

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 11-CP-10-5051

CORPORATE AIR, LLC, and
CAM INVESTMENTS, INC.,..... Appellants,

vs.

DAVIS AIR, INC., and GARY DAVIS,..... Respondents.

APPELLANTS' FINAL BRIEF

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ATTORNEYS FOR APPELLANTS

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AUG 13 2013

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in compelling Appellants to provide documents to Respondent when the production of such documents is not relevant to the issue of whether Appellants were in default for failing to provide those documents?
2. Did the trial court err in compelling Appellants to provide documents to Respondents when the production of such document is the ultimate relief available to the Respondents if they succeed in proving their claims?

STATEMENT OF THE CASE

Respondent DavisAir, Inc., is a former member and stockholder of Appellant Corporate Air, LLC, and is owned by Respondent Gary Davis. Appellant CAM Investments, Inc., is the other member and stockholder of Corporate Air. On or about August 6, 2010, Respondents agreed to purchase DavisAir's 20% interest in Corporate Air pursuant to a Redemption and Settlement Agreement, and subsequently entered into a Default Agreement setting forth the events which would trigger default under the Redemption Agreement. On July 15, 2011, Respondents filed this action for Declaratory and Injunctive Relief as well as Specific Performance. (R. p. 6-7) In their Answer and Counterclaim, the Appellants denied the substantive allegations of Respondents' Complaint, averred that they have complied with the terms of the Redemption and Default Agreements, and objected to the relief requested by Respondents. (R. pp. 10-16)

The primary relief sought by the Respondents in their Complaint and subsequently filed Amended Complaint is to have the Appellants declared to be in default, because they have not provided all of their accounting records to Respondents. (R. p. 8) Specifically, the Respondents requested that *final judgment* be entered against the Appellants as follows:

- c) That Defendants be ordered to provide accounting and financial records of Defendant Corporate Air from the date of the Redemption to the present date, as alleged herein;
- d) That Defendants make its accounting and financial records available to Plaintiffs and/or Plaintiffs' agent(s);

(R. p. 8)

Thereafter, on October 24, 2011, Respondents served their First Request to Produce on Appellants. In that request, Respondents asked Appellants to produce the very accounting and financial records to which they would be entitled only if judgment

were to be entered against Appellants. In particular, the Respondents requested the production of the following:

1. Detailed general ledger for January 1, 2010 through December 31, 2010 for Corporate Air, LLC and CAM Investments, Inc.
2. Detailed general ledger for January 1, 2011 through October 31, 2011 for Corporate air, LLC and CAM Investments, Inc.
3. Detailed records itemizing all receipts and disbursement records from November 1, 2010 through October 31, 2011.
4. Copies of all bank statements and cancelled checks issued by Corporate Air, LLC and CAM Investments, Inc., from November 1, 2010 through December 31, 2010.
5. Copies of all bank statements and cancelled checks issued by Corporate Air, LLC and CAM Investments, Inc., from January 1, 2011 through October 31, 2011.
6. Copies of the monthly statements for any credit cards paid through Corporate Air, LLC and CAM Investments, Inc., from November 1, 2010 through December 31, 2010.
7. Copies of the monthly statements for any credit cards paid through Corporate Air, LLC and CAM Investments, Inc., from January 1, 2011 through December 31, 2011.

(R. pp. 41-42)

Appellants answered Respondents' document request on January 5, 2012, and objected to the production of Request Numbers 1 through 7 above. The basis of Respondents' objection was stated as follows: "Defendants object to this request as being overly broad and burdensome, as well as requesting irrelevant information to the matters at issue in the Plaintiffs' Complaint. Defendants object that information requested is in fact the object of the Plaintiffs' request for relief to which Plaintiffs are not entitled, unless there is a decision on the merits.

Defendants are multimillion dollar businesses and their general ledgers are voluminous.” (R. pp. 44-45)

On December 6, 2011, Respondents filed a Motion to Compel, which was heard before the Honorable Roger Young on July 25, 2012. On July 30, 2012, the Honorable Roger Young issued an Order compelling Appellants to provide all documents and information requested by Respondents, including the documents sought in Request Numbers 1-7 above. Respondents timely appealed that Order.

FACTS

On August 6, 2010, the Appellants and Respondents entered into a Redemption and Settlement Agreement pursuant to which Appellant Corporate Air, LLC (Corporate Air) agreed to redeem the membership interest of Respondent DavisAir, Inc. (DavisAir) in Corporate Air through a payment over time of \$1.6 Million. Thereafter, the Appellants and Respondents, along with others, entered into a Default Agreement dated November 19, 2010. Respondents have timely made all payments as required under the Redemption and Default Agreements for the redemption of DavisAir’s interest.¹

In addition to making all required payments, Appellants have provided Respondents with all information and access as would be required by either the Redemption and Settlement Agreement or the Default Agreement. In fact, Respondents never provided the requisite notice of default and a period for cure with regard to their claims of Appellants’ failure to provide adequate financial records prior to initiating this lawsuit.

¹ In December of 2012, Respondents fully paid Appellants for the redemption of the 20% ownership interest in Corporate Air.

ARGUMENT

I. Applicable Standard of Review.

The appellate court reviews the trial court's ruling on issues of discovery under an abuse of discretion standard. Evening Post Pub. Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 85, 708 S.E.2d 745, 750 (2011). "An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (citing Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42 (1974)).

