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December 19, 2012

Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: INDRA. SI. S.A. v. Rotomotion. LLC
Case No. 2011-CP-08-2439
Appellate Case No. 2012-212154

RECEIVED

DEC 20 2012

SC Court of Appeals

Dear Sir/Madam:

Enclosed please find the original, signed Final Brief of Appellant with fifteen (15) bound copies.

If you have any questions, please do not hesitate to contact my office.

Very truly yours,



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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

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DEC 20 2012

SC Court of Appeals

INDRA SI, S.A.

Respondent,

v.

ROTOMOTION, LLC, a
South Carolina Limited
Liability Company

Appellant.

FINAL BRIEF OF APPELLANT

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2. THE TRIAL COURT ERRED IN PREMATURELY GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT BECAUSE THE CRITERIA SET FORTH IN THE BELOW ARGUMENT HAVE NOT BEEN PROPERLY APPLIED IN THIS CASE.

3. THE TRIAL COURT ERRED IN AWARDING TREBLE DAMAGES TO PLAINTIFF UNDER THE S.C. UNFAIR TRADE PRACTICES ACT BECAUSE A) THIS ISSUE WAS CONTESTED, B) THIS ISSUE WAS NOT ARGUED I N PLAINTFF’S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM, AND C) THIS ISSUE WAS NOT ARGUED BEFORE THE COURT BY EITHER PARTY AT THE FINAL HEARING ON APRIL 2, 2012.

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT DUE TO THE FACT THAT THE COURT'S FINDINGS OF LAW IN ITS' FINAL ORDER WERE BASED UPON DEFENDANT'S LATE FILING OF ITS ANSWER?
2. DID THE TRIAL COURT ERR IN GRANTING PLAINTIFF'S SUMMARY JUDGMENT MOTION BECAUSE THE QUALIFYING FACTORS SET FORTH IN THE BELOW ARGUMENT HAVE NOT BEEN PROPERLY APPLIED IN THIS CASE?
3. DID THE TRIAL COURT ERR IN AWARDING TREBLE DAMAGES TO PLAINTIFF UNDER THE S.C. UNFAIR TRADE PRACTICES ACT BECAUSE A) THIS ISSUE WAS CONTESTED, B) THIS ISSUE WAS NOT ARGUED I N PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM, AND C) THIS ISSUE WAS NOT ARGUED BEFORE THE COURT BY EITHER PARTY AT THE FINAL HEARING ON APRIL 2, 2012.
4. DID THE TRIAL COURT ERR IN TREBLING PLAINTIFF'S DAMAGES UNDER THE S.C. UNFAIR TRADE PRACTICES ACT BECAUSE THIS ACT DOES NOT APPLY TO THE FACTS IN THIS CASE?

STATEMENT OF THE CASE

On September 2, 2011, Plaintiff, an Argentina company, filed a Summons and Complaint wherein Plaintiff alleged breach of contract, unjust enrichment and violation of the South Carolina Unfair Trade Practices Act with regard to a business transaction in 2009 between the two parties. R. pp. 11-34. Plaintiff's Affidavit of Service was filed on September 12, 2011 indicating that the Defendant had been served with the Summons and Complaint on September 7, 2011. R. pp. 35, 36.

On October 19, 2011, Plaintiff's counsel consented to an extension with which Defendant had to file an Answer to November 5, 2011. On November 15, 2011, Plaintiff filed an Affidavit of Default. R. pp. 37-39.

On November 21, 2011, Defendant filed an Answer denying Plaintiff's allegations. R. pp. 40-49. Also contained within Defendant's Answer were the following defenses: doctrine of waiver, doctrine of estoppel, doctrine of forbearance, unclean hands, doctrine of unconscionability, doctrine of laches, failure to mitigate damages and Statute of Frauds. By way of Counterclaim, Defendant requested specific performance.

On December 19, 2011, Plaintiff filed a Motion for Summary Judgment or in the Alternative Motion to Dismiss the Counterclaim. R. pp. 50-52. On March 23, 2012, Plaintiff filed a Memorandum in support of these Motions. R. pp. 53-59.

On March 29, 2012, Defendant filed an Objection to Plaintiff's Motion for Summary Judgment or in the Alternative Motion to Dismiss the Counterclaim. R. pp. 60-63.

