

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable Kristi L. Harrington, Circuit Court Judge

Case Number: 2015-CP-10-06615

(Appellate Case Number: 2017-001532)

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APR 23 2018

SC Court of Appeals

BOUCHELLE INCORPORATED,.....APPELLANT,

vs.

CHARLESTON WRECKING, INC. and MICHAEL C. GOLEMIS.....RESPONDENTS.

RESPONDENTS' JOINT INTIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT ON BEHALF OF RESPONDENT MICHAEL GOLEMIS WAS APPROPRIATE.
- II. IS THE TRIAL COURT'S GRANT OF A STAY TO DEFENDANTS IMMEDIATELY APPEALABLE?

STATEMENT OF CASE

This is a joint brief filed by Respondents Charleston Wrecking, Inc., and Michael C. Golemis. Incorporated into Respondents' Statement of the Case are the first two paragraphs of Appellant's Statement of the Case.

Respondent Charleston Wrecking, Inc., (Charleston Wrecking) filed an Answer on February 1, 2016. Germaine to the issues in this appeal, in its Answer Charleston Wrecking admitted paragraphs 1, 2, of the Complaint, and so much of the allegations in paragraph 3 that individual Defendant Michael C. Golemis ("Golemis") is a citizen and resident of Charleston County. In answering the balance of the allegations in paragraph 3 of the complaint, Charleston Wrecking "admits only that Mr. Golemis is a shareholder of Charleston Wrecking, Inc." (Charleston Wrecking Answer ¶ 3). In response to the allegations in the Complaint in paragraphs 6 and 14, Charleston Wrecking admitted entering into a contract with Appellant Bouchelle Incorporated ("Bouchelle") for demolition services concerning a building located at 7350 Industry Dr., North Charleston SC, and stated the contract language speaks for itself. (*Id.*, ¶s 6, 9, 11, 12). Charleston Wrecking denied the allegations in paragraphs 7, 8, 9, 16, 17, 19, 20, 21, 22 and 24. (*Id.*, ¶s 7, 13).

Respondent Michael C. Golemis filed an Answer on February 1, 2016. Germaine to the issues in this appeal, Golemis admitted so much of the allegations in paragraph 3 of the Complaint that he is a citizen and resident of Charleston County. In answering the balance of the allegations in paragraph 3 of the complaint, Golemis "admits only that Mr. Golemis is a

shareholder of Charleston Wrecking, Inc. (Golemis Answer ¶ 3). In answering the allegations of paragraph 6 of the complaint, Golemis denied he individually entered into a contract with the Plaintiff. (Golemis Answer ¶ 6). Golemis denied the allegations in paragraphs 7, 8, 9, 11, 12, 16, 17, 19, 20, 22 and 24 of the Complaint. (*Id.*, ¶s 7, 11).

On January 9, 2017, Golemis filed a Motion for Summary Judgment and individually moved for an Order granting summary judgment in his favor. The specific grounds for the motion germane to this appeal are as follows:

- a) Michael C. Golemis, individually was not a **party** to the subcontract entitled “Standard Short Form Agreement Between Constructor and Subcontractor” dated May 20, 2015, 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 the Plaintiff’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;

The motion was supported by the Affidavit of Michael C. Golemis, dated December 27, 2016, which provided in pertinent part as follows:

7. I was not individually a party to this contract nor did I have any other contractual relationship with Bouchelle Incorporated....
8. At the time of the incident, I was not personally present, however Charleston Wrecking, Inc., had personnel experienced in demolition on the job and being supervised by a licensed general contractor, Horace B. Thomas. Mr. Thomas, to my personal knowledge, has been a licensed general contractor for approximately forty (40) years and has worked in demolition for Charleston Wrecking, Inc. and its predecessor, Conco, Inc., for approximately the same length of time.

13. Neither Charleston Wrecking, Inc., nor myself has committed any act which would make it inequitable or fundamentally unfair to look solely to Charleston Wrecking, Inc. for any recovery...

Golemis' Motion for Summary Judgment also included as attachments, the Articles of Incorporation for Charleston Wrecking, Inc., a Statutory Close Corporation and Certificate of Existence of Mark Hammond, Secretary of State, dated December 29, 2016.

Finally, Golemis' motion provided that pursuant to S.C. Code § 33-18-250, even if Bouchelle were to show that Charleston Wrecking failed to observe the usual corporate formalities or requirements, which Respondents deny, said allegations are not grounds for imposing personal liability on individual Respondent Golemis.

