

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2011-CP-08-2439

Indra SI, S.A.,

Respondent,

v.

Rotomotion, LLC,
a South Carolina Limited
Liability Company,

Appellant.

FINAL BRIEF OF RESPONDENT

HELLMAN & YATES, P.A.

Brian A. Hellman
bh@hellmanyates.com
SC Bar # 72399
Jason S. Smith
js@hellmanyates.com
SC Bar # 80700
145 King Street, Suite 102
Charleston, SC 29401
(843) 266-9099
(843) 266-9188 (facsimile)

ATTORNEYS FOR RESPONDENT

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I.

STATEMENT OF THE CASE

This action arose from a Purchase and Sale Agreement in 2009 for an Electric Helicopter UAV System. See March 2009 Sale Agreement (R. pp. 25-27). Respondent in advance paid the full purchase price of \$45,400.00. See Wire Transfer Instructions (R. p. 28); Letter from Dennis S. D'Annunzio to Eduardo Ricardo Viaggio, dated October 28, 2009 (R. pp. 29-30); Letter from Eduardo Ricardo Viaggio to Dennis D'Annunzio dated May 31, 2010 (R. pp. 31-34); Affidavit of Eduardo Ricardo Viaggio (R. pp. 108-129). Appellant did not convey the Electric Helicopter UAV System, nor did Appellant return Respondent's purchase money. Id.

On September 7, 2011, Respondent served the Summons and Complaint via process server, providing Appellant thirty (30) days to answer or otherwise appear and defend. See Summons and Complaint (R. pp. 11-34). The Complaint includes detailed allegations and asserts four causes of action: (1) Breach of Contract; (2) Unjust Enrichment; (3) South Carolina Unfair Trade Practice Act ("SCUTPA"); and (4) Breach of Contract Accompanied by Fraudulent Act. Id. The Complaint also includes requests for actual, consequential, compensatory, and punitive damages, attorneys fees and costs, pre and post judgment interest, and such other relief as the trial court deems proper. Id. Along with the Complaint, on September 7, 2011, Respondent served its First Set of Interrogatories and First Request for Production on Appellant. See Plaintiff's First Set of Interrogatories (R. pp. 96-100); Plaintiff's First Request for Production (R. pp. 100-107). Notably, Appellant never responded to those discovery requests.

On or about October 4, 2011, Counsel for Respondent was contacted via e-mail by Appellant's Florida Counsel, and as a courtesy, Counsel for Respondent agreed to an extension of ten (10) days, to be used to retain South Carolina local counsel for Appellant. On October 17, 2011, Counsel for Respondent agreed to an additional twenty (20) day extension with Appellant's newly retained South Carolina local counsel, making the new deadline to answer or respond November 5, 2011. See Letter from Karen DeJong, Esq. to Brian Hellman, Esq., dated October 19, 2011 (R. pp. 92-93).

Appellant did not answer the Complaint or otherwise defend within the additional twenty (20) day extended period, which expired on November 5, 2011. After waiting an additional week as an extra measure of courtesy, on November 11, 2011, Counsel for Respondent served an Affidavit of Default, swearing that more than sixty (60) days had elapsed since the service of the Summons and Complaint (including the ten (10) day extension and subsequent twenty (20) day extension) exclusive of the date of service upon the Appellant, and that no Answer, Demurrer or Notice of Appearance had been served upon him as required by the Summons and therefore that Appellant was in default. See Affidavit of Default (R. pp. 37-39).

Only thereafter, on or about November 18, 2011, which was seventy-six (76) days after service of the Summons and Complaint, without first making a motion to show good cause to file a late answer, Appellant filed an Answer and Counterclaim for Specific Performance, which was not properly served; it was merely e-mailed to Counsel for Respondent. See Defendant's Answer and Counterclaim (R. pp. 40-49); E-mail from Karen DeJong, Esq. to Brian Hellman, Esq., dated November 21, 2011 (R. pp. 150-151). Notably, although the Answer was dated November 18, 2011, it was not e-mailed to

Counsel for Respondent until November 21, 2011, and also not filed with the trial court until November 21, 2011. Id. Also, Respondent never filed a Certificate of Service.

