

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
Phillip DeClemente, a/k/a Alec Rochford, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
Assistive Technology Medical Equipment )  
Services, LLC; Jeffery Reed; Murrell G. )  
Smith, )  
 )  
Defendants. )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Docket No. 2015-CP-10-3325

ORDER

**RECEIVED**

JUL 30 2018

SC Court of Appeals

FILED  
JUL 30 2018  
JULIE CLERK OF COURT  
PH 2:28

This case is before the court on a motion for summary judgment. For the reasons that follow, the motion is granted.

ABBREVIATED BACKGROUND

This is a case between former partners. The plaintiff (Phillip DeClemente) owned a medical equipment business. Two of the defendants (Jeffery Reed and Murrell Smith) owned a similar business. These people ultimately combined their businesses into an entity named Assistive Technology Medical Equipment Services. Assistive Technology is the third defendant.

A dispute arose among Assistive Technology's owners and it progressed to the point where litigation commenced. In October of 2011, Assistive Technology sued DeClemente and several other parties. The case number for that litigation is 2011-CP-10-08011.

DeClemente was held in default in that litigation and a default judgment was entered against him. His appeal of those orders is pending at the Court of Appeals.

DeClemente filed *this* lawsuit on June 11, 2015. His complaint stated several causes of action and named two other parties as defendants in addition to Reed, Smith, and ATMES. Those defendants were granted summary judgment by Judge Harrington in an order filed May 11, 2016.

Defendants Reed, Smith, and Assistive Technology responded to DeClemente's complaint with a motion alleging various grounds for dismissal including the statute of limitations.

In January of 2016 Judge Dennis issued a Form 4 order dismissing all counts of DeClemente's claims based on the statute of limitations. DeClemente filed a motion to amend the order of dismissal and requested leave to amend the complaint. After a hearing in February of 2016 Judge Dennis amended his decision, reinstated DeClemente's first cause of action, and allowed DeClemente the opportunity to amend his complaint. DeClemente filed his amended complaint in March of 2016. The amended complaint states a single cause of action against Reed, Smith, and ATMES. Judge Dennis issued a formal order confirming his prior rulings on May 16, 2018.

#### SUMMARY OF THE AMENDED COMPLAINT

DeClemente's amended complaint alleges the defendants have breached an agreement with him regarding the sale of his interest in ATMES. The amended complaint describes the underlying agreement as a bill of sale and promissory note calling for monthly installment payments. The first payment was due in July of 2009. The last payment was due in March of 2013. DeClemente claims the defendants made its last full payment in September of 2011.

The parties agree the second page of the order Judge Dennis entered on May 16, 2018, contains a typographical error regarding DeClemente's alleged date of last full payment. The order correctly recites this date was September of 2011 at the top of page two, but it incorrectly states in the next paragraph that DeClemente alleges payments have not been made since 2009. Defendants' counsel informed the Court this was his error and that there is no dispute DeClemente's complaint alleges the date of last payment was September of 2011.

DeClemente's amended complaint also asserts three breaches of the agreement. The first of these additional grounds for breach of contract involves a payment related to a non-compete clause. The parties' agreement provided that DeClemente would be paid \$30,000 at the end of the buyout period if he had kept his end of the bargain, which included a confidentiality agreement and a covenant not to compete. DeClemente claimed he was owed this money. Next, DeClemente alleged the defendants wrongfully seized proceeds from the sale of an option to buy real estate to which he was entitled under the agreement. Finally, DeClemente alleged the defendants misappropriated a vehicle to which he was entitled under the parties' agreement.

On June 6, 2016, the Defendant's attorney filed another motion to change venue and motion to dismiss based on Plaintiff's failure to file within applicable statute of limitations. On July 22, 2016, this Court denied the Plaintiff's motion and a form 4 was filed.

  
SUMMARY JUDGMENT ARGUMENTS & RULING

The defendants moved for summary judgment in September of 2017. The Court conducted a hearing on December 11, 2017. Attorney James Smith attended for the defendants. Attorney Cameron Marshall appeared for DeClemente.