Respondent Charleston Wrecking served Requests for Admissions on Appellant Bouchelle on February 2, 2016. Appellant Bouchelle did not respond and the requests are deemed admitted. Among the matters deemed admitted were:

- a) Golemis was not a party to the contract between Appellant Bouchelle and Respondent Charleston Wrecking;
- b) That there exists no other contract between Plaintiff and Michael C. Golemis. (Transcript p.16, line 24 - p.17, line 11; Charleston Wrecking RFA 2, 3).

On March 31, 2017, Charleston Wrecking moved for summary judgment and for a stay of the action until a resolution in a case brought by Appellant against its insurance carrier, Canopus US Insurance, Inc., and Seneca the insurance carrier for Charleston Wrecking, Inc., for the same occurrence that is the subject of this action. (Case Number 2016-CP-10-4984). Respondents' Motions for Summary Judgment and Motion for Stay were heard by the Honorable Kristi L. Harrington on May 17, 2017. As to matters that were before the trial court at the summary judgment hearing; there were no pending motions filed on behalf of Appellant Bouchelle Inc., Appellant offered no exhibits and none were marked for identification. Appellant did not

designate any deposition excerpts for use at the hearing. Appellant did not submit any affidavits in opposition to the Respondents' motions. Appellant did not object to any affidavits or attachments to Respondents' Motions. Appellant acknowledged being prepared on all motions by defendant(s). (Transcript p.4, line 7 –p.5, line 15; Transcript p.13, lines 16-24).

Appellant relied solely on argument and its Complaint to defeat summary judgment. "I've made the negligence claim. Mr. Golemis is the owner of Charleston Wrecking. He is part and parcel of what happened that day. Obviously, we've had dispute regarding the facts of that day, that's why summary judgment should be denied." (Transcript p.14, line 21 - p.15, line 1). Appellant deferred to the Complaint when questioned by the Trial Court as to how Respondent Golemis could be personally liable to Appellant. (Transcript p. 19, lines 9 - 24).

Respondent Golemis argued, "...that the facts before the Court today speak for themselves. There was a corporate entity in existence of entering the contract. All actions in the performance of the contract were taken on behalf of the corporate entity. There is no factual issue as to piercing the corporate veil that is before the Court today." (Transcript p.22, lines 7-13).

Respondent Charleston Wrecking argued that the allegations of the Complaint just aren't enough, there is no opposing affidavit, and it applies to both motions. (Transcript p. 21, lines 1-11).

At the hearing Appellant abandoned the breach of contract claim, stating, "I'm primarily going for negligence more so than breach of contract. If we want to dismiss breach of contract, I'm fine with that." (Transcript p.12, lines 16-25). In the Order appealed from, the trial court noted that Appellant withdrew the claim for breach of contract.

On June 8, 2017, the Trial Court issued Judgment in a Civil Case for Decision By The Court, pursuant to SCRCP Form 4C (12/20/2016). “IT IS ORDERED AND ADJUDGED:... Defendant Charleston Wrecking's Motions for Summary Judgment, filed 11/10/17 and 3/31/17, is denied, as Defendant has failed to demonstrate a lack of a genuine issue of material fact. Defendant Michael Golemis's Motion for Summary Judgment is granted, as Defendant has demonstrated no genuine issue of material fact exists as to the claims made against him. Defendant's Motion for Stay, filed 3/31/17, is granted. Plaintiff has voluntarily withdrawn the claim of breach of contract.” The Court noted: This Order does not end case. (Order of the Honorable Kristi L. Harrington filed June 8, 2017).

This Appeal follows.

STATEMENT OF FACTS

Pursuant to a ConsensusDocs 751 Standard Short Form Agreement Between Constructor and Subcontractor (ConsensusDocs 751 Agreement, Exhibit “C” to Defendant Charleston Wrecking, Inc.’s Motion for Summary Judgment filed March 31, 2017), Bouchelle as “Constructor” or general contractor engaged Charleston Wrecking as “Subcontractor” to perform partial demolition work on a project known as the Atlantic Electric, LLC warehouse.

The agreement was executed by David Bouchelle, President of Bouchelle Incorporated, and Michael C. Golemis, as President of Charleston Wrecking, Inc. Golemis, individually, is not a party to the contract nor is there any other contractual agreement between Bouchelle and Golemis, individually. (Transcript p.16, line 24 - p.17, line 11; Charleston Wrecking RFA 2, 3).

Charleston Wrecking, Inc., is a statutory close corporation organized under South Carolina Code § 33-18-101, *et seq.*, and is in good standing with the Secretary of State for South Carolina. (Exhibits to Golemis Motion for Summary Judgment filed January 9, 2017).

