THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILE COUNTY
Circuit Court

Roger L. Couch, Circuit Court Judge

Case No. 2015-CP-23-04535

Appellate Case No. 2017-002487

Communication Concepts, Inc. ..... Appellant,

v.

Controls for Automation, Inc. and
Digital Management Solutions, Inc. ..... Respondent.

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This Court should reverse the circuit court's Order Compelling Settlement and Order Denying Communication Concepts, Inc.'s Motion to Alter or Amend because the circuit court committed reversible error on two separate occasions. First, contrary to the express terms of a settlement agreement ("Settlement Agreement") between the parties,[1] the circuit court improperly held that it was not solely limited to ordering a damages hearing between CFA and DMS in the event that any party failed to fulfill its obligations under the Settlement Agreement. In so holding, the circuit court ignored the parties' intent, disregarded the plain language of the Settlement Agreement, and improperly used judicial discretion to insert its own remedy into an otherwise unambiguous contract. Second, the circuit court improperly compelled specific performance of the originally hoped-for trailer transaction within the Settlement Agreement when CFA had an adequate remedy at law for money damages against DMS. In support of this holding, the circuit court disregarded the fact that CFA had an adequate remedy at law, and instead improperly gave decisive weight to the style of motion brought by CFA. Because each of the circuit court's holdings constitutes reversible error, CCI respectfully requests that this Court reverse the circuit court's orders and remand this case with instructions that a damages hearing against DMS was CFA's sole remedy under the terms of the Settlement Agreement.[2]

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[1] The parties to this dispute – all of which executed the Settlement Agreement at issue – are Communication Concepts, Inc. ("CCI"), Controls for Automation, Inc. ("CFA"), and Digital Management Solutions, Inc. ("DMS").

[2] A damages hearing was conducted on April 24, 2017 in Greenville, South Carolina before the Honorable Cordell Maddox, Jr., which resulted in CFA obtaining a judgment against DMS in the amount of $138,585.16. (*See generally* Damages Hr'g Tr.; *see also* Order of J.).

STATEMENT OF FACTS

This is a commercial dispute that involves component part suppliers involved in the construction of mobile surveillance units ("MSUs"). (Decl. of Mark Mills, at ¶ 3). MSUs are essentially 3' x 3' trailers that are up-fitted with electronic equipment, including, for example, video cameras, and are used for safety and monitoring purposes. (*Id.* at ¶¶ 4-5). An MSU can be placed in any location and can monitor, via video signal transmission, the happenings at that location. (*Id.* at ¶ 6). Law enforcement and railroad companies regularly use these devices. (*Id.* at ¶ 7). The MSUs at issue in this case were being constructed for a third party ("the third party"). (*Id.* at ¶ 8).

CCI received a contract to provide 14 MSUs to the third party. (*Id.* at ¶ 9). In order to provide the MSUs to the third party, CCI contracted with DMS to construct the base trailers, which also included wiring and fuel cells. (*Id.* at ¶ 10). In turn, DMS contracted with CFA for the purchase of the fuel cells. (*Id.* at ¶ 11). Upon receipt of the trailers from DMS, CCI planned to up-fit them with substantial surveillance and other electronic equipment. (*Id.* at ¶ 12). Following this up-fit, the trailers would become MSUs. (*Id.* at ¶ 13). CCI then planned to sell those MSUs to the third party pursuant to its contract with the third party. (*Id.* at ¶ 14).

In order to facilitate construction of the trailers by DMS, on June 20, 2014, CCI advanced DMS $213,070.20. (*Id.* at ¶ 15). Later, on August 27, 2014, CCI provided a second installment payment to DMS in the amount of $142,046.80. (*Id.* at ¶ 16). Finally, on February 5, 2015, CCI provided a third installment payment to DMS in the amount of $100,000. (*Id.* at ¶ 17). Prior to the commencement of this litigation, CCI paid DMS for roughly nine MSUs. (*Id.* at ¶ 18). However, CCI had only taken possession of eight MSUs, all of which were delivered to the third party. (*Id.* at ¶ 18).