Respondent served a Notice and Motion for Summary Judgment or Alternatively to Dismiss Appellant's Counterclaim on December 16, 2011. See Notice and Motion for Summary Judgment or Alternatively to Dismiss Appellant's Counterclaim (R. pp. 50-52). On March 21, 2012, Respondent served a Memorandum of Law and Affidavit of Eduardo Ricardo Viaggio in Support of that Motion and Respondent's prayer for liquidated damages. See Plaintiff's Memorandum of Law in Support Motion for Summary Judgment on the Complaint or Alternatively to Dismiss Appellant's Counterclaim (R. pp. 53-59); Affidavit of Eduardo Ricardo Viaggio (R. pp. 108-129). Also on March 21, 2012, Respondent served a Notice of Hearing to be held on April 2, 2012. See Notice of Hearing (R. pp. 130-135). Appellant served a Response in Opposition to Respondent's Motion on March 28, 2012, but did not serve or produce any affidavits or other evidence opposing Respondent's affidavit. See Opposition to Summary Judgment or in the Alternative to Dismiss Counterclaim (R. pp. 60-63). Respondent served a Reply prior to the hearing on April 2, 2012. See Reply in Support of Summary Judgment or Alternatively to Dismiss Counterclaim (R. pp. 64-67).

The hearing on April 2, 2012 was held before the Honorable Krisiti Lea Harrington. At the summary judgment hearing, without a motion from Appellant, Judge Harrington, *sua sponte*, provided Appellant's Counsel an opportunity to argue why Appellant's late Answer and Counterclaims should be considered and should prevent the trial court from granting summary judgment to Respondent. See Trial Transcript at p.8, ll. 12-19 (R. p. 144, ll. 12-19) ("THE COURT: I understand that. But he's saying that I

– I should grant Summary Judgment because your Answers were not filed timely. Your answers are late, so I shouldn't even consider them so then there is no genuine issue of material fact. But if you're telling me that I need to not follow the Rules of Civil Procedure and allow late time – late filed Answers, then I will hear your arguments.”). Judge Harrington ultimately took the matter under advisement and instructed both parties to present proposed orders within ten (10) days. Both parties submitted proposed orders to Judge Harrington on April 5, 2012. See Plaintiff's Proposed Order (R. pp. 68-77); Defendant's Proposed Order (R. pp. 83-86).

On April 30, 2012, Judge Harrington issued an Order Granting Respondent's Motion for Summary Judgment and awarding a total judgment of \$153,814.12, concluding after thorough legal analysis: “Plaintiff's affidavit in support of its Motion for Summary Judgment supports the factual allegations in the Complaint and contradicts any allegations that Defendant has made in a general, summary fashion, in both Defendant's Opposition to Plaintiff's Motion and Defendant's late filed Answer and Counterclaim. As such, Defendant has not made a showing of any meritorious defenses either by affidavit or otherwise. The South Carolina Rules of Civil Procedure cannot be ignored. The Court finds that Defendant's late and improperly served Answer is ineffective as a denial of Plaintiff's allegations or assertion of any defense or counterclaim. Accordingly, Plaintiff's allegations are deemed admitted, there are no material facts at issue, and Plaintiff is summarily entitled to the relief sought in its Complaint.” See Order Granting Summary Judgment at 7 (R. p. 9).

Appellant filed a Notice of Appeal on May 30, 2012. Appellant served its Initial Brief of Appellant on September 4, 2012. In response thereto, Respondent submitted its Initial Brief of Respondent on October 3, 2012.

II.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56, SCRPC. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRPC; Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 213, 609 S.E.2d 565, 567 (Ct. App. 2005). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005); BPS, Inc. v. Worthy, 362 S.C. 319, 325, 608 S.E.2d 155, 159 (Ct. App. 2005).

III.