One of the demolition services to be performed by Charleston Wrecking was the removal of an exterior concrete façade wall above the second floor level of the warehouse building. On July 21, 2015, it is alleged that an incomplete saw cut at the second story level resulted in damage to the first floor exterior wall.

At the time of the incident allegedly causing the damage, there was no contractual relationship between Bouchelle and Golemis. Golemis was not present. Charleston Wrecking's personnel were being supervised by a licensed general contractor, Horace V. Thomas. Mr. Thomas has been a licensed general contractor for approximately forty (40) years and worked in demolition for approximately the same length of time. Also on the job was James Pressley, who was experienced and knowledgeable in the process and procedures for the work assigned (Golemis Affidavit dated December 27, 2016, ¶s 8, 9).

Charleston Wrecking had complied with the terms of the Agreement by providing a Certificate of Insurance for General Liability (*Id.*, ¶ 10).

According to Golemis' undisputed Affidavit, neither Charleston Wrecking nor Golemis committed any act which would make it inequitable or unfair for Bouchelle to look solely to Charleston Wrecking for any recovery. No act of fraud or other circumstance has been alleged against Golemis or Charleston Wrecking (*Id.*, ¶ 13). The record is devoid of any fact which would suggest that piercing the corporate veil is legally justified.

ARGUMENT

I. THE TRIAL COURT'S GRANTING OF SUMMARY JUDGEMENT ON BEHALF OF MICHAEL GOLEMIS WAS APPROPRIATE BECAUSE GOLEMIS' MOTION WAS SUPPORTED AND APPELLANT RELIED SOLELY ON HIS PLEADINGS AND ARGUMENTS OF COUNSEL.

As set forth in Respondents' statement of the case, Michael Golemis individually moved for Summary Judgment on the grounds that there are no genuine issues of fact or law as to

imposing personal liability on Michael Golemis. The Golemis motion was support by his answer, affidavit, deemed admissions of Bouchelle, the contract between Bouchelle Inc., and Charleston Wrecking, Inc., and statutory authority S.C. Code § 33-18-250.

Pursuant to Rule 56(c), SCRCPP, the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCPP. *Grinnell Corp., v. Wood*, 389 S.C. 350, 355, 698 S.E.2d 796, 798 (2010). Under Rule 56, SCRCPP, when a party makes a motion for summary judgment and supports it by affidavits the adverse party may not rest on the allegations of his pleadings but must respond by affidavits or other evidence demonstrating a genuine issue of material facts. *Kippel v. Mid-Carolina Oil, Inc.*, 303 S.C.127, 129, 399 S.E.2d 163,164 (Ct.App.1990)

As set forth above Golemis supported his motion for summary judgment with his affidavit, documents filed with the South Carolina Secretary of State as to the formation and continuing existence of Charleston Wrecking, Inc. Golemis further argued that since Charleston Wrecking is a statutory close corporation, pursuant to S.C. Code § 33-18-250 allegations to pierce the corporate veil on the ground that Charleston Wrecking failed to observe the usual corporate formalities or requirements, which is denied, are not grounds for imposing personal liability on individual Defendant Michael Golemis.

Appellant did not respond to Respondent's request for admission. For purposes of this action pursuant to Rule 36(A) SCRCPP, it is deemed admitted that Michael Golemis was not a party to any contract with Appellant Bouchelle.

Appellant Bouchelle did not file a separate pleading in opposition to Respondent Golemis' Motion for Summary Judgment. Appellant filed nothing in the form of affidavits, designation of deposition excerpts, or any additional exhibits in opposition to Golemis' Motion for Summary Judgment. To defeat Golemis' summary judgment motion Appellant relied on his pleadings and unsupported arguments before the trial court.

As to claims that Respondent Golemis was negligent, Appellant Bouchelle submitted no evidence of any duty owed by Michael Golemis individually, or that Golemis individually breached any duties owed to Bouchelle. There were no facts within the trial court record that Michael Golemis did anything to legally or factually proximately cause the damages alleged by Bouchelle. Indeed, the only mention of damages in the record comes from arguments of Appellant's counsel.

In the Trial Court¹ and in his Amended Brief, Appellant's counsel argued, "...that under the negligence cause of action against Respondent Golemis, that there existed a factual dispute as to what happened on July 14, 2015; and, "In addition Appellant notified the Court that Respondent Golemis could be found personally liable, even if Respondent's company, Charleston Wrecking Inc., was statutory closed corporation under the *Sturkie* criteria that was set forth in Appellant's Complaint." (Amended Initial Brief of App. p.13)

Further, unsupported allegations in Appellant's complaint and arguments of counsel on the application of the criteria of *Sturkie v. Sify*, 280 S.C.453, 459, 313 S.E.2d 316, 319 (Ct.App. 1984), do not create a genuine issue of material fact; nor do said allegations and arguments defeat Golemis' entitlement to judgment as a matter of law. See, Rule 56(c), SCRPC.

