should be excluded.

Finally, as a Fourth Defense, Respondent Charleston Wrecking, Inc. alleged that there was a substantial sum due and owed to Respondent Charleston Wrecking, Inc. for work that was completed and that therefore, Respondent Charleston Wrecking, Inc. was entitled to a setoff in such amount as may be proven to the trier of fact.

On February 1, 2016, Respondent Michael C. Golemis filed an Answer wherein he

admitted that he was a shareholder of Respondent Charleston Wrecking, Inc. and that Appellant was hired by the owners of 7350 Industry Drive, North Charleston, SC to reconstruct the commercial building. Respondent Michael C. Golemis denied that he individually entered into a contract with Appellant, but that Respondent Charleston Wrecking, Inc. did enter into a contract for demolition services.

Also in its' Answer, Respondent Golemis alleged as a Second Defense that the Paragraph 16.7 of the contract between Appellant and Respondent Charleston Wrecking, Inc. provided that mediation of disputes was a condition precedent to any form of binding dispute resolution including this action, and that Appellant failed to comply with Paragraph 16.7 of the contract so therefore, this action should be dismissed.

As a Third Defense, Respondent Golemis alleged that pursuant to Paragraph 13 of the contract between Appellant and Respondent Charleston Wrecking, Inc., Appellant waived consequential damages as described in Paragraph 13 of the contract and therefore, any evidence of such damages should be excluded.

Finally, as a Fourth Defense, Respondent Golemis alleged that there was a substantial sum due and owed to Respondent Charleston Wrecking, Inc. for work that was completed and that therefore, Respondent Charleston Wrecking, Inc. was entitled to a setoff in such amount as may be proven to the trier of fact. Respondent Golemis also argued that to the extent that Respondent is bound by the contract, which was specifically denied, such setoff is applicable to Respondent Golemis. See Answer, p. 1 – 5.

On or about January 9, 2017, Respondent Golemis filed a Motion for Summary Judgment. See Respondent Golemis's Motion for Summary Judgment, p. 1-24. The specific

grounds for his Motion for Summary Judgment were as follows:

- a) Michael C. Golemis, individually was not a party to the subcontract between Bouchelle Incorporated and Charleston Wrecking, Inc.;
- b) No other contractual obligation existed between Michael C. Golemis and Bouchelle Incorporated;
- c) Michael C. Golemis did not personally perform the services (an alleged improper saw cut) that led to this action;
- d) Michael C. Golemis was not present and in actual supervision of the work that allegedly caused Bouchelle Incorporated's damages;
- e) Charleston Wrecking, Inc. had experienced personnel performing the work including supervision by a South Carolina licensed general contractor with extensive demolition experience;
- f) Bouchelle Incorporated's breached the terms of the agreement between Contractor and Subcontractor by failing to demand mediation prior to litigation as required by the contract.
- g) Charleston Wrecking, Inc. was organized as a statutory close corporation and that pursuant to S.C. Code Section 33-18-250, even if Bouchelle Incorporated were to show that Charleston Wrecking, Inc. failed to observe the usual corporate formalities or requirements relating to the exercise of its corporate powers, or management of its' business and affairs, which Respondents denied, these allegations are not grounds for imposing personal liability on individual Michael C. Golemis.

On or about March 31, 2017, Respondent Charleston Wrecking, Inc. filed Motion for

Summary Judgment. See Respondent Charleston Wrecking, Inc.'s Motion for Summary Judgment, p. 1-62.

On March 31, 2017, both Respondents filed a Motion to Stay based upon the fact that there was a separate action (Case No. 2016-CP-10-4984) wherein, based upon the same incident, Bouchelle Incorporated was suing its' contractor general liability insurance company (Canopus US Insurance, Inc.), Charleston Wrecking, Inc.'s insurance carrier (Seneca Specialty Insurance Co.) and Bouchelle Incorporated's insurance agent (The Brinson Agency and its' principal, John Brinson"). See Respondents' Motion for Stay as to Defendants, p. 1-3.

Respondents argued in their Motion to Stay that Bouchelle Incorporated could not recover from its' own insurance company and also from the Respondents. Respondents argued that the case against Respondents should be stayed until the outcome of the Appellant's case against the insurance companies is known and that to require this case to move forward until there was a determination of the Appellant's action against the insurers would burden the parties with unnecessary fees and costs and would be an unwise use of judicial time.