This litigation began when CFA filed a lawsuit against DMS and CCI on July 21, 2015. (*See generally* CFA Compl.). However, CFA's Complaint only sought to collect a debt against DMS, alleging that DMS failed to pay CFA for a large portion of the costs of the fuel cells. (*Id.* at ¶¶ 7-19). CFA's Complaint did not allege any claims against CCI. (*See generally id.*). Rather, CFA merely sought to enjoin CCI from paying any further funds due to DMS without DMS first paying CFA sufficient funds to satisfy its debt with CFA. (*Id.* at ¶¶ 21-27).

On August 14, 2015, DMS answered the Complaint and filed a Cross-Claim against CCI. (*See* DMS Answer and Cross-cl.). DMS's Cross-Claim against CCI was based upon the fact that CCI had yet to pay for and take delivery of the final six MSUs. (*See id.* at ¶¶ 14-16). After a delayed service of process, CCI answered the Complaint and Cross-Claim on October 20, 2015 and December 15, 2015, respectively. (*See* CCI Answer to Compl.; *see also* CCI Answer to Cross-cl.).

The parties mediated this case on March 8, 2016, and continued to negotiate a settlement thereafter. Ultimately, on or about April 6, 2016, the parties executed the Settlement Agreement, which envisioned a process whereby CCI would take the remaining MSUs in piecemeal fashion in order to generate the cash flow necessary to purchase the remaining six MSUs.[3] (*See generally* Settlement Agreement). As the Settlement Agreement makes clear, CCI was provided with the previously paid for ninth MSU, (*See id.* at ¶ 1), and CCI hoped that it could sell that MSU to the third party in order to generate the cash flow necessary to purchase the next MSU from DMS, and so on. (*See, e.g., id.* at ¶ 3 ("CCI will continue to purchase the remaining trailers, cash on

[3] During the course of the commercial relationship between DMS and CCI (CFA was not in the picture at this time, as it only supplied fuel cells to DMS), CCI experienced payment lags from the third party. (Mills Decl., at ¶ 19). Notwithstanding the lag in payment, CCI was repeatedly assured that the remaining MSUs were needed by the third party. (*Id.* at ¶ 20). Moreover, notwithstanding the lag in payment, and as noted above, at the time this litigation was instituted, CCI had paid for more trailers than it had received from DMS. (*Id.* at ¶ 18).

delivery (as defined above), ***as funds become available*** . . . .") (emphasis added)). Unfortunately, the hoped-for process did not work, as CCI was unable to receive payment for the remaining MSUs from the third party. (Mills Decl., at ¶ 21). As a result, because the third party ceased paying CCI for the MSUs, funds never became available as contemplated by Paragraph 3 of the Settlement Agreement, and CCI could not purchase the remaining MSUs from DMS.

Despite CCI's extensive efforts to get the third party to accept the remaining MSUs, which spanned months, the third party informed CCI that it would not accept the remaining MSUs and cancelled its contract with CCI. (Second Decl. of Mark Mills, at ¶ 22). The third party also asked CCI to confirm that CCI had paid for the MSUs that the third party had received because a company named SFC Energy ("SFC") had directly contacted the third party multiple times inquiring about payment for the fuel cells located in the MSUs. (*Id.* at ¶ 25). SFC sold fuel cells for the MSUs to CFA before CFA sold the fuel cells to DMS, and based upon the repeated payment inquiries from SFC, it is the understanding of CCI's President, Mark Mills ("Mr. Mills"), that CFA had not paid SFC for these fuel cells. (*Id.* at ¶¶ 26-27). As a result, SFC's interference with CCI's client (that is, the third party) helped erode any and all opportunities to get the MSUs accepted by the third party. (*Id.* at ¶ 28).