¹ Additional Citations to the trial transcript are omitted as citations to relevant portions of the trial transcript are set forth herein and in Appellant's Amended Brief

Sturkie v. Sify, 280 S.C.453, 459, 313 S.E.2d 316, 319 (Ct.App. 1984), actually supports the granting of the Golemis Motion for Summary Judgment. For *Sturkie*, to apply as a defense to the Golemis Motion, Appellant must make a showing of fundamental unfairness. In the case at bar there is no evidence in the Trial Court record of fundamental unfairness. There is no evidence in the Trial Court record that Golemis did anything in a self serving manner with property of the corporation or that Golemis acted in a self serving manner in disregard of Appellant's claims.

Rule 56(a), SCRCP provides "a party may move for summary judgment with...supporting affidavits for a summary judgment in his favor upon all or any part thereof." Rule 6(d), SCRCP provides the adverse party may serve opposing affidavits not later than two days before the hearing.

Applying the law to the facts in this case, Respondent Michael Golemis' Motion for Summary Judgment was fully supported by his Answer, wherein he denied individual responsibility for the incident that was the subject of the Complaint; his affidavit; corporate filings of Charleston Wrecking, Inc.; and Appellant's admissions that Michael C. Golemis had no contractual obligations to Appellant Bouchelle Inc.,

Upon the filing of Golemis' supported motion for summary judgment, Appellant Bouchelle, may not rest on allegations in his pleadings and/or arguments of counsel. Appellant Bouchelle had the duty and obligation to respond by submitting for the trial court's consideration factual evidence in the form of affidavits or otherwise that there is a genuine issue for trial. In the case at bar in response to Respondent Golemis' supported motion for summary judgment, Appellant Bouchelle did not respond with any evidence as to any genuine issue of material fact and Respondent Golemis is entitled to judgment as a matter of law.

Respondents also request the court to affirm the granting of summary judgment as to Michael C. Golemis individually for any ground appearing in the Record on Appeal as provided by Rule 220(c), SCACR.

Therefore, it was appropriate for the Trial Court to grant Summary Judgment on Appellant's claims against Respondent Michael C. Golemis, individually. The Trial Court's order entering Summary Judgment for Respondent Michael Golemis against the claims of Appellant Bouchelle should be affirmed.

II. THE TRIAL COURT'S GRANT OF A STAY IS NOT IMMEDIATELY APPEALABLE

The subcontract between Appellant (the "constructor") and Respondent Charleston Wrecking, Inc. (the "subcontractor") required the Appellant to maintain liability insurance for claims arising out of the performance of this subcontract (ConsensusDocs 751 Agreement ¶ 11.a, Exhibit "C" to Defendant Charleston Wrecking, Inc.'s Motion for Summary Judgment filed March 31, 2017).

The subcontract also provided for a mutual waiver of certain damages with the exception of losses covered by insurance (ConsensusDocs 751 Agreement ¶ 13).

The motion for stay arose because the Appellant not only sued the Respondent Charleston Wrecking in the case at bar; but in a separate action sued Charleston Wrecking's insurance carrier (Seneca) and its own general liability insurance company, Canopus US Insurance, Inc. (hereinafter "Canopus"), alleging indemnity for the same damages claimed in this action. (Case Number 2016-CP-10-4984, Complaint, Exhibit "E" to Charleston Wrecking, Inc.'s Motion for Summary Judgment filed March 31, 2017).

Canopus has defended that action by alleging, among other defenses, that Appellant misrepresented the nature of its business on its application for insurance (Correspondence from

Blair Claims Management to David Bouchelle dated September 15, 2015, Exhibit “D” and Canopus US Insurance Inc.’s Answer in Case Number 2016-CP-10-4984 filed January 9, Exhibits “F” to Charleston Wrecking, Inc.’s Motion for Summary Judgment filed March 31, 2017). Respondent Charleston Wrecking, Inc. argued in support of its motion for stay that if Appellant is successful in its action against Canopus, it will recover the same damages alleged against Respondent Charleston Wrecking, Inc. On the other hand, if it fails to recover against Canopus because it is eventually determined that Appellant did make misrepresentations in its application for the liability policy, it will have breached its obligations under the subcontract.

Upon these facts, the trial court granted a stay of this action against Respondent Charleston Wrecking, Inc. until a resolution of Appellant’s action against Canopus.

