

STATE OF SOUTH CAROLINA

COUNTY OF Horry

CAPTAIN'S HARBOUR AND
RACQUET CLUB HOMEOWNERS
ASSOCIATION, INC.,

Plaintiff,

vs

JERALD W. JONES,

Defendant

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 2014-CP-26-7417

ORDER

RECEIVED

SEP 24 2018

SC Court of Appeals

2018 APR 12 AM 9:05

This matter came before the Court on February 17, 2018 for consideration of Plaintiff's Motion for Summary Judgment, as well as Defendant's Motion for Summary Judgment. Both parties were represented by counsel at the hearing and were afforded the opportunity to present oral arguments. The Court also considered Plaintiff's Memorandum of Law and documents presented to the Court during the hearing. Following consideration of the evidence before the Court, I find Defendant's argument, that he is entitled to indemnification under the Property Management Agreement between the Plaintiff and ACE Management, is unavailing, and therefore, Plaintiff is entitled to recover those funds Defendant used from Plaintiff's operating account, including applicable interest and costs. Therefore, Plaintiff's Motion for Summary Judgment is GRANTED and Defendant's Motion for Summary Judgment is DENIED.

STANDARD OF REVIEW

Pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure, summary judgment is appropriate if "the pleadings, dispositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for



summary judgment, "the court must view the facts and inferences therefrom in a light most favorable to the nonmoving party." *Bravis v. Dunbar*, 316 S.C. 263, 265, 449, S.E.2d 495, 496 (Cl. App. 1994). "A party opposing a properly supported Motion for Summary Judgment, however, may not rest on the mere allegations or denials of its pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact. Thus, the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment." *Dickert v. Metropolitan Life Insurance Company*, 306 S.C. 311, 313, 411, S.E.2d 672, 673 (Cl. App. 1991), *reversed in part on other grounds*, 311 S.C. 218, 428, S.E.2d 700 (1993).

FINDINGS

In this case, Plaintiff seeks to recover from Defendant for conversion of funds from the Plaintiff's operating account. Jones, without authorization from Plaintiff, used Plaintiff's funds to pay for personal criminal defense legal fees and personal medical bills following physical altercations on July 7, 2014 that led to his arrest. At the time, Jones was an employee of ACE Management ("ACE"), the property management company for Plaintiff's regime pursuant to a management agreement ("the Agreement"). Jones claims he was entitled to use the Plaintiff's funds under the terms of the Agreement.

In October of 2012 Plaintiff entered the management agreement with ACE "for the orderly and uniform administration, operation, maintenance, and management of the Association and for the promotion, preservation, and the protection of property values in the regime." The parties to the Agreement are identified in the first paragraph of the Agreement:

THIS AGREEMENT, made and entered into this 1st day of October 2012, by and Between Captains Harbour and Racquet Club Homeowners Association, a nonprofit corporation organized and existing under the laws of South Carolina, hereinafter called "The Association" and American Contracting Engineers, P.A., a Corporation organized and existing under the laws of Delaware and doing business as (dba) ACE Management hereinafter called "The Manager".

The Agreement outlined the responsibilities and duties ACE owed to Plaintiff and contained an indemnity provision, upon which Defendant relies to justify his use of Plaintiff's operating account funds. The indemnity provision in the Agreement states:

VI. HOLD HARMLESS

A. Section III, Item B (4): The Association shall indemnify the Manager from any claims, demands, judgments or suits that may be brought against or incurred by the Manager by reason of the Manager's recommendations unless such acts shall be caused by said Manager's gross negligence or willful misconduct.

B. Section III, Item D: The Association specifically agrees and shall indemnify the Manager from any claims, demands, judgments or suits or damages that may be brought against or incurred by the Manager by reason of Manager's role in assisting the Board with regard to the services set forth in this Section III, Item D. Manager agrees to use Manager's best efforts to investigate and recommend qualified, reputable subcontractors; however Manager shall not be responsible for any nonperformance, negligence or any loss or damages resulting from the provision of these services unless such acts shall be caused by said Manager's gross negligence or willful misconduct.