On August 4, 2016, CFA filed a Motion to Compel Settlement, which sought an order from the circuit court compelling enforcement of the terms of the Settlement Agreement entered into by the parties. (*See generally* CFA Mot. to Compel Settlement). The circuit court granted CFA's motion and issued an Order Compelling Settlement on October 24, 2016.[4] (*See generally* Order Compelling Settlement). Specifically, the circuit court ordered "the parties [to] comply with the terms of the Settlement Agreement within thirty (30) days of the date of the entry of [the

[4] Although the Order Compelling Settlement was signed on October 24, 2016, it was not electronically filed until November 18, 2016. Furthermore, counsel for CCI did not receive written notice of the entry of the Order until November 21, 2016. (Mot. for Recons., at p. 1).

Order Compelling Settlement] with all trailers and funds having been delivered pursuant to the Settlement Agreement by that time." (*Id.* at p. 2).

In response, on December 2, 2016, CCI timely filed a Motion for Reconsideration pursuant to Rule 59(e), SCRCP, requesting that the circuit court reconsider its Order Compelling Settlement. (*See generally* CCI Mot. for Recons.). On November 16, 2017, the circuit court issued an order denying CCI's Motion for Reconsideration. (*See generally* Order Den. Def.'s Mot. to Alter or Am.). In its order, the circuit court held that it was not solely limited to ordering a damages hearing and further found that specific performance was an appropriate remedy. (*Id.* at pp. 3-5).

STANDARD OF REVIEW

"When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Mazloom v. Mazloom*, 382 S.C. 307, 316, 675 S.E.2d 746, 751 (Ct. App. 2009) (citations and quotations omitted). "The reviewing court should view the actions separately for the purpose of determining the appropriate standard of review." *Id.* "In an action in equity, tried by the judge alone, without a reference, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence." *Id.* (citations omitted). "On the other hand, when reviewing an action at law, . . . the appellate court's jurisdiction is limited to correction of errors at law . . . ." *Id.*

"An action for breach of contract is an action at law." *Lee v. Univ. of S.C.*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014) (citations and quotations omitted). "Because the construction of a clear and unambiguous contract is a matter of law for the court, [the court] review[s] the trial court's findings of law *de novo*." *Id.* (citations omitted). An action for specific performance is an

action in equity. *Fesmire v. Digh*, 385 S.C. 296, 303, 683 S.E.2d 803, 807 (Ct. App. 2009). Thus, when analyzing a specific performance action, this Court "may resolve questions of fact in accordance with its own view of the preponderance of the evidence." *Id.* (citations omitted).

ARGUMENT

I. The Circuit Court Committed Reversible Error by Holding That it Was Not Solely Limited to Ordering a Damages Hearing Under the Terms of the Settlement Agreement.

The circuit court committed reversible error because the plain language of the Settlement Agreement required the circuit court to order a damages hearing, not specific performance of the Settlement Agreement. As noted above, the circuit court ordered that the parties comply with the terms of the Settlement Agreement, specifically requiring that all trailers and funds be delivered pursuant to the Settlement Agreement. (Order Compelling Settlement, at p. 2). However, the Settlement Agreement expressly provides, "[i]f ***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***." (Settlement Agreement, at ¶ 8) (emphasis added). This language – contrary to the circuit court's holding – clearly contemplates a damages hearing between DMS and CFA as being CFA's sole remedy in the event that ***any party*** fails to fulfill its obligations under the Settlement Agreement.

A settlement agreement is a contract. *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). The circuit court correctly recognized that "[g]eneral contract principles are used in the construction of a settlement agreement." (Order Den. Def.'s Mot. to Alter or Am., at p. 3). Thus, under general contract principles, "'[i]f [a settlement agreement's] language is plain, unambiguous, and capable of only one reasonable interpretation,

no construction is required and the [settlement agreement's] language determines [its] force and effect.'" *CoastalStates Bank v. Hanover Homes of S.C., LLC*, 408 S.C. 510, 518, 759 S.E.2d 152, 157 (Ct. App. 2014) (quoting *Ellie, Inc. v. Miccihi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004).