II. The Trial Court Erred as a Matter of Law in Compelling Appellants to Produce Documents which Are Irrelevant to this Case.

The right to discovery is expressly restricted to "any matter, not privileged, which is relevant to the subject matter involved in the pending action." S.C. R. Civ. Pro. 26(b)(1). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence." S.C. R. Evid. 401. The burden is on the party requesting the discovery to show it is relevant and necessary to the case. If the party seeking discovery cannot meet that burden, the court should prohibit the discovery. Hamm v. South Carolina Pub. Serv. Comm'n 312, S.C. 238, 241-42, 439 S.E.2d 853, 854 (1994). Courts should not hesitate in using their discretion to control discovery. "[T]he requirement of Rule 26(b)(1) that the material sought in discovery be 'relevant' should be firmly applied." Herbert v. Lando, 441 U.S. 153, 164-9 177 (1979).

Here, the Respondents in their Complaint and Amended Complaint asked the Court to determine whether the Appellants are in default under the Redemption and

Default Agreements, because they failed to provide the accounting and financial records from Corporate Air as required by these agreements. In addition to requesting financial documents from Corporate Air, Respondents also requested voluminous financial documents from Appellant CAM Investments, Inc., which Respondents have asserted no right or need to receive to prove their case.

Respondents have provided no evidence to support their need for the voluminous financial documents requested in order to have the Court declare the Appellants to be in default for failing to provide those very documents. Indeed, there is nothing in the documents themselves that is relevant in any way to the ultimate question of *whether or not Corporate Air should have produced the requested financial documents under the terms of the agreement*. There is no agreement requiring that CAM Investments produce any financial documents to Respondents.

Clearly, the Respondents are attempting to use the discovery process to obtain the ultimate relief they have requested without a proper adjudication of the Respondents' claims, and the trial court failed to use its sound discretion to control the scope of discovery. In its Order, the court offered no factual support for its sweeping conclusion "that the [Respondent] is entitled to receive all documents and information requested...." There is no finding that the Respondents met their burden to show the requested information was relevant, nor is it in fact relevant, and the Court erred in prohibiting the discovery sought.

III. The Trial Court Erred as a Matter of Law in Compelling Appellants to Produce Documents Which Cannot Be Rightly Had Until There Is a Final Judicial Determination that the Respondents Are in Default and the Appellants Are Entitled to Such Accounting Records.

Respondents are not entitled to the discovery of Appellants' accounting records unless and until there has been a judicial determination that the Defendants are obligated to provide those records. See Wolther v. Samuel, 110 A.D.2d 506, 507, 487 N.Y.S.2d 45, 46 (1985) ("Under established principles, discovery as to fiscal matters in an action for an accounting may not be obtained in the usual situation unless and until plaintiff establishes a right to an accounting"); see also State Farm Fire & Cas. Co. v. Martin, 673 So. 2d 518, 519 (Fla. Dist. Ct. App. 1996) ("Discovery of an insurer's claim and litigation file is not permissible in an action to determine coverage ... until the insurer's obligation to provide coverage has been established"); Mari v. Strater, 91 A.D.2d 579 (N.Y. App. Div. 1982) ("[U]ntil [the declaratory judgment] issue is resolved..., defendant may not secure production of the detailed financial records and information sought herein"). Prior to the adjudication of Respondents' claims, these documents have no relevance to the litigation. See Mari, 91 A.D.2d at 579 ("The relevance of the financial information to the counterclaims depends upon final disposition of plaintiff's action for declaratory judgment....").

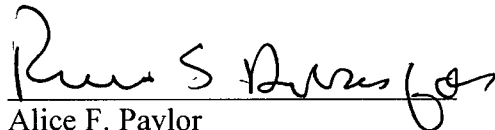
The trial court's Order, dated July 30, 2012, compels Appellants to provide to Respondents documents to which Respondents are entitled only if they ultimately prevail in this case. Respondents' Complaint seeks a declaration that Appellants have breached a contract, because they did not provide the documents that Respondents are now seeking to obtain through discovery. Those documents are not relevant to establish whether the contract has been breached by Appellants' failure to provide them. Instead, the production of those documents provides to Respondents the ultimate relief that they request.

Again, the trial court offered no factual findings that these documents were something other than the ultimate relief requested in ruling that the Respondents were entitled to them during the discovery phase of the litigation. The trial court's order resulted in severe prejudice to the Appellants because it awarded Respondents a final remedy prior to an evidentiary hearing and effectively circumvented Appellants' right to be heard at trial. Accordingly, the order was an error of law and an abuse of the trial court's discretion.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court's Order compelling discovery.

RESPECTFULLY SUBMITTED,



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Charleston, South Carolina
August 12, 2013

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In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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Roger M. Young, Circuit Court Judge

Appellate Case No. 2012-212725

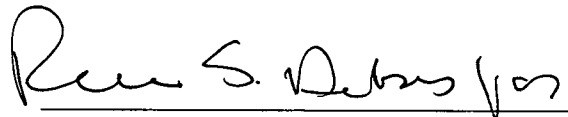
DAVIS AIR, INC., and GARY DAVIS, Respondents.

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CAM INVESTMENTS, INC., Appellants,

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellants' Final Brief Complies with
Rule 211(b), SCACR.



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PROOF OF SERVICE

I certify that I have served the Appellants' Final Brief on Appeal on Respondents by U.S. Mail, postage prepaid, on August 12, 2013, addressed to their attorneys of record as follows:

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