STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS

Albert H. Dallas, and A. Stephenson Wallace, Chapter 7 Trustee,

Petitioners/Plaintiffs,

vs.

Russell Bauknight as Special Administrator of the Estate of James Brown,

Respondent/Defendant.

Case No. 2008-CP-02-1426

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pending before this Court are cross motions for summary judgment filed by the above named Parties. Plaintiffs have moved for summary judgment; the Defendant has moved for partial summary judgment. The Parties fully briefed their respective positions, and after briefing closed, the Court held a hearing on June 14, 2016. After a review of the legal arguments and the record evidence submitted by the Parties, the Court hereby rules that Defendant's motion for partial summary judgment is granted, and Plaintiffs' motion for summary judgment is denied. The legal basis for the Court's ruling will be discussed below.

I. Standard of Review

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *M & M Group, Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008) (citation omitted). When discovery demonstrates that there are no genuine issues of material fact, the Court should decide which party is entitled to judgment as a matter of law, and then enter judgment. Rule 56(c), SCRCP.

FILED 9-7-16
Liz Godard
C.C.C.P.&G.S.
Anita Khoepfle 12:30 am
Deputy Clerk

RECEIVED
DEC 27 2018
SC Court of Appeals

II. BACKGROUND

This case arises out of a creditor's claim that Albert H. Dallas ("Mr. Dallas" also referred to in various records as Buddy Dallas) filed against the Estate of James Brown for unpaid legal fees.

A. Beginning of the Legal Relationship

In or around 1984, Mr. Dallas began providing legal services to the late James Joseph Brown ("Mr. Brown") and his company, James Brown Enterprises, Inc. ("JBE"). The scope of Mr. Dallas' legal services was general in nature and he was often referred to as Mr. Brown's day-to-day legal advisor. The Court has reviewed legal documents wherein Mr. Dallas was also identified as the General Counsel of JBE. Further, for a time Mr. Dallas served as a member of the board of directors of JBE.

At his deposition, Mr. Dallas testified that when he first began the legal engagement, he mailed Mr. Brown a bill that included hourly billing. Mr. Dallas testified that upon receipt of the bill, Mr. Brown brought him in to discuss it. During that meeting Mr. Brown notified Mr. Dallas that he did not compensate his advisors on an hourly basis. Instead, Mr. Dallas testified that Mr. Brown told him that he would pay him a percentage of his revenue. Accordingly, Mr. Brown and JBE compensated Mr. Dallas for his legal work by sometimes paying him 5% of the performance revenues generated by Mr. Brown and JBE.

Mr. Dallas testified that he agreed to provide legal services to Mr. Brown and JBE based upon a percentage of the revenue compensation structure. He testified that he never presented Mr. Brown with a bill ever again. Mr. Dallas testified that he provided legal services for twenty-two years based solely upon the oral agreement reached during his meeting with Mr. Brown regarding his hourly bill.

B. Background Facts Relevant to the Subject Motion

In 1999, Mr. Brown entered into a financial transaction referred to by the parties as the Pullman Bond. The Pullman Bond provided a lump sum loan to Mr. Brown, which was secured by future royalty payments on Mr. Brown's intellectual property. The amount of the Pullman Bond was approximately $26 million. Although Mr. Brown did not receive the entire loan amount, he did receive a substantial portion. By 2006, however, those proceeds no longer existed.[1] Accordingly, Mr. Brown decided to pursue a second transaction that would generate cash for his use. Mr. Brown retained the law firm of Greenberg Traurig, LP ("GT") to coordinate this potential transaction.

1. The October 18, 2006 Letter re a Potential Transaction

On or about October 18, 2006, a GT lawyer named Steven B. Sidman sent Mr. Brown a letter outlining his firm's understanding of the engagement surrounding the potential transaction (the "GT Letter").

In pertinent part, the GT Letter stated as follows:

> I'm sure you are aware of the ongoing discussions with Super Frank Copsidas, David Cannon and Buddy Dallas regarding strategies to enhance your liquidity and create a beneficial tax structure. However, it is now our understanding that, with the express consent of your management, Intrigue Music Management, Inc. ("Intrigue"); your business manager, DGC Associates ("DGC"); your personal day-to-day legal advisor, Albert H. "Buddy" Dallas, Esq. ("Dallas"); and your personal manager, Charles Bobbitt ("Bobbitt"), you have authorized Greenberg Traurig and Intrigue to assist you in exploring the legal and business facets of finding a possible buyer for or lender in connection with either a portion or the entirety of your so-called "writer's share" of revenues generated by the commercial exploitation of the copyrights in your songs, as well as artist royalties payable to you under any recording agreements ("the "New Transaction").