Under the plain language of the Settlement Agreement, the parties expressly agreed that if ***any party*** failed to fulfill its obligations under the Settlement Agreement and the case returns to litigation – ***as it did*** – then ***DMS and CFA*** would conduct a damages hearing. (*See* Settlement Agreement, at ¶ 8). The agreement for DMS and CFA to conduct a damages hearing makes clear that the parties did not wish to require CCI to purchase the trailers from DMS if the hoped-for transaction could not be accomplished. Indeed, the parties also agreed that "***[i]f CCI [did] not purchase*** the second or subsequent trailer from DMS, as provided in Paragraphs 2 and 3,[5] then DMS [would] return the remaining unused fuel cells to CFA for a credit against the amount owed to CFA, less a 15% stocking fee." (Settlement Agreement, at ¶ 7). ***Nothing*** in the Settlement Agreement required CCI to purchase the remaining trailers from DMS in the event that CCI failed to purchase the trailers as originally planned.

The circuit court also erred by concluding that, in "***its judicial discretion***," the "equitable remedy for specific performance was warranted." This finding is contrary not only to the parties' intent, but also to basic principles of contract law.[6] The plain language of Paragraph 8 of the Settlement Agreement only provides for a damages hearing between CFA and DMS—not

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[5] As noted above, Paragraph 3 of the Settlement Agreement provided that CCI would continue to purchase the remaining trailers from DMS "***as funds bec[a]me available***" from the third party. (Settlement Agreement, at ¶ 3) (emphasis added). This language clearly evidences the parties' understanding that CCI's payments to DMS were contingent upon CCI continuing to receive payments for the MSUs from the third party.

[6] *See Lee*, 407 S.C. at 517, 757 S.E.2d at 397 ("In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties.") (citations and quotations omitted).

specific performance. Thus, in making its determinations, the circuit court ignored the parties' intent, disregarded the plain language of the Settlement Agreement, and improperly used "judicial discretion" as a vehicle to insert its own specific performance provision into an unambiguous contract that otherwise did not provide for such a remedy. *See Lee*, 407 S.C. at 518, 757 S.E.2d at 397 ("Courts are without authority to alter an unambiguous contract by construction or to make new contracts for the parties."). If the parties intended for specific performance of the originally hoped-for trailer transaction to be an available remedy under the Settlement Agreement, then they would have included such a provision within the four corners of the Settlement Agreement. This Court should reverse the circuit court, enforce the plain language of the Settlement Agreement, and hold that a damages hearing against DMS was CFA's sole remedy under the terms of the Settlement Agreement. This Court should not countenance such a result.

II. The Circuit Court Committed Reversible Error by Compelling Specific Performance of the Originally Hoped-For Trailer Transaction Within the Settlement Agreement When CFA Had an Adequate Remedy at Law for Money Damages Against DMS.

The circuit court committed reversible error on a separate ground when it compelled specific performance of the originally hoped-for trailer transaction within the Settlement Agreement despite the fact that CFA had an adequate remedy at law for money damages against DMS. In so holding, the circuit court gave improper weight to the fact that CFA brought a motion in equity to compel specific performance rather than an action at law to construe a contract against CCI. (Order Den. Def.'s Mot. to Alter or Am., at p. 5). The style of motion brought by CFA is immaterial if CFA had an adequate remedy at law and, thus, should not have influenced the circuit court's specific performance analysis.

"[S]pecific performance is ***not an absolute right***, and a court granting it must follow

established principles and carefully consider all the circumstances of the particular case." *Time Warner Cable v. Condo Servs., Inc.*, 381 S.C. 275, 282, 672 S.E.2d 816, 819 (Ct. App. 2009) (emphasis added and citations omitted). Furthermore, whether to grant specific performance is an equitable determination. *Campbell v. Carr*, 361 S.C. 258, 262, 603 S.E.2d 625, 627 (Ct. App. 2004) ("An action for specific performance is one in equity."); *see also Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000) (holding that specific performance is only appropriate if "enforcement of the contract is equitable between the parties."). If an adequate remedy exists at law, then a party is not entitled to specific performance. *Ingram* at 105, 531 S.E.2d at 291 ("Specific performance should be granted only if there is no adequate remedy at law . . . ."); *see also Time Warner*, 381 S.C. at 284, 672 S.E.2d at 820 ("A party is not entitled to specific performance of a contractual provision if an adequate remedy exists at law."); Order Den. Def.'s Mot. to Alter or Am., at p. 4 ("Specific performance is appropriate if no adequate remedy exists at law.").