C. General: Including Items A and B above, the Manager shall not be liable to the Association and/or its Members for any loss or damage caused by acts of the Manager unless said acts constitute gross negligence, and said Association and its Members, do hereby agree to indemnify and save harmless the Manager from any such liability for all damage, costs, and expense (including attorney fees incurred by the Manager in defending legal action), arising from any injury to any person or property in, about and in connection with the Association, its Common

Elements, Limited Common Elements, and Dwellings, from any cause whatsoever, unless such injury shall be caused by said Manager's gross negligence or willful misconduct.

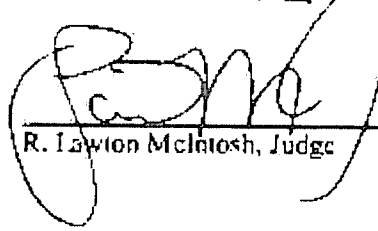
The plain language of the Agreement identifies the parties to the contract as Plaintiff and ACE. Defendant is not a party to the Agreement, and therefore, is unable to claim contractual indemnification in this case.

CONCLUSION

Plaintiff is entitled to damages from the Defendant in the amount of: \$12,788.80, representing the money converted from Plaintiff's operating account for Defendant's personal use, pre-judgment interest beginning September 1, 2014 of \$1,847.71, and costs involved in instituting this action of \$1,684.63. Therefore, the total actual damages Defendant owes Plaintiff

are \$16,321.14. ~~and this case will proceed to trial on the issue of punitive damages.~~ *This issue of Punitive Damages was not addressed At the hearing.* (RLP)

IT IS SO ORDERED.



R. Lawton McIntosh, Judge

This 7 day of April, 2016
Anderson, South Carolina

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NO. 2014-CP-26-7617

Captain's Harbour and Racquet Club-Homeowners
 Association, Inc.

Jerald W. Jones

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : Plaintiff Defendant
 or
 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
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other

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:

ORDER INFORMATION

THE COURT DENIES DEFENDANT'S MOTION FOR RECONSIDERATION. INASMUCH AS IDENTICAL GROUNDS WERE ARGUED AT PREVIOUS HEARING THE REQUEST FOR A HEARING ON THIS MOTION IS DENIED. THE COURT NOTES THAT DEFENDANT'S MOTION FOR RECONSIDERATION WAS NOT PROVIDED TO THE COURT UNTIL AUGUST 25, 2016. PLAINTIFF'S COUNSEL TO PREPARE A FORMAL ORDER.

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 money 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)
		\$
		\$
		\$

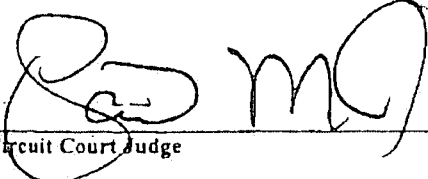
If applicable, describe the property, including tax map information and address, referenced in the order:

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.



2016 OCT 1 11:51 AM 8:52

RECEIVED
 SEP 24 2018
 SC Court of Appeals


Circuit Court Judge

2155
Judge Code

9-1-16
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

Copy of Order, _____
filed 10-4-16 mailed to all
parties not in default on 10-11-16
Initials fw

LAW OFFICES OF
JOHN M. LEITER, PA
ATTORNEY AND COUNSELOR AT LAW

1203 48TH AVE. N. SUITE 109
MYRTLE BEACH, SC 29577

TELEPHONE (843) 449-1451
FACSIMILE (843) 449-4884
E-MAIL jleiter@48th.com

March 27, 2017

Honorable Jenny Abbott Kitchings
Clerk of the Court
South Carolina Court of Appeals
Post Office Box 116929
Columbia, South Carolina 29211

Via facsimile (803) 734-1839
and U.S. Mail

Re: *Captains Harbour and Racquet Club Homeowners Association, Inc.*
v. Jerald W. Jones
Appeal from Horry County
Appellate Case No. 2016-CP-26-002299

Dear Ms. Kitchings:

Thank you for your letter of March 15, 2017. As you requested, I am writing regarding the status of the formal Final Order.