ARGUMENT

A. APPELLANT DID NOT PRESERVE ITS ARGUMENTS FOR APPEAL

“An appellate court may not, of course, reverse for any reason appearing in the record.” I’On, L.L.C. v. Town of Mt. Pleasant, 526 S.E.2d 716, 724, 338 S.C. 406, 422 (2000). “The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.” Id. “This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.” Id. (citing Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995); State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991); Sumter Building & Loan Ass’n v. Winn, 45 S.C. 381, 23 S.E. 29 (1895)).

“If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.” I’On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724 (citing Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993); Hoffman v. Powell, 298 S.C. 338, 380 S.E.2d 821 (1989); Rules 52(b) and 59(e), SCRPC).

”Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” I’On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724 (citing Roche v. South Carolina Alcoholic Beverage Control Comm’n, 263 S.C. 451, 211 S.E.2d 243 (1975)). “The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It

prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” I’On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724 (citing Brown v. Singletary, 226 S.C. 482, 85 S.E.2d 738 (1955); State v. Warren, 207 S.C. 126, 134, 35 S.E.2d 38, 41 (1945)).

In the instant case, Appellant’s arguments on appeal are unpreserved. Appellant’s first two arguments accuse the trial court of failing to properly apply the summary judgment standard and instead applying a default judgment standard. Appellant’s Brief at 6-7. These arguments were not asserted in Appellant’s Opposition to Summary Judgment or at the April 2, 2012 hearing, but rather are new and inherently responsive to the trial court’s Order. Appellant’s third argument, accusing the trial court of error in awarding treble damages, as Appellant’s Brief explicitly admits in its Statement of Issues on Appeal, “...WAS NOT ARGUED BEFORE THE COURT BY EITHER PARTY.” Appellant’s Brief at 8. Appellant’s final argument is directed to the elements of a cause of action under SCUTPA, another issue that was not argued in Appellant’s opposition or at oral argument or addressed in the trial court’s Order. Appellant’s Brief at 8. As discussed above, Rule 59(e), SCRCPP, was designed to facilitate the trial court’s review of exactly these types of arguments prior to calling upon the resources of the Court of Appeals – but Appellant made no such motion under Rule 59(e), SCRCPP. See Nelums v. Cousins, , 304 S.C. 306, 307, 403 S.E.2d 681, 681 (Ct. App. 1991) (“Moreover, it is not preserved for appellate review since the trial court was never afforded the opportunity to rule on the clarity of its order because Cousins made no motion, as she was required to do, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure.”).

This appeal, which was not preceded by a motion for reconsideration under Rule 59(e), SCRCP, and relies upon unpreserved arguments, appears to be yet another attempt by Appellant to circumvent the South Carolina Rules of Civil Procedure. It is also worth noting that Appellant's brief in Opposition to Summary Judgment – which is a total of two pages long, consisting of seven conclusory sentences – fails to cite any cases or statutes, and does not rely on any affidavits or other evidence. See Defendant's Opposition to Summary Judgment (R. pp. 61-63). Appellant now attempts to pull a proverbial ace card from its sleeve over a year into this litigation. Indeed, Appellant chose not to invest the time and resources required to comply with the Rules of Civil Procedure in serving a timely answer, responding to discovery, and thoroughly preparing legal arguments, memoranda, and supporting affidavits in this action. Instead, Appellant chose to minimize its attorneys' fees and delay and neglect this litigation, understanding full well that it had no colorable defense for refusing to refund Respondent's purchase money for the undelivered helicopter equipment. See I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724 (“[The preservation] requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve--intentionally or by chance--in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.”). Accordingly, Appellant's unpreserved arguments on appeal do not merit this Court's valuable attention.

