

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
In The Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2011-CP-05-00160

Dr. Robert W. Denton and Dr. John P. May,
d/b/a Edusystems, a general partnership,

Appellants,

v.

Denmark Technical College and
South Carolina State Board for Technical
and Comprehensive Education,

Respondents,

v.

Dr. John K. Waddell,

Third Party Defendant.

FINAL BRIEF OF APPELLANT

RECEIVED
OCT 10 2012
SC Court of Appeals

Timothy G. Quinn
Post Office Drawer 12589
Columbia, South Carolina 29211
(803) 771-0936
Fax: (803) 254-7751
Attorneys for Appellants

TABLE OF CONTENTS

Table of Authorities.....ii

Statement of Issues on Appeal.....iv

Statement of the Case and Facts.....1

Arguments

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DENMARK TECHNICAL COLLEGE AS TO THE PLAINTIFFS COMPLAINT...4

II. THE TRIAL COURT ERRED IN USING THE CONSOLIDATED PROCUREMENT CODE TO UNJUSTLY INJURE THE APPELLANTS.....6

Conclusion.....10

TABLE OF AUTHORITIES

CASES

Aherns v. State, 392 S.C. 340, 709 S.E. 2d 54 (2011).....8

Dawkins v. Fields, 354 S.C. 58, 580 S.E. 2d 433 (2003)4

Fleming v. Rose, 350 S.C. 488, 567 S.E. 2d 857 (2002).....4

HHHunt Corp. v. Town of Lexington, 389 S.C. 623, 699 S.E. 2d 699 (Ct. App. 2010).....8

Knight v. Austin, 27095 (S.C. 2-22-2012).....4

Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 362, 563 S.E. 2d 333 (2002)4

Rawlinson Road Homeowners Assoc., Inc., v. Jackson, 4893 (S.C. App. 9-28-2011).....4

Service Mgmt. V. Health SVCS, Fin., 298, S.C. 234, 379 S.E. 2d 442 (Ct. App. 1989).....9

Schnellmann v. Roettger, 373 S.C. 379, 645 S.E. 2d 239 (2007).....10

Tournes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 221 S. E. 2d 773 (1976).....8

STATUTES

Rule 56(c) SCRCF.....4

S.C. Code Ann. § 11-35-10 (1981).....4

S.C. Code Ann. § 11-35-20 (1981).....7

S.C. Code Ann. § 11-35-1520 (7).....9

S.C. Code Ann. § 11-35-1550 (c).....9

OTHER AUTHORITIES

State Regulation 19-445.2015.....9

State Regulation 19-445.2015 A, B.....10

12-16-2011 Deposition of Dr. John K. Waddell.....7

Affidavit of R. W. Denton in support of motion for summary judgment dated May 5, 2011....5

Denmark Technical College Purchasing Policies and Procedure Manual.....8

STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DENMARK TECHNICAL COLLEGE AS TO THE PLAINTIFFS COMPLAINT?
2. DID THE COURT ERR IN USING THE CONSOLIDATED PROCUREMENT CODE TO UNJUSTLY INJURE THE APPELLANTS?

STATEMENT OF THE CASE AND FACTS

This action commenced with a Complaint filed March 26, 2010 (R. pp. 13-26), in which the Plaintiffs allege they entered into a contract with Denmark Technical College for consulting services. The Complaint was filed as a non-jury action. The initial complaint also named, the South Carolina State Board of Technical and Comprehensive Education as a Co-Defendant. The action against the State Board was subsequently dismissed and no appeal was taken from that dismissal.

Denmark Technical College filed an Answer and Affirmative Defenses and Counterclaim (R. pp. 27-44). The Answer consisted of a general denial. This Defendant asserted affirmative defenses as follows:

- a. failure to state a cause of action;
- b. that the contracts relied upon were procured in violation of state procurement requirements and approval by Denmark Technical College's governing board and are invalid, void and/or voidable;
- c. that the contracts were procured by Plaintiffs through their fraudulent and conspiratorial acts;
- d. the Plaintiffs' claims are barred by the doctrine of unclean hands;
- e. Plaintiffs' claims are barred by a failure of consideration; and,
- f. Plaintiffs breach operates as a discharge of Defendant's remaining obligation.