Douglas W. MacKelcan, III, Esq., the attorney for Captains Harbour and Racquet Club Homeowners Association, Inc., submitted a proposed Final Order to Judge R. Lawton McIntosh on or about November 18, 2016. A copy of Mr. MacKelcan's letter and proposed Order are enclosed for your file. I followed up with Mr. MacKelcan on December 20, 2016. He had not yet received the formal order and he told me he would let me know when he received it. According to the Horry County public index, the Final Order has not been entered.

Please let me know if there is any additional information I can provide.

Sincerely yours,

LAW OFFICES OF JOHN M. LEITER, PA



John M. Leiter

JML/smp
Enclosures

cc: Douglas W. MacKelcan, III, Esq.
Jerald Jones

EXHIBIT D



State of South Carolina
The Circuit Court of the Tenth Judicial Circuit

R. Lawton McIntosh
Judge

November 21, 2016

Post Office Box 8002
100 South Main Street
Anderson, SC 29622-8002
Phone: (864) 260-4059
Fax: (864) 224-6320
lmcintosh@sccourts.org

Honorable Melanie Huggins-Ward
Clerk of Court for Horry County
Post Office Box 677
Conway, South Carolina 29528

Dear Madame Clerk:

Please find enclosed an original Order signed by Judge McIntosh in the following case:

Captain's Harbour and Racquet Club Homeowners Association Inc. V. Jerald W. Jones
2014-CP-26-7617

Please file these in your office and provide certified copies to the attorneys of record pursuant to your customary procedure. Thank you for your assistance in this matter.

Sincerely,

Tammy Jennings
Administrative Assistant to
R. Lawton McIntosh, Judge
Tenth (10th) Judicial Circuit

Enclosures

COPIES MAILED

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CASE NO.: 2014-CP-26-7617
)	
CAPTAIN'S HARBOUR AND)	
RACQUET CLUB HOMEOWNERS)	
ASSOCIATION, INC.,)	
)	
Plaintiff,)	
vs.)	
)	
JERALD W. JONES,)	
)	
Defendant.)	

ORDER RECEIVED
SEP 24 2018
SC Court of Appeals

This matter came before the Court for consideration of Defendant's Motion for Reconsideration, filed on March 11, 2016. Plaintiff's and Defendant's Motions for Summary Judgment were heard on February 17, 2016. The Court issued a Form-4 Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment on February 18, 2016. The Court entered a Formal Order on the motions dated April 7, 2016. Counsel for the Defendant requested the Court consider the Motion for Reconsideration, and, in response, Plaintiff requested that the Court consider the Motion without a hearing and deny the Motion on the ground that Defendant failed to assert any new or supplemental arguments beyond those presented in prior written submissions to the Court or heard at the February 17, 2016 hearing.

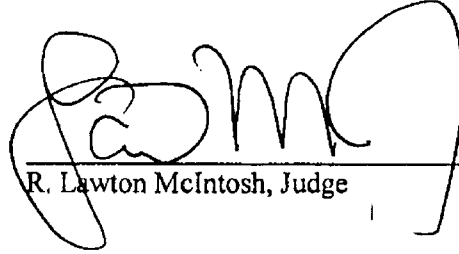
Because Defendant has not asserted any new or alternative grounds in support of his Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment,

CLERK OF COURT
2016 NOV 28 AM 8:29

EXHIBIT E

the Court **DENIES** Defendant's request for a hearing on his Motion to Reconsider, and **DENIES** Defendant's Motion for Reconsideration.

IT IS SO ORDERED.



A handwritten signature in black ink, appearing to read 'R. Lawton McIntosh', is written over a horizontal line. The signature is stylized and cursive.

R. Lawton McIntosh, Judge

This 21 day of November, 2016
Anderson, South Carolina