

STATE OF SOUTH CAROLINA)
)
) IN THE COURT OF COMMON PLEAS
) THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER)
) 2015-CP-43-596

Paul Branco and Branco Investments, Inc.)
d/b/a Great American Cookie Co.,)
)
)
) Plaintiffs,)
)

vs.

AMENDED ORDER OF JUDGMENT

Hull Storey Retail Group, LLC and)
Sumter Mall, LLC,)
)
)
) Defendants.)

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SC Court of Appeals

This matter came before this Court by way of a bench trial on February 28, 2017 before the Honorable Ralph Ferrell Cothran Jr. The plaintiffs appeared and were represented by Patrick M. Killen, Esq. The defendants also appeared and were represented by William Buxton, Esq. and Matthew Matson, Esq., of the Georgia bar. Judgment was entered in favor of plaintiffs on March 23, 2017. On March 21, 2017, the defendants filed a Motion to Amend Judgment under Rule 52(b) of the South Carolina Rules of Civil Procedure. Subsequently, the defendants filed a notice of appeal with the South Carolina Court of Appeals on April 21, 2017. On August 30, 2017, the Court of Appeals granted the defendants' motion to remand, holding the appeal in abeyance until this Court resolved the pending motion to amend. Plaintiffs filed a response to defendants' motion on February 7, 2018. A hearing on Defendant's motion was held on February 9, 2018. Plaintiffs appeared and were represented by Patrick M. Killen, Esq. and Derek A. Shoemake, Esq. Defendants appeared and were represented by Miles E. Coleman, Esq. and Timothy E. Madden, Esq. of the South Carolina Bar.

The court has carefully considered all facts and arguments raised by all parties and reaffirms its findings for the plaintiff, as amended, in the amount of \$63,625.00 in actual damages.

FINDINGS OF FACT

The plaintiff, Paul Branco (hereinafter "Branco"), owned and operated two Great American

Cookie Co. (hereinafter "GAC") franchises, one in the Sumter Mall and the other in the Magnolia Mall in Florence. Branco began the Magnolia Mall GAC franchise in Florence in 2001. Branco entered into a contract (hereinafter "lease") with defendant, Sumter Mall, LLC, a South Carolina LLC under the control and direction of Defendant Hull Storey Retail Group, LLC (hereinafter "Hull Storey"), giving Branco a lease on unit 55 in Sumter Mall. The lease term was from December 30, 2002 to April 30, 2013. Beginning in 2003, Branco operated a GAC store in unit 55 and paid monthly rent to the defendants as provided in the lease for the next ten (10) years and four (4) months.

In September of 2012, Branco and defendant Hull Storey began discussions about the possibility of Branco's daughter taking over from Branco and operating the GAC store in Sumter Mall. Ultimately, Branco was told by Hull Storey that, in order for Branco's daughter to be approved by Hull Storey as a lessee, Branco would have to sign as a guarantor on the daughter's lease. Branco was not interested in signing as a guarantor for his daughter and withdrew the proposal to have his daughter take over the GAC franchise.

Following this, Branco Investments, Inc. (hereinafter "Branco Investments"), the owner of the equipment and assets utilized in the Sumter Mall and Magnolia Mall GAC franchises, through Branco, negotiated an assets sale with Brooktenn, LLC (hereinafter "Brooktenn"), a Georgia limited liability company owned by Stewart Applebaum (hereinafter "Applebaum"). Brooktenn owns and operates several GAC franchises in neighboring and other southeastern states. Pursuant to the asset sale contract with Branco, Brooktenn applied submitted a lease application to Hull Storey. Communications between Branco and Lewis White, a representative of Hull Storey, indicated that Hull Storey approved Brooktenn's lease application to operate a GAC franchise in Sumter Mall. This lease agreement between Hull Storey and Brooktenn was never executed.

When Hull Storey became aware of Branco's deal with Brooktenn, Hull Storey made a demand of \$70,000.00 for a "lease assignment fee." Evidence suggested Hull Storey knew and

understood that Brooktenn, LLC was not taking an assignment of Branco's lease, but Hull Storey nevertheless cited paragraph 16.2 of the lease (which deals with lease assignments) as the basis for the demand. Hull Storey eventually reduced its demand from \$70,000.00 to \$20,000.00.

Both Branco and Brooktenn were told by Hull Storey that Brooktenn would not be allowed to operate in the Sumter Mall unless the \$20,000.00 was paid. Branco was even told by Hull Storey that Brooktenn's lease application ". . . **has been** approved if we can determine a way to come up with 20k." (emphasis added). When both Branco and Brooktenn objected and pointed out that there was not nor would be a lease assignment, Hull Storey then told Branco that the \$20,000.00 was instead based on an effort to recoup capital investments made by the defendants in the Sumter Mall, such as carpet in the common areas of the building. Branco continued to refuse to pay the \$20,000.00.