The language of the GT Letter made clear that Mr. Brown authorized GT to pursue one

[1] The missing funds are the subject of ongoing litigation against Mr. Dallas and others.

of two possible transactions: (1) a sale of his writer's share of revenues from his copyrights and his artist's royalties under any recording agreements, or (2) a loan that would be secured by his writer's share of revenues from his copyrights and his artist's royalties under any recording agreements. Furthermore, the GT Letter made clear that at that time, it was unclear whether the potential sale or loan would be based upon a "portion or the entirety" of this intellectual property.

The GT Letter went on to state that:

> [A]ssuming that the New Transaction can go forward, it is also our understanding that you have authorized certain disbursements to various people and entities on your team out of the proceeds, if any, of the New Transaction.

Finally, the GT Letter included a list of potential payees that were slated to receive a portion of the proceeds of the potential New Transaction. Relevant to this motion, Mr. Dallas was one of the payees identified in the GT Letter. Specifically, the GT Letter stated that Mr. Dallas would receive the following:

> 6. A portion of the net proceeds of the New Transaction, after the payments to TIAA-CREF, Pullman, DGC and Intrigue, in the amount of $549,019, payable to Dallas, for legal services rendered.
>
> 9. A portion of the gross proceeds of the New Transaction (less the indebtedness to TIAA-CREF as set forth in Paragraph 1, above) in the amount of five percent (5%) of such proceeds, payable to Dallas for legal services rendered.

The GT Letter was signed by Mr. Brown and Mr. Dallas (and other potential payees). Furthermore, each signature was made in the presence of a notary and accompanied by a notary's acknowledgment. The potential transaction never went forward.

2. *The Basis for Mr. Dallas' Claims*

In a stipulation entered into between the parties and filed with the Aiken County Clerk of Court on January 30, 2014, Mr. Dallas stipulated that his only claims in this case were as

follows: "$549,019 for legal services rendered to James Brown prior to his death, and for 5% of revenues from the sale of Mr. Brown's writer's share [of] music." In his deposition, Mr. Dallas testified that he was entitled to $549,019 for legal services rendered, and 5% of the revenue of the writer's share of the copyrights based upon the GT Letter. Consequently, Mr. Dallas' creditor's claim is based upon the GT Letter, and its inclusion of him as a potential payee.

III. Moving Positions of the Parties

A. Mr. Dallas' Legal Positions for Entitlement to Summary Judgement

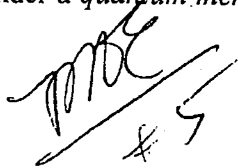
Mr. Dallas moved for summary judgment based upon the GT Letter. Mr. Dallas' primary position for entitlement to summary judgment is that the GT Letter constitutes a binding contract between Mr. Brown and himself, and that the contract requires Defendant to pay him $549,019 and 5% of the writer's share of the copyrights. Mr. Dallas also contended that the GT Letter: (1) constituted an accord and satisfaction, (2) created an equitable lien on the intellectual property identified in the GT Letter, and (3) constituted an acknowledgment of a debt.

B. Defendant's Legal Defenses for Entitlement to Partial Summary Judgment

Defendant moved this court for partial summary judgment based upon the unenforceability of the GT Letter.[2] Defendant's primary positions for entitlement to partial summary judgment are that: (1) the GT Letter is not a contract, and (2) even if it were a contract, it is unenforceable because it contained a condition precedent that never occurred. Defendant also contended that it was entitled to partial summary judgment because: (3) Mr. Dallas was not entitled to recover the specific amount of the fees claimed because they were based upon a representation agreement that violated the Rules of Professional Conduct, and (4) the GT Letter

---

2 Defendant only moved for partial summary judgment because he acknowledged that Mr. Dallas was Mr. Brown's long time legal advisor and, therefore, may have a right to recover for past due legal services under a *quantum meruit* theory to the extent that he has not already been paid in full.



was unenforceable because it too violated the Rules of Professional Conduct.