The immediate appealability of an interlocutory order is governed by S.C. Code § 14-3-330, which was construed by the Supreme Court in *Edwards v. SunCom*, 369 S.C. 91, 631 S.E. 2nd 529 (2006), a case involving the appeal of a trial court’s stay.

There the Supreme Court held that an order of the trial court granting a stay pending a ruling by the Federal Communications Commission was not immediately appealable.

The Supreme Court held that such an interlocutory order did not discontinue the proceeding but merely temporarily stayed the matter. The stay was not immediately appealable as it did not:

“...finally determine some substantial matter forming the whole or part of some cause of action or defense”, Citation Omitted.

nor did it:

...“discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense...” *Id.* at 369 S.C. 94-95.

In summary, the Supreme Court observed:

“Under Section 14-3-330, however, an order must affect a substantial right **and** prevent a judgment from which an appeal may later be taken in order to be immediately appealed.” *Id.* at 369 S.C. 95.

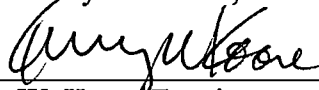
The stay ordered by the trial court in this case is identical in its legal application to the stay order in *Edwards*. The appeal of the order granting stay is premature and should be dismissed.

CONCLUSION

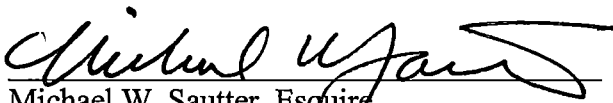
As set forth above it was appropriate for the Trial Court to grant Summary Judgment on Appellant’s claims against Respondent Michael C. Golemis, individually. The Trial Court’s order entering Summary Judgment for Respondent Michael Golemis against the claims of Appellant Bouchelle Inc. should be affirmed.

The appeal of the order granting stay is premature and should be dismissed.

Respectfully submitted,



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April 18, 2018

Charleston, South Carolina

STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
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(Appellate Case Number: 2017-001532)

SC Court of Appeals

BOUCHELLE INCORPORATED,.....APPELLANT,

vs.

CHARLESTON WRECKING, INC. and MICHAEL C. GOLEMIS.....RESPONDENTS.

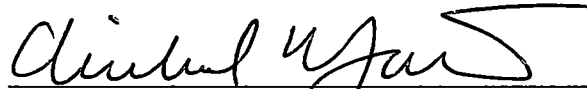
COUNSEL'S CERTIFICATION

Kerry W. Koon, counsel for Respondent Charleston Wrecking, Inc., and Michael W. Sautter, counsel for Respondent Michael C. Golemis, hereby certify that the materials designated to be included on the Record on Appeal contain no matters which are not relevant to this appeal.

Respectfully submitted,



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STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

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The Honorable Kristi L. Harrington, Circuit Court Judge **APR 23 2018**

Case Number: 2015-CP-10-06615

SC Court of Appeals

(Appellate Case Number: 2017-001532)

BOUCHELLE INCORPORATED,.....APPELLANT,

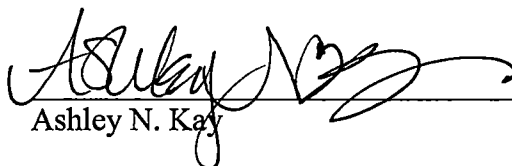
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CHARLESTON WRECKING, INC. and MICHAEL C. GOLEMIS.....RESPONDENTS.

PROOF OF SERVICE

I, Ashley N. Kay, hereby certify that I have served copies of the foregoing Joint Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal, in connection with the above-referenced case on April 18th, 2018, by sending copies of the same via United States Mail and addressed as follows:

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

**RE: Bouchelle Incorporated v. Charleston Wrecking, Inc. &
Michael C. Golemis
Appellate Case No.: 2017-001532**


Dear Ms. Kitchings:

Enclosed please find the original and one copy Joint Initial Brief of Respondents Charleston Wrecking, Inc. and Michael C. Golemis, Respondents' Designation of Matter to be Included in the Record on Appeal and Counsel's Certification in connection with the above-referenced case. Please file the originals and return the certified copies to me in the enclosed envelope. By copy of this letter, I am serving Karen M. Dejong, Esquire, counsel for the Appellant, with the same.

Your attention to this request is greatly appreciated. Please do not hesitate to contact our office should you have any questions.

With best wishes, I remain

Sincerely,


Ashley N. Kay,
Law Clerk to
Michael W. Sautter

/ank

Enclosures as stated

cc: Karen M. Dejong, Esquire, with enclosures

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