This Defendant then asserted Counterclaims as follow:

1. The Plaintiffs failed wholly or substantially to perform or complete the consulting services contracted for. Upon the termination of the President of Denmark Technical

College, Dr. John K. Waddell, the interim president directed the Plaintiffs to stop all work under the alleged contract and failed to render any services since mid-July 2009, and Denmark Technical College refused demands for payment through September 2009. Denmark Technical College terminated its relationships with the Plaintiffs when they were unable to provide a satisfactory explanation regarding the services they had rendered and what had been achieved under the alleged agreements;

2. That the Plaintiffs and John K. Waddell engaged in a civil conspiracy to cause financial damage to Denmark Technical College ;
3. That the Plaintiffs breached the contract with Denmark Technical College ;
4. That the Plaintiffs breach of contract was accompanied by a fraudulent act;
5. That the Plaintiffs were unjustly enriched; and,
6. That the Plaintiffs violated the South Carolina Unfair Trade Practices Act.

Denmark Technical College seeks judgment against the Plaintiffs for actual damages of \$130,000.00, plus incidental and consequential damages, treble damages and attorneys fees together with the costs of this action, interest and such relief as the Court deems proper.

The Plaintiffs, on June 18, 2010, filed a Reply to the Counterclaim of Denmark Technical College (R. pp. 45-47). On or about January 7, 2011, Denmark Technical College filed a Third Party Complaint against Dr. John K. Waddell (R. pp. 48-63) alleging civil conspiracy and constructive fraud and fraud. Dr. John K. Waddell timely filed a Thirty-Party Answer (R. pp. 64-66).

On or about March 30, 2011, Judge L. Casey Manning issued his order confirming the dismissal of the State Board of Technical and Comprehensive Education as a party Defendant.

On January 20, 2011, Denmark Technical College moved to transfer venue to Bamberg County. On July 21, 2011, the Richland County Court's Order was filed which granted the requested change of venue to Bamberg County.

Throughout these proceedings, limited discovery was conducted and motions were filed including the Motion of Denmark Technical College to demand a jury trial which was dated August 24, 2011. This Motion was granted by Judge Doyet A. Early, III and filed December 14, 2011.

The Plaintiffs also filed a Motion to Compel discovery.

On or about May 5, 2011, the Plaintiffs filed a Motion for Summary Judgment (R. pp. 67-69). On June 20, 2011, the Plaintiffs filed a supplement to their motion (R. pp. 70-72).

On or about October 26, 2011, Denmark Technical College made a motion for Summary Judgment (R. pp. 73-75).

On November 14, 2011 the Plaintiffs filed an Amended Motion for Summary Judgment (R. pp. 76-118).

On November 18, 2011, the Third Party Defendant, Dr. John K. Waddell, filed a response in opposition to Denmark Technical College's Motion for Summary Judgment (R. pp. 165-169).

On December 9, 2011, Judge Early issued his Order denying Plaintiffs' Summary Judgment Motion and Granting Denmark Technical College's Motion for Summary Judgment as to the Complaint (R. pp. 3-11).

By Plaintiff's Motion filed December 27, 2011, the Plaintiffs moved to alter or amend the Trial Court's Order of December 9, 2011 (R. pp. 173-189) and on January 11, 2012, the Plaintiffs filed Plaintiff's Supplement to its Motion to Alter or Amend the Court's Order granting Summary Judgment in favor of Denmark Technical College (R. pp. 196-199).

By Form 4 Order received January 25, 2012, the Trial Court denied the Plaintiffs' Motion to Alter or Amend (R. p. 12).