IV. DEFENDANT IS ENTITLED TO PARTIAL SUMMARY JUDGMENT

After reviewing the applicable case law cited by the parties during their pre-hearing briefing, the relevant depositions, and documentary evidence, the Court concludes that Defendant is entitled to partial summary judgment for the following reasons:

A. The GT Letter is not a contract.

B. Even if the GT Letter were a contract, it contained a condition precedent that did not occur.

C. Mr. Dallas is not entitled to 5% of the writer's share of the copyrights because that claim is based upon the GT Letter.

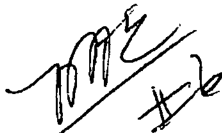
Each bases for this decision will be addressed in turn below.

A. <u>The GT Letter is not a contract</u>

The Court finds as a matter of law that the plain and unambiguous language of the GT Letter demonstrates that it is not a contract. The GT Letter did not obligate Mr. Brown to engage in any transaction. It is black letter law that a valid contract requires the existence of an (1) offer, (2) acceptance of that offer, and (3) valuable consideration. *E.g., Electro Lab of Aiken, Inc. v. Sharp Construction Co. of Sumter, Inc.*, 357 S.C. 363, 368, 593 S.E.2d 170, 173 (Ct. App. 2004). Because the GT Letter reserved the exclusive right to Mr. Brown to determine whether to proceed with any transaction, there was no valuable consideration, only an illusory promise. An illusory promise is not sufficient consideration to form a contract. *Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 275, 525 S.E.2d 898, 900 (Ct. App. 1999).

As noted above, the GT Letter states only that,

> [Y]ou have authorized Greenberg Traurig and Intrigue ***to assist you in exploring the legal and business facets of finding a possible buyer for or lender*** in connection with either a portion or the entirety of your so-called "writer's share" of revenues generated by the commercial exploitation of the copyrights in your songs, as well as artist royalties payable to you under any recording



agreements ("the "New Transaction").

The GT Letter further stated that, "***assuming that the New Transaction can go forward***, it is also our understanding that you have authorized certain disbursements to various people and entities on your team out of the proceeds, ***if any***, of the New Transaction." (emphasis added). The Court finds that Mr. Brown's reservation of the right to determine whether to proceed with any transaction was merely an illusory promise.

"By the phrase 'illusory promise' is meant words in promissory form that promise nothing; they do not purport to put any limitation on the freedom of the alleged promisor, but leave his future action subject to his own future will, just as it would have been had he said no words at all." CORBIN ON CONTRACTS, § 145 (1952). Where an illusory promise exists, "[a]s a matter of course, no action will lie against the party making the illusory promise. Having made no promise it is not possible for him to be guilty of a breach." *Id.* Accordingly, the Court finds as a matter of law that the GT Letter is not a contract.[3]

B. Even if the GT Letter were a contract, it cannot be enforced because of the presence of an unfulfilled condition precedent

The Court finds as a matter of law that the plain and unambiguous language of the contract contained a condition precedent, which was never fulfilled—the New Transaction did not occur. "A condition precedent entails something that is essential to a right of action, as

[3] The GT Letter is also not a contract because Mr. Dallas provided no consideration. "Valuable consideration may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *McPeters v. Yeargin Construction Co.*, 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986). Mr. Dallas testified at his deposition that he did not work on the proposed New Transaction and did nothing to advance any transaction. It is black letter law that past consideration (here, Mr. Dallas' previous legal work) is insufficient consideration to create a new contract. *Henderson & Dempsey v. Skinner*, 146 S.C. 281, 143 S.E. 875, 875-76 (1928). Mr. Dallas provided no consideration for any of the alleged obligations found in the GT Letter. Accordingly, for this additional reason, the GT Letter is not a contract.

opposed to a condition subsequent, which is something relied upon to modify or defeat the action." *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994). "In contract law, the term connotes any fact other than the elapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises." *Id.* at 210, 452 S.E.2d at 624. "The question of whether a provision 'in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ.'" *Id.* (quoting *Ballenger Corp. v. City of Columbia*, 286 S.C. 1, 5, 331 S.E.2d 365, 368 (Ct. App. 1985)).