Once it became clear Branco would not pay to it the \$20,000.000, Hull Storey turned to Brooktenn for the money. When Brooktenn refused, Hull Storey offered to finance the \$20,000.00 over the first twelve months of Brooktenn's lease. Brooktenn declined.

Evidence showed Hull Storey subsequently contacted Applebaum and suggested Applebaum should break his asset sale agreement with Branco. Hull Storey told Applebaum that Branco likely could not remove his equipment from the Sumter Mall and that, in exchange for \$20,000.00, Hull Storey would give Brooktenn the equipment for use in operation of Brooktenn's GAC store. It was even suggested by Hull Storey to Applebaum that Brooktenn would come out \$50,000.00 "better" if it backed out of its deal with Branco. Applebaum testified that due to Hull Storey's conduct, Brooktenn withdrew from the agreement with Branco and abandoned its effort to operate a franchise in Sumter. Applebaum testified he has been in business for years and dealt with many malls and landlords but had never encountered this sort of behavior (as employed by Hull Storey).

Because Brooktenn withdrew from the agreement with Branco Investments, Branco lost

\$70,000.00. Branco testified that after removing the equipment from the Sumter Mall, he was able to sell some of it for \$5,000.00 to another buyer. The remaining equipment is in Branco's possession but is of little value because, once removed from the store, it became obsolete.

This Court finds Branco neither renewed his lease with Hull Storey nor made, attempted to make or contemplated any assignment of his lease with the mall. Hull Storey allowed Branco to remain in the store until May 15, 2013. During that 15-day period Branco failed to pay rent to Hull Storey for an amount totaling \$1,375.00. Based on these facts, the court finds Hull Storey owes the plaintiff \$63,625 in actual damages.

CONCLUSIONS OF LAW

The plaintiff has alleged four causes of action in this case, breach of contract with fraudulent intent, tortious interference with a contract, fraud, and constructive fraud respectively.

(Breach of Contract with Fraudulent Intent)

To recover for a breach of contract, the plaintiff must prove: "(1) a binding contract; (2) a breach of contract; and (3) damages proximately resulting from the breach." *Hennes v. Shaw*. 397 S.C. 391, 725 S.E.2d 501 (2012).

In this case there was a valid contract between the plaintiff and defendant in the 10 year lease between Branco and Hull Storey. The plaintiff failed to prove defendant breached this contract. The plaintiff's arguments at trial and in the pleadings failed to show any specific language in the contract that the defendant violated. Therefore, the court finds for the defendant on this cause of action.

(Tortious Interference with a Contract)

To succeed on a claim for tortious interference with a contract the plaintiff must satisfy the following elements: “(1) existence of a valid contract; (2) the wrongdoer’s knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages.” *Dutch Fork Dev. Group II, LLC v. Sel Props*, 406 S.C. 596, 604 (2012) quoting *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517 (1993).

The court finds persuasive the evidence showing Branco Investments had a valid contract with Brooktenn for the asset sale discussed at length in this order’s findings of fact. Hull Storey had knowledge of this contract. Hull Storey intentionally interfered with this agreement, and ultimately procured its breach, by deeming it a lease assignment and attempting to collect \$20,000 first from Branco and then from Brooktenn. Persuasive evidence was offered at trial that Branco had no intention of assigning its lease to Brooktenn, and that the contract between them was solely for the assets and equipment located in the Sumter Mall. Applebaum, testifying on behalf of Brooktenn, stated that he did not want an assignment of Branco's lease because "it might have had things in there that I didn't want that I wouldn't sign for or I wouldn't agree to." Transcript of Record pg. 84, *Paul Branco v. Hull Storey Retail Group, LLC, et al.*, 2015-CP-43-00596, February 28, 2017.

Notably, Hull Storey undermined Branco and Brooktenn’s contract by suggesting Brooktenn should ignore its deal with Branco, gambling Branco would be unable to move his equipment which Hull Storey would then sell to Brooktenn for \$20,000.00 instead of the \$70,000 Brooktenn agreed to pay Branco. This interference was not justified in any way and there was no credible evidence of justification offered by defendants at trial or in the pleadings. Hull Storey argued at trial, and in their motion for consideration, that their actions in demanding the \$20,000.00 from Branco, and then from Brooktenn, were a legitimate exercise of their right to place conditions on the lease of their property in Sumter Mall. In support of their argument, Hull Storey cites Judge