This Appeal followed.

ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DENMARK TECHNICAL COLLEGE AS TO THE PLAINTIFFS COMPLAINT.

Our Appellant Courts have consistently held that summary judgment is appropriate when the pleadings, deposition, affidavits and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.* Rule 56 (c), SCRPC. The evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Fleming v. Rose, 350 S.C. 488, 567 S.E. 2d 857 (2002) and Knight v. Austin, 27095 (S.C. 2-22-2012).

Summary judgment is a drastic remedy, it must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Dawkins v. Fields, 354 S.C. 58, 580 S.E. 2d 433 (2003). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 362, 563 S.E. 2d 333 (2002).

A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony. Rawlinson Road Homeowners Assoc., Inc., v. Jackson, 4893 (S.C. App. 9-28-2011).

In this instance, the Trial Court based its decision solely on the South Carolina Consolidated Code, S.C. Code Ann. §11-35-10 (1981). It would appear that the Respondent is

attempting to utilize the procurement code to create an injustice to a vendor. A good faith vendor who entered into contracts with the Respondent's President, who relied on the President to take the administrative steps necessary to properly administer the contracts. In doing so, the Trial Court ignored the affidavit of Dr. John K. Waddell, wherein he avers that when he arrived at Denmark Technical College, various problems existed that would have prevented the filing of a timely audit. He informed the President of State Tech and the CFO of Midlands Technical College of these events and requested help with the audit. Neither provided any assistance. He then discussed retaining Edusystems with each member of the Denmark Technical College Board and instructed his Vice-President of business to discuss it with the appropriate officials for approval and instruction on the proper procurement procedures for retaining Edusystems. He was told by his Vice-President how to properly hire Edusystems, the steps were taken and the Denmark Technical College Board voted to retain Edusystems. He had his Vice-President review the contracts in question and approve them prior to his signing them. Thereafter a representative of Edusystems attended all Denmark Technical College Board meetings and provided status updates on the services being provided. (Affidavit of Dr. John K. Waddell dated November 16, 2011) (R. pp. 168-169). Further ignored by the Trial Court was the affidavits of Dr. R.W. Denton who avers to have had several meetings with the President and the area commission and provided services for the interim President. However, when Edusystems asked for its compensation the interim President stopped returning their calls or responding to emails. (Affidavit of Dr. R.W. Denton in support of motion for summary judgment dated May 5, 2011) (R. pp. 68-69).

It would appear that even at this early stage of the proceedings ample facts were raised

sufficient to defeat the Respondent's Motion for Summary Judgment.

Additionally, the Plaintiffs' Supplement to its Motion to Alter and Amend the Court's Order Granting Summary Judgment in Favor of Denmark Technical College (R. pp. 196-289) contained excerpts from the deposition of Dr. John K. Waddell (R. pp. 205-289). This deposition which was taken by the attorney for Denmark Technical College reiterates the existence of an emergency situation at Denmark Technical College the unique abilities of Edusystems and the advice he received that the procurement was proper and had been reviewed by the proper persons including Denmark Technical College's legal counsel.

His deposition further goes on to support the efforts of Edusystems and the positive benefits received. The existence of fact laden issues in this matter were emphasized when the Respondent filed in opposition to Plaintiffs' Motion for Summary Judgment (R. pp. 290-299). In page 3, lines 13 and 14 Respondent states "There is, at the very least, a genuine issue of material fact regarding Plaintiffs' performance, which requires denial of their motion" (R. p. 292). At page 7, "Even if Plaintiffs had a valid agreement, their summary judgment motion must be denied because, there is a material issue of fact regarding their performance under the contract" (R. p. 296). At page 9, line 2 "such allegations are sufficiently supported.... to at least raise a triable issue of fact as to the adequacy of Plaintiffs' performance...". At page 9, lines 9 and 10 it further state "there is a triable issue" (R. p. 298).