Here, CFA has an adequate remedy at law for money damages against DMS. This is further supported by the fact that the parties expressly provided for a damages hearing between CFA and DMS in the event that ***any party*** failed to fulfil its obligations under the Settlement Agreement. As noted above, a damages hearing was conducted on April 24, 2017, through which CFA obtained a judgment against DMS in the amount of $138,585.16. (*See generally* Damages Hr'g Tr.; *see also* Order of J.). Consequently, CFA has an adequate remedy at law against DMS, and the circuit court erred by failing to give this fact decisive weight.

In addition, the circuit court failed to give proper weight to several equitable factors when it ordered specific performance. As noted above, this Court has jurisdiction to review the record and find facts in accordance with its own view of the preponderance of the evidence. *Mazloom*,

382 S.C. at 316, 675 S.E.2d at 751 (citations and quotations omitted). Prior to the initiation of this litigation, CCI had paid DMS for more MSUs than it had received. And, it was DMS that in turn failed to pay CFA for the fuel cells. Moreover, CCI did not have a commercial relationship with CFA, CFA had no claims against CCI in its Complaint, and the third party cancelled its contract with CCI because it was no longer interested in purchasing the remaining MSUs from CCI—a fact which renders impossible CCI's ability to obtain the necessary funding (as contemplated by Paragraph 3 of the Settlement Agreement) to purchase the remaining MSUs from DMS.[7] Furthermore, as detailed above, SFC's direct interference with CCI's clients – which, per Mr. Mills' understanding, was based upon CFA's failure to pay SFC for the fuel cells – helped erode any and all opportunities to get the MSUs accepted by the third party. (Mills Second Decl., at ¶¶ 25-28). Finally, the Settlement Agreement expressly contemplated that if CCI did not purchase the trailers from DMS as originally planned, then DMS would return the remaining unused fuel cells to CFA for a credit against the amount owed to CFA, less a 15% stocking fee. (Settlement Agreement, at ¶ 7).[8] In light of these facts, and notwithstanding the fact that CFA has an adequate remedy at law, it is inequitable – as between the parties – to compel CCI to purchase the remaining MSUs.

The circuit court was made aware of all of this information prior to issuing its Order Denying CCI's Motion for Reconsideration. The circuit court improperly ordered specific performance. This Court should reverse.

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[7] Notably, DMS's operations in Greenville, South Carolina ceased operations and went out of business, rendering the originally hoped-for trailer transaction an impossibility. (*See* Damages Hr'g Tr., at 4:9-5:20).

[8] Indeed, as noted above, CFA's only role in the trailer transaction was to provide fuel cells to DMS. (Mills Decl., at ¶ 11).

CONCLUSION

For the reasons set forth above, CCI respectfully asks this Court to reverse the circuit court's orders and remand this case with instructions that a damages hearing against DMS was CFA's sole remedy under the terms of the Settlement Agreement.

Respectfully submitted,

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April 13, 2018
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on April 13, 2018 on the above named Respondents by depositing a copy of it in the United States Mail, postage prepaid, on April 13, 2018, addressed to counsel of record for Controls for Automation, Inc. as follows:

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VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
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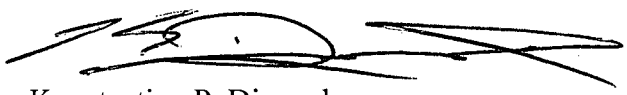
Appellate Case No. 2017-002487

Dear Ms. Kitchings:

Please find enclosed for filing the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal and Proof of Service in the above-referenced matter.

By way of copy, I am serving Respondent Controls for Automation, Inc.'s counsel. Thank you for your assistance.

Sincerely,



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