Anderson's opinion from *BCD, LLC v. BMW Mfg. Co., LLC*, 2008 U.S. Dist. LEXIS 7410, 66-67, 69-70 (Dist. Ct. 2008):

Absence of justification is an essential element of a tortious interference claim. *Waldrop Bros. Beauty Supply, Inc. v. Wynn Beauty Supply Co.*, 992 F.2d 59, 62 (4th Cir. 1993). The absence of justification means conduct that is carried out for an improper purpose, such as malice or spite, or through improper means, such as violence or intimidation. *Id.* at 63.

a. Improper Purpose

If some legitimate purpose or right exists, liability cannot be imposed even if the defendant exercises that right for malicious reasons. *Id.* Moreover, if a defendant acts for more than one purpose, the improper purpose must predominate in order to create liability. *Crandall Corp. v. Navistar Int'l. Transp. Corp.*, 302 S.C. 265, 395 S.E.2d 180 (S.C. 1990).

b. Improper means

Improper means are defined as "means that are illegal or independently tortious." *Love v. Gamble*, 316, S.C. 203, 448 S.E.2d 876, 883 (S.C. Ct. App. 1994) (internal quotes omitted). In South Carolina, "improper methods may include violence, threats, or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information or breach of a fiduciary relationship." *Waldrop Bros.*, 992 F.2d at 63.

Hull Storey argues that seeking the \$20,000 fee from either Branco or Brooktenn as an assignment fee was a proper and legitimate exercise of its rights as a landlord. Both Branco and Brooktenn testified during trial that their asset sale contract was not, and was never intended to be, and assignment of Branco's lease to Brooktenn. Evidence further suggested that Hull Storey's rationale for demanding the \$20,000 shifted as the negotiations between Branco and Brooktenn unfolded. Branco testified that Hull Storey initially demanded the entire \$70,000 price of the asset sale contract between Branco and Brooktenn. "Q: The defendant put a demand on you of 70,000 dollars, correct? A: Initially, Yes." Transcript pp. 59-60. This demand was later lowered to \$20,000. When Branco refused to pay the \$20,000, Hull Storey attempted to collect the payment from Brooktenn. Brooktenn refused. Evidence also suggested that Hull Storey later attempted to claim the demanded \$20,000 as a "maintenance" fee for the common areas in the mall. This repeated prodding caused Brooktenn to walk away from the asset sale contract with Branco, after Hull

Storey's suggestion that Brooktenn could simply wait for Branco's lease to expire, and pay Hull Storey \$20,000 instead of the \$70,000 purchase price with Branco. Hull Storey briefly cites *Love v. Gamble* for a definition of improper means, as noted above. *Love v. Gamble* further states, however, that "[m]ethods also may be improper because they violate an established standard of a trade or profession, or involve unethical conduct. Sharp dealing, overreaching, or unfair competition may also constitute improper methods." *Id* at 215, 448 S.E.2d 876 (citing *Duggin v. Adams*, 234 Va. 221, 228, 360 S.E.2d 832, 837 (1987)). Applebaum, testifying on behalf of Brooktenn, stated at trial that "[t]hey assumed Paul was going to leave that, and I said I don't do business this way. I wouldn't stab somebody in the back." Transcript pg. 91. The evidence at trial supports the conclusion that Hull Storey's interference with the asset sale contract was not justified, and was carried out through improper means.

As a result of Hull Storey's interference with Branco and Brooktenn's asset sale agreement, Brooktenn walked away from the deal and Branco lost the opportunity to sell his assets. The sale price on the contract was \$70,000 but this amount is offset by Branco's sale of some of the equipment for \$5,000 and unpaid rent owed to Hull Storey of \$1,375.00. After these deductions, the total amount of plaintiff's damages is \$63,625. Therefore, the court finds for the plaintiff on this cause of action for actual damages of \$63,625.

(Fraud and Constructive Fraud)

In the present case, the plaintiff argued that the defendant made a false, material representation that proximately caused his injuries. However, at trial the plaintiff never specified with statement made by the defendant was fraudulent and did not prove that he, Branco, relied on the false statement. Therefore the court finds for the defendants on this cause of action.

Finally, the court finds for the plaintiff on the defendant's counterclaim because no evidence was presented at trial to support this cause of action.

AND IT IS SO ORDERED.

March ____, 2018

The Honorable R. Ferrell Cothran
Chief Administrative Judge
Third Judicial Circuit



Sumter Common Pleas

Case Caption: Paul Branco , plaintiff, et al VS Hull Storey Retail Group Llc ,
defendant, et al
Case Number: 2015CP4300596
Type: Order/Other

So Ordered

s/ R. Ferrell Cothran, Jr., 2144