For the foregoing reasons the Appellants urge that the Order of the Trial Court be reversed.

II. THE TRIAL COURT ERRED IN USING THE CONSOLIDATED PROCUREMENT CODE TO UNJUSTLY INJURE THE APPELLANTS.

The South Carolina Consolidated Procurement Code with its purpose and policies being set forth in S.C. Code Ann. §11-35-20 (1981) and sub-section (h) states, “to develop an efficient and effective means of developing roles and responsibilities to the various governmental procurement officers.”

There is no statutory provision that authorizes or requires a contractor to insure that the governmental body is in compliance with the South Carolina Consolidated Procurement Code, yet the Trial Court placed that burden on the Appellants.

While the Appellant’s contend that the South Carolina Consolidated Procurement Code was erroneously utilized by the Trial Court, a discussion of the evidence before the Trial Court seems appropriate.

The affidavit of Dr. John K. Waddell (R. pp. 168-169) states that problems existed which would have prevented the filing of a timely audit, that he consulted State Tech and received no assistance. He states that prior to hiring the Appellants he instructed the Vice President of business to properly procure Edusystems and was advised that such had been accomplished. He thereafter had the contracts approved and submitted to his Board which approved the same.

His deposition testimony extensively explains his concerns and reasons for hiring the Appellants. In his deposition he described the unique talents, abilities and experiences of Edusystems and the urgency that existed which lead to their being hired. The deposition of Dr. Waddell is so pertinent to these issues that it must be cited as 12-16-2011 Deposition of Dr. John K. Waddell pages 19 through 189 (R. pp. 206-289).

With this evidence before it the Trial Court concluded that the procurement was unauthorized and that the Respondent should be granted summary judgment. It would appear

that Waddell was authorized to enter into the contracts with Edusystems, as he is granted that authority by the Denmark Technical College Purchasing Policies and Procedures manual (R. pp. 322-368) clearly sets forth such authority under its “Authorization for Purchasing”, page 5, leaves the determination of emergency procurement to the president (R. p. 331), page 12, requires the president to approve sole source procurement (R. p. 338), page 15, requires the president’s signatures on consultant contracts (R. p. 341), page 19 and allows the president to ratify unapproved purchases up to procurement certification limit and sets forth ratification procedures for those purchases above the certification limit (R. p. 345).

In the matter of HHHunt Corp. v. Town of Lexington, 389 S.C. 623, 699 S.E. 2d 699 (Ct. App. 2010), the Appellant Court held “...where the officers or agents of a governmental body act within the proper scope of their authority, a municipality cannot escape liability on a contract within its power to make, on the ground that the officer executing it on its behalf was not technically authorized to do so, where he was the proper person to enter into such a contract.”

As early as 1976, our Supreme Court expressed the identical view in Tournes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E. 2d 773 (1976). Tournes also concludes that “the failure of the City Council to ratify a formal contract under the facts of this case was a mere technicality not entitling it to escape liability for the reasonable value of Plaintiff’s services.”

It is urged that one could conclude under the facts existing in this appeal that the Appellant’s had no responsibility nor any practical ability to insure that the Respondent properly complied with procurement requirements.

The Trial Court’s Order relies on the case of Aherns v. State, 392 S.C. 340, 709 S.E. 2d 54 (2011), however this reliance is misplaced. Aherns working state employee retirees could not

prevail on the existence of a contract allegedly created by statements and forms provided by the S.C. Retirement Systems as such statements and forms were contrary to the existing statute pertaining to retirees obligation to contribute to the retirement system.