B. APPELLANT DID NOT PRESENT ANY AFFIDAVIT OR OTHER EVIDENCE TO CREATE ANY ISSUE OF FACT

Appellant attempts to support its argument that issues of material fact exist merely by pointing to its own counsel's so-called "testimony" at the April 2, 2012 hearing, rather than submitting affidavits or other evidence. See Appellant's Brief at 7. Oral argument by counsel at a hearing is not testimony or evidence, and it cannot create a genuine issue of fact. See Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986) (citing Smith v. Mack Trucks, Inc., 505 F.2d 1248 (9th Cir.1974) ("Legal memoranda and oral argument, in the summary-judgment context, are not evidence, and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment.")).

In contrast, Respondent submitted an unopposed affidavit proving its allegations in support of its Motion for Summary Judgment, which the trial court duly based its ruling upon. See Affidavit of Eduardo Ricardo Viaggio (R. pp. 108-129); Order Granting Summary Judgment at 7 (R. p. 9) ("Furthermore, Plaintiff's affidavit in support of its Motion for Summary Judgment supports the factual allegations made in the Complaint and contradicts any allegations that Defendant has made in a general, summary fashion, in both Defendant's Opposition to Plaintiff's Motion and Defendant's late filed Answer and Counterclaim. As such, Defendant has not made a showing of any meritorious defenses either by affidavit or otherwise."). Pursuant to Rule 56(e), SCRC: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if

appropriate, shall be entered against him.” Rule 56(e), SCRPC. Accordingly, the trial court was correct in finding no genuine issue of fact based on Respondent’s unopposed affidavit and granting Respondent summary judgment.

C. APPELLANT’S BRIEF DOES NOT ADDRESS THE TRIAL COURT’S ANALYSIS AND FAILS TO PROVIDE ANY CONTRADICTORY AUTHORITY

The substance of Appellant’s Appeal Brief is best responded to by highlighting an argument it does not make. Namely, Appellant does not argue that the trial court abused its discretion in finding a lack of good cause to allow Appellant’s untimely and improperly served Answer and Counterclaims under the South Carolina Rules of Civil Procedure. It is from this finding, in addition to Respondent’s unopposed affidavit, that the trial court’s grant of summary judgment ultimately flows. See Order Granting Summary Judgment at 7 (R. p. 9). Because the trial court decided not to recognize Appellant’s late and improperly served Answer and Counterclaim, Appellant was necessarily deemed to have admitted all of the allegations in Respondent’s Complaint, pursuant to Rule 8(d), SCRPC. Id. In turn, because Appellant admitted all of the allegations in Respondent’s Complaint and Respondent’s affidavit in support was unopposed, no material issues of fact existed and summary judgment was granted in Respondent’s favor. Id.; Hatchell v. Jackson, 290 S.C. 256, 258, 349 S.E.2d 407, 408 (Ct. App. 1986) (holding that summary judgment was properly granted because no issues of fact existed based on judicial admissions for failing to timely respond to requests to admit under Rule 36, SCRPC); Scott v. Greenville Housing Authority, 353 S.C. 639, 648, 579 S.E.2d 151, 155 (Ct. App. 2003) (“Admissions under Rule 36 are treated as

admissions in pleadings.”). Appellant’s arguments on appeal fail to recognize or contradict this analysis and misguidedly continue to rely on the substance of the disregarded Answer and Counterclaim.

Indeed, the trial court did not abuse its discretion in finding a lack of good cause to allow Appellant’s untimely and improperly served Answer and Counterclaims under the South Carolina Rules of Civil Procedure. Rule 12(a), SCRPC, provides that a defendant must serve an answer or otherwise defend a summons and complaint within thirty (30) days. Rule 13(a), SCRPC, provides that compulsory counterclaims must be asserted in such answer. Rule 6(b), SCRPC, allows for extensions up to thirty (30) days when agreed to in writing by counsel. Rule 5(b)(1), SCRPC, provides how service must be made; notably, e-mail is not an option. Appellant has not adhered to any of those rules, filing its Answer and Counterclaim seventy-six (76) days after being served with the Summons and Complaint, which was outside of the ten (10) day extension and subsequent twenty (20) day extension, and moreover, was not properly served, but merely e-mailed. See Defendant’s Answer and Counterclaim (R. pp. 40-49); E-mail from Karen DeJong, Esq. to Brian Hellman, Esq., dated November 21, 2011 (R. pp. 150-151).