As detailed above, the GT Letter stated that, "***assuming*** that the New Transaction can go forward, it is also our understanding that you have authorized certain disbursements to various people and entities on your team out of the proceeds, ***if any***, of the New Transaction." (emphasis added). "Words and phrases such as 'if,' 'provided that,' 'when,' 'after,' 'as soon as,' and 'subject to' frequently are used to indicate that performance expressly has been made conditional." *Ballenger Corp.*, 286, S.C. at 5, 331 S.E.2d at 368. When a contract contains a condition precedent, failure of the condition precedent to occur makes the contract unenforceable. *McGill*, 381 S.C. at 186, 672 S.E.2d at 575 (noting condition precedent not met and therefore the contract was unenforceable); *M & M Group*, 379 S.C. at 477-78, 666 S.E.2d at 266-67 (affirming summary judgment and finding contract was unenforceable due to failure of condition precedent to occur).

The plain language of the GT letter provides that any promised monies would only become payable if, provided that, when, after, as soon as (or as the GT Letter states, "assuming that") the New Transaction went forward. Again, there is no dispute that the New Transaction did not occur; accordingly, the GT Letter is unenforceable as a matter of law. *McGill*, 381 S.C. at

186, 672 S.E.2d at 575 (noting condition precedent not met and therefore the contract was unenforceable); *M & M Group*, 379 S.C. at 477-78, 666 S.E.2d at 266-67 (affirming summary judgment and finding contract was unenforceable due to failure of condition precedent to occur). This ruling is further supported by the "if any" language found in the GT Letter. The conditional nature of the letter expressly recognized that the parties did not know how much money could be generated by the proposed New Transaction. Consequently, Plaintiff may very well have received nothing if there were not enough funds remaining after the proposed New Transaction.[4]

C. Plaintiff is Not Entitled to 5% of the Writer's Share of the Copyrights

As noted above, Mr. Dallas' claim for 5% of the writer's share of the copyrights is based upon the language of the GT Letter. This Court has ruled that the GT Letter is not a contract. This Court has further ruled that even if the GT Letter were a contract, it is unenforceable. Therefore, the Court rules that Mr. Dallas' claim for 5% of the writer's share of music fails as a matter of law.

V. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT

Plaintiffs' motion for summary judgment identified four grounds for summary judgment. The Court finds that none of the grounds advanced by Plaintiffs entitle them to summary judgment. As detailed above, the GT Letter is not a contract, and even if it were, it is not enforceable. Plaintiffs' reliance on the doctrine of accord and satisfaction in misplaced, for it is

---

4 Furthermore, even if the GT Letter were a contract, Mr. Dallas does not have the right to enforce the GT Letter. The Court finds that the plain and unambiguous language demonstrates that Mr. Brown did not promise Mr. Dallas that he would do anything. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *McGill*, 381 S.C. at 185, 672 S.E.2d at 574. "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Id.* The unambiguous language of the GT Letter demonstrates that it did not create any affirmative obligation upon Mr. Brown to find a lender or buyer for the benefit of Mr. Dallas; rather, it provides that Mr. Brown only agreed that GT and Intrigue could proceed to determine whether they could find a willing buyer or lender acceptable to Mr. Brown.

an affirmative defense. *Adams v. B & D, Inc.*, 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989) ("Accord and satisfaction is an affirmative defense which must be pleaded and proved."). Plaintiffs' reliance on the equitable lien doctrine is misplaced as a required element of this claim is that a debt exists. *Carolina Attractions, Inc. v. Courtney*, 287 S.C. 140, 145, 337 S.E.2d 244, 247 (1985) (noting that a party must establish a debt). Of course, Mr. Dallas has not established that he is owed anything. Finally, Mr. Dallas' reliance on the acknowledgment of a debt doctrine is misplaced, for it does not provide him a right to recovery; rather, if it applies, the acknowledgement can operate to remove a case from the bar of the statute of limitations. *Burden v. McElhenny*, 2 Nott & McC. 60, 62 (1819).

VI. CONCLUSION

For the reasons set forth above, Defendant's Motion for Partial Summary Judgment is **GRANTED**. Plaintiffs' Motion for Summary Judgment is **DENIED**.

Based upon a review of the stipulated claims in this case, the only claim left for adjudication is Mr. Dallas' claim for past due attorney's fees.

IT IS SO ORDERED.

The Honorable Doyet A. Early III

~~July~~ Sept 1, 2016

Bamberg, South Carolina