Also relied upon was the matter of Service Mgmt. v. Health & Human SVCS. Fin., 298 S.C. 234, 379 S.E. 2d 442 (Ct. App. 1989). This case holds an “erroneous misconstruction of the contract by a State employee does not change its explicit terms and the State is not bound by the act of its officer in making an unauthorized payment”. The cases relied upon by the Trial Court would not appear to be applicable to the instant matter which involves the execution of a contract by the President of Denmark Technical College, the performance under that contract by the Appellant for the first full year and for eight months of the second when Denmark Technical College without notice or explanation stopped paying, even though the South Carolina Consolidated Procurement Code at S.C. Ann. §11-35-1520 (7) requires a written determination of appropriateness if the cancellation is after the award but before performance. In this instance no written determination was required as performance was substantially complete and the Respondent had an existing obligation to complete its part.

Further, the fact that the South Carolina Consolidated Procurement Code is applicable only to the governmental body is reinforced by S.C. Code Ann. §11-35-1550(c) which provides for the temporary suspension of the violating governing body’s ability to procure under this section.

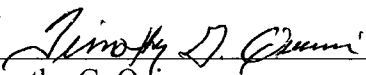
The Trial Court further improperly relied on State Regulation 19-445. 2015 dealing with unauthorized procurement when the facts of this matter clearly show that the procurement was entered into by the President of Denmark Technical College who was acting within the scope of

his authority, as previously shown above.

The Trial Court erred in applying Regulation 19-445.2015 A, B by finding that the contracts in issue were procured fraudulently or in bad faith. Fraud requires proof by clear, cogent and convincing evidence Schnellmann v. Roettger, 373 S.C. 379, 645 S.E. 2d 239 (2007) none of which has been shown and the Trial Court erred on relying on the same.

CONCLUSION

The Appellant's would urge that the Trial Court's Order was erroneously based upon a misinterpretation of the law; was erroneously granted in view of significant issues of facts and that the Trial Court's Order should be reversed.


Timothy G. Quinn
Quinn & Quinn, P.A.
2309 Devine Street
Post Office Drawer 12589
Columbia, South Carolina 29205
(803) 771-0936
Fax: (803) 254-7751
Attorneys for Appellants

October 9, 2012

Other Counsel of Record:

David T. Duff
Robert E. Tyson, Jr.
PO Box 1486
Columbia, SC 29202

Margaret Fox
James M. Griffin
1513 Hampton Street
Columbia, SC 29201

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
In The Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2011-CP-05-00160

Dr. Robert W. Denton and Dr. John P. May,
d/b/a Edusystems, a general partnership,

Appellants,

v.

Denmark Technical College and
South Carolina State Board for Technical
and Comprehensive Education,

Respondents,

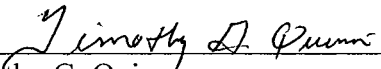
v.

Dr. John K. Waddell,

Third Party Defendant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant is in compliance with
Rule 211(b), SCACR.


Timothy G. Quinn
2309 Devine Street
Post Office Drawer 12589
Columbia, South Carolina 29205
(803) 771-0936
Fax: (803) 254-7751

November 13, 2012

RECEIVED

NOV 19 2012

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
In The Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2011-CP-05-00160

Dr. Robert W. Denton and Dr. John P. May,
d/b/a Edusystems, a general partnership,

Appellant,

.v.

Denmark Technical College and
South Carolina State Board for Technical
and Comprehensive Education,

Respondent,

v.

Dr. John K. Waddell,

Third Party Defendant.

PROOF OF SERVICE

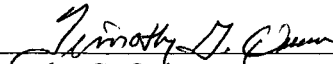
I certify that I have served the Appellant's Final Brief by depositing a copy of it in the United States Mail, postage prepaid, on October 10, 2012, addressed to their attorney of record as follows:

David Duff
Robert Tyson, Jr.
3700 Forest Drive
Suite 404
Columbia, SC 29204

and

Margaret Fox
James M. Griffin
1513 Hampton Street
Columbia, SC 29201

October 10, 2012


Timothy G. Quinn
2309 Devine Street
Columbia, South Carolina 29205
Phone (803)771-0936
Fax (803)254-7751
Attorney for Appellant