Rule 55(a), SCRPC, provides that if a defendant fails to serve an answer or otherwise defend within the above described period, and that fact is made to appear by affidavit or otherwise, the clerk of court must enter default. “[W]hether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit.” Thynes v. Lloyd, 294 S.C. 152, 153-54, 363 S.E.2d 122, 123 (Ct. App. 1987); Stark Truss Co., Inc. v. Superior Construction Corp., 360 S.C. 503, 509, 602 S.E.2d 99,

102 (Ct. App. 2004) (“A plain reading of Rule 55(a) allows entry of default when a pleading or defense is asserted in a manner noncompliant with the Rules of Civil Procedure. To hold otherwise would render the requirements in Rule 12(a), SCRC, meaningless.”). Long after Appellant’s extended time to answer had expired, Respondent served and filed an Affidavit of Default. See Affidavit of Default (R. pp. 37-39). Accordingly, the trial court properly deemed default as having been entered by the clerk at that time.

Rule 55(c), SCRC, provides that a court may set aside an entry of default only after a showing of “good cause.” Appellant did not move under Rule 55(c), SCRC, to show good cause to set aside the entry of default and file a late answer, but rather filed its answer late on its own accord without the trial court’s approval. Such an unauthorized late filing does not constitute an answer, but merely an “appearance” that entitles Appellant to notice and a hearing before entry of default can be converted into a judgment under Rule 55(b), SCRC. Dyman v. Hyman, 305 S.C. 170, 171-2, 406 S.E.2d 388, 389 (Ct. App. 1991); Stark Truss Co., Inc. v. Superior Construction Corp., 360 S.C. 503, 512, 602 S.E.2d 99, 104 (Ct. App. 2004) (“Appellants failed to timely serve and file their answer and compulsory counterclaims on Stark Truss pursuant to the Rules of Civil Procedure. Thus, the entry of default was proper, the circuit court’s refusal to set aside the entry of default was supported by the evidence, and the dismissal of Appellants’ compulsory counterclaims was proper. However, as Appellants made an appearance in this action by filing a late answer, they were entitled to notice before entry of default judgment.”). Indeed, Appellant was served with a Notice and Motion for Summary Judgment on December 16, 2012, the trial court considered Appellant’s Memorandum in

Opposition, and Appellant's Counsel appeared and was given the opportunity to present oral argument at the April 2, 2012 hearing. See Notice and Motion for Summary Judgment (R. pp. 50-52); Defendant's Opposition to Summary Judgment (R. pp. 60-63). Appellant's unauthorized late filing therefore received all the attention to which it was entitled from the trial court. Above and beyond that which Appellant was entitled, and exercising utmost discretion in a light most favorable to Appellant, the trial court, *sua sponte*, considered Appellant's argument as to good cause for its late filing, despite the fact that Appellant had never made a motion under Rule 55(c), SCRCP. See Trial Transcript at p.8, ll. 12-19 (R. p. 144, ll. 12-19) ("THE COURT: Your answers are late, so I shouldn't even consider them so then there is no genuine issue of material fact. But if you're telling me that I need to not follow the Rules of Civil Procedure and allow late time – late filed Answers, then I will hear your arguments.").

The good cause standard of Rule 55(c), SCRCP, requires, as a threshold burden, a party to put forth an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607-8, 681 S.E.2d 885, 888 (2009). Once a party has put forth a satisfactory explanation, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. Id. However, the trial court need not make specific findings of fact for each factor if sufficient evidence supports a determination that no reasonable explanation exists for vacation of default. Id. Ultimately, whether the trial court finds good cause is a matter of discretion, not to be disturbed on appeal absent a clear showing of an abuse of that discretion. Id.