On May 16, 2017, Appellant filed Opposition to Respondent Charleston Wrecking, Inc.'s Motion for Summary Judgment in that Appellant disagreed with the facts set forth in Respondents' Motions for Summary Judgment. See Appellant's Opposition to Respondent Charleston Wrecking's Motion for Summary Judgment, p. 1-2.

On May 16, 2017, Appellant filed Opposition to Respondents' Motion for Stay on the grounds that Appellant was entitled to have his day in court and proceed to trial against the Respondents; that there is no federal or state statute or court rule that denies Appellant his right to pursue liability and damages against someone who has breached a contract and/or committed

malfeasance against Appellant; and that to stay this action pending resolution of the insurance company claims, was ludicrous and against public policy. See Appellant's Opposition to Respondents' Motion for Stay, p. 1-2.

On or about May 17, 2017, a hearing was held before Hon. Krisi Lea Harrington, Charleston County Court of Common Pleas, for purposes of hearing oral arguments from Respondents' on their Motions for Summary Judgment and Motions for Stay and for hearing oral argument from Appellant regarding its' Opposition to Respondents' Motions.

On June 8, 2017, an Order was filed with the Charleston County Court of Common Pleas wherein Judge Harrington ruled as follows:

1. "Respondent Charleston Wrecking, Inc.'s Motions for Summary Judgment filed 1/20/2017 and 3/31/2017 was denied as Respondent failed to demonstrate a genuine issue of material fact."
2. Respondent Golemis's Motion for Summary Judgment was granted, "as Respondent had demonstrated no genuine issue of material fact existed as to the claims made against him".
3. Respondent Charleston Wrecking, Inc.'s Motion for Stay was "granted".
4. Appellant had "voluntarily withdrawn the claim of breach of contract."

no further explanation, finding of facts or conclusions of law were set forth in the Order. See Order filed on June 8, 2017, p. 1-2.

This Appeal now follows.

STANDARD OF REVIEW

An appellate court reviews the granting of a summary judgment under the same standard

applied by the trial court under Rule 56, SCRPC. Quail Hill, LLC v. Cty. Of Richland, 387 S.C. 223, 692 S.E.2d 499, 505 (2010).

Summary Judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law”.

The circuit court has discretion whether to grant a stay of a matter pending before the court. Talley v. John-Mansville Sales Corp., 285 S.C. 117, 119, 328 S.E.2d 621, 623 (1985); City of Spartanburg v. Belk’s Dep’t Store of Clinton, 199 S.C. 458, 480, 20 S.E.2d 157, 167 (1942). Accordingly, the appropriate standard of review is abuse of discretion. “An abuse of discretion arises where the circuit court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support.” Steinke v. South Carolina Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO THE RESPONDENT MICHAEL C. GOLEMIS IN THE FACE OF EVIDENCE THAT THERE EXISTED GENUINE ISSUES AS TO MATERIAL FACTS BETWEEN PLAINTIFF AND DEFENDANT GOLEMIS.

Respondent’s Golemis’s Motion for Summary Judgment was improperly granted. There existed genuine issues as to material facts in this case. Respondent Golemis’s counsel argued that because Respondent Golemis’s company was a statutory-closed corporation, that Respondent Golemis was protected by its’ corporate veil from personal liability and therefore, there exists a

corporate veil that shields Respondent Golemis from any individual liability. Court Transcript dated May 17, 2017, p. 15, line 12 to p. 18, line 6.

Respondent Golemis's counsel attached a copy of S.C. Code Section 33-18-250 as an Exhibit to his Motion. This statute is inapplicable and misapplied in this case nor was it raised as a cause of action by Appellant or as a defense/counterclaim by Respondent Golemis. This statute was misleading in that under the Official Comment Section, it specifically states that "This section does not prevent a court from "piercing the corporate veil" of a statutory corporation if the circumstances should justify imposing personal liability on the shareholders were the corporation not a statutory close corporation." See Motion for Summary Judgment as to Defendant Michael C. Golemis, Unmarked Exhibit of a copy of S.C. Code Section 33-18-250, Official Comment, Court Transcript dated May 17, 2017, p. 18, line 7 – line 22 (wherein the Court stopped Appellant's counsel's analysis regarding that statute).