The defendants sought summary judgment based on the statute of limitations and on the grounds that all of DeClemente's breach of contract claims should have been brought as compulsory counterclaims in the lawsuit filed against DeClemente in 2011. DeClemente argued this issue had already been resolved by Judge Dennis' refusal to dismiss the breach of contract claim under Rule 12(b)(6), SCRPC. This Court agrees with the defendants and grants summary judgment based on the statute of limitations.

Section 15-3-530(1) establishes a three-year statute of limitations for breach of contract

claims. The discovery rule determines the date a breach of contract action accrues.

*CoastalStates Bank v. Hanover Homes*, 408 S.C. 510, 517, 759 S.E.2d 152, 156 (Ct. App. 2014).

Under the discovery rule a breach of contract action accrues “not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence.” *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998).

The evidence presented to the Court indicates there is no genuine dispute that DeClemente knew the defendants intended to breach the parties’ agreement and that they were in fact in breach of the parties’ agreement more than three years before he filed this lawsuit.

gc<sup>m</sup>  
First, there is DeClemente’s affidavit, which was filed with the Court on September 20, 2016. Paragraph 8 of the affidavit indicates no full payment has been made to DeClemente since September of 2011; more than three years before this suit began. Second, there is DeClemente’s deposition, a portion of which was provided to the Court during the summary judgment hearing. DeClemente’s deposition testimony indicates he received the last payment on defendants’ behalf from the private investigator who served him with the 2011 lawsuit. The order of default in the 2011 suit indicates DeClemente was served December 1, 2011, which is more than three years before this suit began.

These circumstances are comparable to those that were present in *Maher v. Tietex*. There, as here, the case involved a dispute over periodic payments. The plaintiff in that case sued his employer alleging breach of an employee bonus plan. The plaintiff commenced that lawsuit in September of 1994. The Court of Appeals reversed a jury verdict in the plaintiff’s favor, finding the plaintiff knew or should have known he had a cause of action over the bonus plan after he had

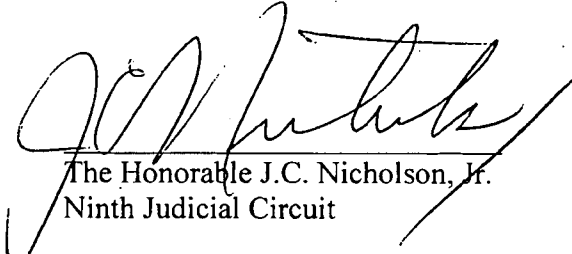
unsatisfactory conversations with his boss about the plan in 1989 and 1990. 331 S.C. at 379, 500 S.E.2d at 208. The same is true here. The defendants ceased making full payments to DeClemente in September of 2011. The next month, they sued him. Any reasonable observer would view these actions as a clear indication that the defendants believed DeClemente had breached *his* obligations to them and that the defendants did not intend to follow the agreement.

With respect to DeClemente's argument that this Court is precluded from granting summary judgment by Judge Dennis' prior ruling, the Court respectfully disagrees. Judge Dennis denied a Rule 12(b)(6), SCRPC motion to dismiss this claim. Such a motion is generally confined to the four corners of the complaint. *Spence v. Spence*, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006). But the Court may look outside the complaint when considering a motion for summary judgment. Rule 56(c) recognizes this, explaining summary judgment involves considering the pleadings, depositions, answers to interrogatories, and affidavits.

For the foregoing reasons, the defendants' motion for summary judgment is Granted. Any arguments not specifically addressed in this order are denied.

AND IT IS SO ORDERED.

July 2, 2018  
Charleston, South Carolina



The Honorable J.C. Nicholson, Jr.  
Ninth Judicial Circuit

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-3325

Phillip DeClemente a/k/a Alec Rochford

Assistive Technology Medical Equipment,  
et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

2018 JUN -2 PM 2:28  
FILED  
COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

RECEIVED  
JUL 30 2018  
SC Court of Appeals

ORDER INFORMATION

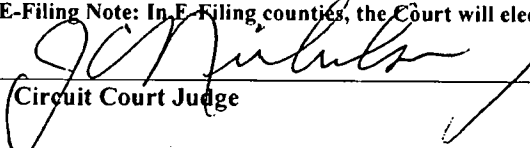
This order  ends  does not end the case.  
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

  
Circuit Court Judge

2117  
Judge Code

7/2/18  
Date