Under this standard, the trial court did not abuse its discretion when it held that the explanation offered in Appellant's Opposition – "clerical error and/or inadvertence," which was further explained by Appellant's Counsel at the April 2, 2012 hearing to have resulted from a legal assistant's failure to docket the extension date – falls short of good cause. See Defendant's Opposition to Summary Judgment; Trial Transcript p. 6, ll. 19-24 (R. p. 142, ll. 19-24). South Carolina case law is clear that mere negligence on the part of the defendant or its attorney is not good cause. Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 410 (Ct. App. 1994) ("Whether the [defendants] failed to ask their attorney to file an answer or whether the attorney was negligent in failing to answer, however, is not critical, because even if the attorney were negligent in failing to answer the Complaint, his negligence would be imputed to the [defendant] Because the [defendants] have failed to set forth any other reason why they failed to answer the Complaint, the master's finding that the [defendants] failed to demonstrate good cause in setting aside the default is supported by the evidence."). Accordingly, under Sundown Operating Co., Appellant's proffered explanation could not support a finding of good cause as a matter of law, and the trial court could have stopped its analysis without considering any other factors.

Nonetheless, the other factors considered by the trial court also supported a finding of a lack of good cause. As explained above, Appellant failed to timely file a motion for relief under Rule 55(c), SCRCP. In fact, Appellant never filed any such motion at any time before or after Respondent served its Affidavit of Default over ten (10) months ago. Additionally, Respondent articulated several reasons why it would be prejudiced if the trial court were to allow Appellant's late answer, including that:

Appellant has failed to respond to discovery requests served over a year ago; Appellant has not fulfilled multiple assurances since 2009 that it would return Respondent's money; Appellant did not provide notice of a motion under Rule 55, SCRCP, to allow a late answer with opportunity for Respondent to oppose; Respondent has lost the use of its purchase money since 2009; Appellant is believed to be in worsening financial trouble that may impact its ability to pay a judgment. See Trial Transcript at p.9, l. 17 – p.11, l. 13 (R. p. 145, l. 17 – p.147, l. 13); Plaintiff's First Set of Interrogatories (R. pp. 96-100); Plaintiff's First Request for Production (R. pp. 101-107); Letter from Dennis S. D'Annunzio to Eduardo Ricardo Viaggio, dated October 28, 2009 (R. pp. 29-30); Letter from Eduardo Ricardo Viaggio to Dennis D'Annunzio dated May 31, 2010 (R. pp. 31-34); Affidavit of Eduardo Ricardo Viaggio (R. pp. 108-129).

Furthermore, the lateness of the filing was not the only deficiency – Appellant did not properly serve its late-filed answer, but merely e-mailed a copy and did not file a certificate of service. Rule 5(b)(1), SCRCP. See E-mail from Karen DeJong, Esq. to Brian Hellman, Esq., dated November 21, 2011 (R. pp. 150-151); Trial Transcript at p. 7, ll. 4-8 (R. p. 143, ll. 4-8) (Counsel for Appellant offered the following excuse for not properly serving an answer: "It is not my policy to just email an Answer. I have never just done that. I always send it by regular mail. So I don't know if somehow it got lost in the mail. It's just not the way I practice law. So I apologize for that."). In sum, the trial court was well within its discretion to disregard Appellant's Answer and Counterclaims. Faced with no answer and Respondent's unopposed affidavit, the trial court was left with no genuine issues of fact, and was therefore correct in granting summary judgment to Respondent.

D. THE TRIAL COURT CORRECTLY APPLIED THE SUMMARY JUDGMENT STANDARD

Appellant argues that the trial court applied the standard for default judgment instead of the standard for summary judgment. See Brief of Appellant at 6-7. This argument is not only unpreserved, as discussed above, but constitutes a misreading of the Order. As described above, the trial court indeed applied the correct standard for summary judgment under Rule 56, SCRCF, finding that there was no genuine issue of material fact because Respondent's affidavit was unopposed and Appellant admitted all of the allegations in Respondent's Complaint pursuant to Rule 8, SCRCF, by failing to timely and properly serve an answer. See Order Granting Summary Judgment at 7 (R. p. 9); Rule 56, SCRCF; Rule 8, SCRCF; Hatchell, 349 S.E.2d 407, 408, 290 S.C. 256, 258-9 (summary judgment granted because no issues of fact existed based on judicial admissions for failing to timely respond to requests to admit under Rule 36, SCRCF); Scott, 353 S.C. 639, 648, 579 S.E.2d 151, 156 ("Admissions under Rule 36 are treated as admissions in pleadings.").

E. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT WAS NOT PREMATURE

Appellant's next unpreserved argument is that the trial court prematurely granted summary judgment by not allowing further time for discovery. See Appellant's Brief at 7. "A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact."

See Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009). Again, as discussed above, the trial court found that no genuine issue of material fact existed because of Respondent's unopposed affidavit and because Appellant admitted all of the allegations in Respondent's Complaint pursuant to Rule 8, SCRPC, by failing to timely and properly serve an answer. See Order Granting Summary Judgment at 7 (R. p. 9). The court further correctly explained that because Respondent's allegations had been admitted, the case was ripe for summary judgment without further discovery. See Order Granting Summary Judgment at 7 (R. p. 9). Indeed, it is ironic that Appellant now argues that it did not have the opportunity to engage in discovery, when Appellant has yet to respond to Respondent's discovery requests served over a year ago along with the Summons and Complaint. See Plaintiff's First Set of Interrogatories (R. pp. 96-100); Plaintiff's First Request for Production (R. pp. 101-107). Strangely, Appellant incorrectly argued in its brief: "there have been no exchange of Interrogatories or Request to Produce." Appellant's Brief at 7. Clearly, Appellant has had plenty of time to respond to Respondent's Interrogatories and Requests For Production, as well as to pursue its own discovery in this case.

F. THE TRIAL COURT CORRECTLY AWARDED RESPONDENT TREBLE DAMAGES UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT

Appellant's final unpreserved argument is that the trial court should not have awarded Respondent treble damages under SCUTPA because "[b]esides Plaintiff's self-serving statements in its' Complaint, there has been absolutely no evidence." See Appellant's Brief at 8. Ironically, this argument inherently admits that Respondent's

allegations support its SCUTPA claim. Once more, as discussed above, Appellant misses the point that the trial court's judgment with respect to treble damages under SCUTPA follows from Respondent's unopposed affidavit and the trial court's holding that Appellant admitted all of the allegations in Respondent's Complaint pursuant to Rule 8, SCRCPP, by failing to timely and properly serve an answer. See Order Granting Summary Judgment at 7 (R. p. 9). Indeed, Respondent alleged and affirmed that Appellant engaged in unfair, deceptive, and willful acts capable of repetition and harmful to the public interest. See Complaint at ¶¶ 37-49 (R. pp. 19-20 at ¶¶ 37-49). See Affidavit of Eduardo Ricardo Viaggio (R. pp. 108-129). See Singleton v. Stokes Motors, Inc., 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004); S.C. Code Ann. § 39-5-140(a) (1985 & Supp. 2011). Specifically, Respondent alleged and affirmed that Appellant intentionally and deceptively required a pre-payment of the purchase price for equipment with intent not to manufacture and deliver the equipment and thereafter intentionally did not refund Appellant's purchase money. Complaint at ¶¶ 37-49 (R. pp. 19-20 at ¶¶ 37-49). Affidavit of Eduardo Ricardo Viaggio (R. pp. 108-129). See Singleton, 358 S.C. at 379, 595 S.E.2d at 466; S.C. Code Ann. § 39-5-140(a) (1985 & Supp. 2011). These undisputed facts support the conclusion that Appellant engaged in knowing and willful thievery, not a simple breach of contract – as Appellant now tries to argue on appeal – and clearly support the trial court's finding of willfulness. S.C. Code Ann. § 39-5-140(d) (1985 & Supp. 2011) (“For the purposes of this section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of Section 39-5-20.”); S.C. Code Ann. § 39-5-20(a) (1985 & Supp. 2011)

(“Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”).