When questioned by the Court as to what the Appellant's allegations were as to Respondent Golemis's acting in his individual capacity, Appellant's counsel argued that under Appellant's negligence cause of action against Respondent Golemis, that there existed a factual dispute as to what happened on July 14, 2015. Court Transcript dated May 17, 2017, p. 14, line 21 to p. 15, line 1 and p. 18, line 22 to p. 19, line 8. In addition, Appellant notified the Court that Respondent Golemis could be found personally liable, even if Respondent's company, Respondent Charleston Wrecking, Inc., was statutory-closed corporation, under the Sturkie criteria that was set forth in Appellant's Complaint. Court Transcript dated May 17, 2017, p. 19, line 12 to p. 20, line 16, p. 21, line 18 to p. 22, line 13

Respondent Charleston Wrecking, Inc. also argued at the hearing that mediation did not

take place as a contractual precondition, Court Transcript dated May 17, 2017, p. 9, line 19 to p. 10, line 8. Appellant set forth in its' Opposition to Defendant Charleston Wrecking, Inc.'s Motion for Summary Judgment that Appellant had tried on multiple occasions to schedule mediation, even prior to the lawsuit, but that Respondent did not respond. Certainly, Respondent had a duty to request mediation as a contractual precondition and it did not and still has not. Opposition to Defendant Charleston Wrecking, Inc.'s Motion for Summary Judgment, P. 1, Paragraph 1 to Paragraph 3.

II. THE TRIAL COURT ERRED IN STAYING THIS MATTER SO THAT A SEPARATE ACTION AGAINST RESPONDENTS' INSURANCE COMPANIES COULD BE DECIDED FIRST.

Respondents Charleston Wrecking, Inc. and Golemis's Motion to Stay as to Defendants was improperly granted. The Court gives no explanation as to the reason why the Motion to Stay is granted. Respondent Charleston Wrecking, Inc. argued that their Motion to Stay is that "a resolution of that separate action will determine whether or not Bouchelle not only has coverage, but really, more importantly, whether Bouchelle, Incorporated misrepresented the nature of its company on its insurance application", Court Transcript dated May 17, 2017, p. 8, line 1 to p. 9, line 3.

Due to the fact that the Court did not explain its' decision to grant the Respondents' Motion to Stay, it is very difficult to argue that an abuse of discretion arose where the Court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support.

Nevertheless, Appellant will argue that Respondents' allegations are without merit and Respondents have offered no evidence, statute, case law or court rule to substantiate its' claim

that its' Motion to Stay be granted until the insurance lawsuit is resolved.

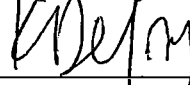
Due to this fact, the Appellant argued at the hearing and in its' Opposition to Defendant Charleston Wrecking, Inc.'s Motion for Stay of Defendants, that Appellant has a right to pursue an action against a tortfeasor without it being mandatory to wait until an insurance lawsuit is resolved first. Opposition to Defendant Charleston Wrecking, Inc.'s Motion for Stay of Defendants and Court Hearing Transcript dated May 17, 2017, p. 10, line 22 to p. 12, line 13.

CONCLUSION

For the reasons stated, this Court should reverse or overrule the trial court's decision, as its' granting Respondent Golemis's Motion for Summary Judgment and its' granting Respondents' Motion to Stay as to the Defendants.

February 15, 2018

Respectfully submitted,



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY COURT OF COMMON PLEAS
Hon. Kristi L. Harrington, Circuit Court Judge
Case No. 2015-CP-10-06615
(Appellate Case No. 2017-001532)

BOUCHELLE INCORPORATED,

Appellant

v.

CHARLESTON
WRECKING, INC. and
MICHAEL C. GOLEMIS,


Respondents.

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PROOF OF SERVICE

I certify that I have served the Amended Appellant's Initial Brief, the Amended Designation of Matter to be Included on the Record on Appeal, and ~~Amended~~ Certificate of Counsel with names, mailing addresses and telephone numbers of all attorneys of record, in compliance with Rule 203, SCACR, on Respondents Charleston Wrecking, Inc. and Michael C. Golemis by depositing a copy of it in the United States Mail, by email on 2/17/2018 and overnight mail on February 19, 2018, addressed to their attorneys of record, Kerry W. Koon, 147 Wappoo Centre, Suite 203, Charleston, SC 29412 (for Respondent Charleston Wrecking, Inc.) and Michael W. Sautter of Query Sautter Forsythe, LLC, 147 Wappoo Creek, Suite 202, Charleston, SC 29412 (for Respondent Michael C. Golemis).

February 17, 2018



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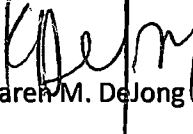
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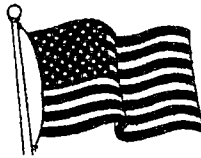
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Very truly yours,


Karen M. DeJong

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