At some point, Plaintiff filed an Affidavit of Attorney Fees but it is unclear from the court records as to when this Affidavit was filed or served on defense counsel. R. pp. 78-82.

On April 2, 2012, a hearing was held before Hon. Kristi Lea Harrington. At that time, Plaintiff's counsel submitted an unfiled Plaintiff's Reply in Support of Plaintiff's Motion for Summary Judgment or Alternative Motion to Dismiss Counterclaim. R. pp. 64-67.

Hon. Kristi Lea Harrington instructed both attorneys to submit proposed Orders. Defendant's proposed Order denying Summary Judgment or in the Alternative Motion to Dismiss Counterclaim was overnighted on April 5, 2012. R. pp. 83-86. Plaintiff's proposed Order Granting Summary Judgment or in the Alternative Motion to Dismiss Counterclaim was mailed to the Court on April 5, 2012. R. pp. 68-77.

On April 30, 2012, the Order Granting Plaintiff's Motion for Summary Judgment was filed. R. pp. 2-10. Defendant's Notice of Appeal was then filed on May 30, 2012.

ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE COURT'S FINDINGS OF LAW IN ITS' FINAL ORDER WERE FOR A DEFAULT JUDGMENT BASED UPON DEFENDANT'S LATE FILING OF ITS' ANSWER.

Plaintiff had filed a Motion for Summary Judgment based upon Rule 56©, see Memorandum in Support, P.1, R. pp. 53-59. Plaintiff set forth case law to support its' Rule 56 Motion, see Memorandum in Support, P.3 and P. 4, R. pp. 53-59, citing Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005) wherein the Court ruled that summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably 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, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (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 material fact and that the moving party is entitled to judgment as a matter of law. SC.R.Civ.P 56 (c); Helms Realty, Inc. V. Gibson-Wall Co., 363 S.C. 334, 611 SE2d 485 (2005); BPS, Inc. v. Worthy, 362 SC 319, 608 S.E.2d 155 (Ct. App. 2005).

In its' final Order filed on April 30, 2012, the Court adopted the above law in its' Standard of Review, P. 3, R. pp. 5. HOWEVER, in the Court's Findings of Law, the Court made rulings regarding the fact that the Answer was filed late, that Defendant had not timely filed a motion, that the Answer was improperly served and that Defendant had not responded to Plaintiff's discovery requests with the Court citing Rule 6(b), P.4, R. p.6, Rule 5(b)(1), P.4, R. p. 6, Rule 55(a), P.4, R. p. 6, Rule 55(c), P. 4 and P. 5, R. pp. 6-7, Rule 8(d), P.7, R. p. 9, with supporting case law.

Therefore, the Court's Standard of Review were for either granting or dismissing Plaintiff's Summary Judgment Motion. However, the Court's Findings of Law were for a Motion for Default Judgment and this Motion was not brought before this Court to be ruled upon for such a finding. The Plaintiff filed a Motion for Summary Judgment or Alternative a Motion to Dismiss Counterclaim. The Court's Findings of Law should have ruled on this Motion with the above Rule 56 and supporting case law discussed and analyzed.

II. THE TRIAL COURT ERRED IN PREMATURELY GRANTING PLAINTIFF'S SUMMARY JUDGMENT MOTION BECAUSE THE QUALIFYING FACTORS SET FORTH BELOW HAVE NOT BEEN PROPERLY APPLIED IN THIS CASE.

Plaintiff argues that Summary Judgment is appropriate and cites the following authority in support of its' position: SC.R.Civ.P 56 (c); Helms Realty, Inc. V. Gibson-Wall Co., 363 S.C. 334, 611 SE.2d 485 (2005); BPS, Inc. v. Worthy, 363 SC. 319, 608 S.E.2d 155 (Ct. App. 2005). Plaintiff set forth case law to support its' Rule 56 Motion, see Memorandum in Support, P.3 and P.4, R. pp. 53-59., citing Pittman v. Grand Strand Entm't, Inc. 363 S.C. 531, 611 S.E.2d 922 (2005) wherein the Court ruled that summary judgment is proper where 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 determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably 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, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (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. SC.R.Civ.P 56 (c); Helms Realty, Inc. V. Gibson-Wall Co., 363 S.C. 334, 611 SE.2d 485 (2005); BPS, Inc. V. Worthy, 362 SC. 319, 608 S.E.2d 155 (Ct. App. 2005).