Upon a finding of willfulness, SCUTPA provides that “the court shall award three times the actual damages sustained.” S.C. Code Ann. § 39-5-140(a) (1985 & Supp. 2011) (“If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper.”). The trial court was therefore correct in trebling the liquidated damages supported by Appellant’s unopposed affidavit. Order Granting Summary Judgment at 7 (R. p. 9); Affidavit of Eduardo Ricardo Viaggio (R. pp. 108-129).

Finally, Appellant frivolously asserts that a SCUTPA claim cannot be brought by a corporation. Appellant’s Brief at 8. The very first section of the Act, however, provides that a corporation is explicitly included in the definition of persons who may bring an action under SCUTPA. S.C. Code Ann. § 39-5-10 (1985 & Supp. 2011) (“Person’ shall include natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity.”).

G. THE TRIAL COURT’S ORDER GRANTING SUMMARY JUDGMENT SHOULD BE AFFIRMED BASED ON ALL GROUNDS APPEARING IN THE RECORD ON APPEAL

In addition to rebutting the arguments in Appellant’s Initial Brief, Respondent hereby argues that this Court should affirm the trial court’s Order Granting Summary Judgment on all grounds appearing in the Order and the Record on Appeal. Rules 208(b)(2) and 220(c), SCRCP.

IV.

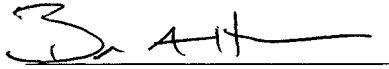
CONCLUSION

Appellant's arguments are not preserved for appeal, not supported by any affidavit or other evidence on the record, and not supported by any case law that contradicts the trial court's Order. Appellant did not follow the South Carolina Rules of Civil Procedure and the trial court did not abuse its discretion in holding that Appellant's late, unauthorized, and improperly served answer was ineffective as a denial of Respondents' allegations or assertion of any defense or counterclaim. In turn, the trial court correctly held that Respondent's allegations were admitted. In light of those judicial admissions and Respondent's unopposed affidavit, the trial court correctly granted summary judgment because no material facts were at issue and properly awarded treble liquidated damages under SCUTPA as supported by Respondent's unopposed affidavit.

WHEREFORE, respectfully, this Court should affirm the trial court's Order Granting Summary Judgment under Rule 56, SCRCP, and issue a remittur to the circuit court so that it may enforce the Judgment and additionally award Respondent its costs and attorneys fees incurred in this appeal as provided under SCUTPA.

[Signature on following page]

HELLMAN & YATES, P.A.



Brian A. Hellman
bh@hellmanyates.com
SC Bar # 72399

Jason S. Smith
js@hellmanyates.com
SC Bar # 80700

145 King Street, Suite 102
Charleston, SC 29401
(843) 266-9099
(843) 266-9188 (facsimile)

ATTORNEYS FOR RESPONDENT

December 14, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 2011-CP-08-2439

Indra SI, S.A.,

Respondent,

v.

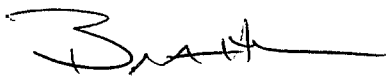
Rotomotion, LLC,
a South Carolina Limited
Liability Company,

Appellant.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCRAP

I, Brian A. Hellman, attorney for Respondent, do hereby certify that
Respondent's Final Brief complies with Rule 211(b), SCRAP.

December 14, 2012



Brian A. Hellman

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SC Court of Appeals

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Rotomotion, LLC, a South
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Appellant.

CERTIFICATE OF SERVICE

I, the undersigned Legal Assistant of the law office of Hellman & Yates, P.A. attorney for Respondent, do hereby certify that I have served all counsel in this action with a copy of the Respondent's Final Brief by mailing a copy of the same by United States Mail; postage prepaid, to the following address:

Counsel Served: Karen DeJong, Esq.
DeJong Law Firm, LLC
940 Johnnie Dodds Blvd., Suite 203
Mount Pleasant, SC 29464



Erin Hickey, Administrative Assistant

December 14, 2012

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