In this case, there are genuine issues of material fact as set forth in Plaintiff's counsel's testimony at the hearing on April 2, 2012, wherein she discussed specific performance as an option, P. 7, R. p. 89, lines 12-17. and also, the reason for the delay in construction of the UAV unit, P. 8, P. 9, R. p. 90, lines 20-25, p. 91, lines -12. Further, beyond the initial filed pleadings, there have been no exchange of Interrogatories or Request to Produce. No depositions have been taken by any party.

Therefore, the Plaintiff's Motion for Summary Judgment should be denied as premature. In the light most favorable to the non-moving party, there exists factual issues that need to be explored through discovery before a Motion for Summary Judgment should be considered.

III. THE TRIAL COURT ERRED IN AWARDING TREBLE DAMAGES TO PLAINTIFF UNDER THE S.C. UNFAIR TRADE PRACTICES ACT BECAUSE A) THIS IS A CONTESTED ISSUE, B) THIS ISSUE WAS NOT ARGUED IN PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM AND C) THIS ISSUE WAS NOT ARGUED BEFORE THE COURT BY EITHER PARTY AT THE FINAL HEARING ON APRIL 2, 2012.

In its' Order filed on April 30, 2012, the trial court took it upon itself to award Plaintiff treble damages or \$136,200.00 based upon Defendant's "willful acts", P. 8, R. p. 10. This issue was contested, this issue was not argued in Plaintiff's pleadings and there was no testimony taken with regard to what constituted "willful acts" under the S.C. Unfair Trade Practices Act, S.C. Code Ann. §39-5-20, et seq.. Therefore, the Court's trebling of damages was inappropriate and should be stricken from the Order.

IV. THE TRIAL COURT ERRED IN TREBLING PLAINTIFF'S DAMAGES UNDER THE S.C. UNFAIR TRADE PRACTICES ACT BECAUSE THIS ACT DOES NOT APPLY TO THE FACTS IN THIS CASE.

The South Carolina Unfair Trade Practices Act is set forth in S.C. Code Ann. §39-5-20, et seq.. This Act provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. S.C. Code Ann. §39-5-20(a) (Current to 2012). "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by §39-5-20 may bring an action individually ... to recover actual damages. S.C. Code Ann. §39-5-140 (Current to 2012). An unfair trade practices has been defined as a practice that is "offensive to public policy or which is immoral, unethical, or oppressive." Wogan v. Kunze, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct. App. 2005).

To be actionable under the act, the unfair or deceptive act or practice must have an impact upon the public interest and have the potential for repetition. Crary . Djebelli, 329 SC. 385, 388, 496 S.E.2d 21, 23 (1998).

Besides Plaintiff's self-serving statements in its' Complaint, there has been absolutely no evidence that would even remotely suggest that Defendant's alleged actions are offensive to public policy, is immoral, unethical or oppressive. This is a simple contested breach of contract lawsuit between two companies. Also, this alleged breach of contract by the parties does not have an impact upon the public interest or have the potential for repetition. Finally, the Act applies to individuals and it is not meant to be applied toward a corporation seeking this type of relief.


Therefore, the Court's ruling on the South Carolina Unfair Trade Practices Act, P. 8, R. p. 10, is misapplied and should be stricken from the Order.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

December 10, 2012

Respectfully submitted,



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CERTIFICATE OF COUNSEL IN FINAL BRIEF

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

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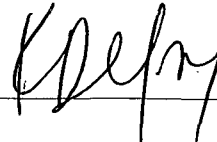
ROTOMOTION, LLC, a
South Carolina
Limited Liability Company

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Dated: December 10, 2012



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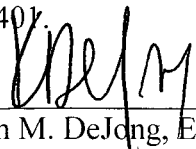
ROTOMOTION, LLC, a
South Carolina
Limited Liability Company

Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief to INDRA SI, S.A. by regular mail, on December 17, 2012, addressed to its attorney of record, Brian A. Hellman, Esq., Hellman & Yates, 145 King Street, Suite 102, Charleston, SC 29401.

December 17, 2012



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