THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

Case No.: 2012-CP-46-02286

Charles Sonnenberg, Festival Corp., Phillip Pulley and Robert Foster. . . . . Plaintiffs,

Of whom Phillip Pulley and Robert Foster are the Appellants,

v.

D&T Imports South Carolina, Inc., a Nevada Corporation, d/b/a Area 51 Fireworks, and York County, a political subdivision of the State of South Carolina, ... Defendants,

Of whom D&T Imports South Carolina, Inc., a Nevada Corporation, d/b/a Area 51 Fireworks is the Respondent.

Appellants' Final Brief

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STATEMENT OF ISSUE ON APPEAL

This is a single-issue appeal:

> Did the trial court err in concluding a defendant had been wrongfully enjoined, where the trial court based its decision solely on the ultimate outcome of the litigation, where the trial court failed to consider equitable factors such as Plaintiffs' good faith in seeking an injunction and where the trial court failed to recognize plaintiff's legitimate use of an injunction to preserve the status quo until the parties' legal rights could be fully investigated and determined?

STATEMENT OF FACTS

This case arises from an attempt by D&T Imports South Carolina, Inc. d/b/a Area 51 Fireworks to develop and occupy real property in a manner contrary to the terms of a recorded deed restriction. D&T's property is located at 3620 Festival Drive, in Fort Mill, South Carolina (the "Property"). Appellants Phillip Pulley and Robert Foster are lessees of an adjoining parcel located at 3644 Festival Drive. (R. pp. 28-29, ¶ 9). Since approximately 2003, Pulley and Foster have lawfully operated a fireworks store, called "Fireworks World," at 3644 Festival Drive. (R. p. 29, ¶10; R. p. 384, ¶2). Pulley and Foster were plaintiffs in the action below and are designated as Appellant before this court. For the sake of convenience, Pulley and Foster will be referred to as "Appellants" or "Plaintiffs."

At one time, both 3644 Festival Drive (where Fireworks World is located) and the Property were owned by Crescent Resources, Inc. (R. p. 28, ¶ 7). Crescent sold 3644 Festival Drive to Appellants' landlord, Charles Sonnenberg,[1] in 1990. Id. ¶ 8. In 2003, Appellants considered purchasing the Property for their planned fireworks store, but lost interest when Crescent's representative informed them that the sale of fireworks would be prohibited on the

[1] Mr. Sonnenberg was a plaintiff in the action below, but is not a party to this appeal.

Property. (R. pp. 28-29, ¶ 9-10; R. p. 384, ¶ 2). As a result, Appellants negotiated a long term lease with Sonnenberg.[2] Id.

On June 14, 2005, Crescent sold the Property to Randazzo Properties, LLC for the operation of a restaurant. Crescent conveyed title to Randazzo Properties by a Special Warranty Deed and a Quitclaim Deed, both of which contained the following deed restriction ("Deed Restriction"):

> The within property is conveyed subject to restrictions, covenants and reservations of record and further to the covenant and restriction that the following activities are prohibited on the subject property: **the sale of fireworks** or the operation of a bingo parlor or similar recreation facility. (emphasis added).

The Randazzo deeds were recorded in the office of the Clerk of Court of York County, South Carolina on June 17, 2005. (R. pp. 45-54).

Randazzo financed its purchase of the Property, and executed a mortgage covering the Property to TD Bank, N.A., formerly known as Carolina First Bank. Randazzo subsequently defaulted on its mortgage and the Property was conveyed to TD Bank by Master in Equity Deed dated May 23, 2011. (R. pp. 55-59). The Master in Equity's deed conveyed title to TD Bank subject to "existing easements and restrictions of record." Id. On April 6, 2012, TD Bank sold the Property to D&T, subject to "all obligations, restrictions, limitations, covenants, easements and other matters of record and governmental ordinances and regulations affecting the Property." (R. p. 60). Within weeks of acquiring the Property, D&T applied to York County for building permits and zoning approval to construct and open a fireworks store upon the Property. *See* Comm'l Bldg. Permit App., dated 4/27/12 (R. pp. 379-380).

The South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (the "Enabling Act"), requires, as part of the local government permitting process, that before

[2] The Sonnenberg property is not subject to any restriction prohibiting the sale of fireworks.

issuing any permits a municipality inquire whether "a parcel of land is restricted by any recorded covenant that is contrary to, conflicts with or prohibits the permitted activity." S.C. Code Ann. § 6-29-1145(A)(Law. Co-op. 2004). In compliance with this provision, York County twice asked D&T in permit applications, "[i]s this parcel of land restricted by any recorded covenant that is contrary to, conflicts with, or prohibits the activity that is being applied for?" *See* Comm'l Bldg. Permit Apps., dated 4/27/12 and 5/22/12 (R. pp. 379-383). Twice, D&T failed to answer York County's question. Id. Nevertheless, between April and June of 2012, York County issued various governmental permits to D&T. *See* Id.

In May of 2012, the general manager of Fireworks World, Ryland Kieffer, learned that D&T intended to open a fireworks store on the Property. (R. p. 384, ¶ 3). Mr. Kieffer immediately notified York County of the Deed Restriction. Id. Because York County had already issued various permits over the Deed Restriction, and because Appellants feared that York County would soon issue a certificate of occupancy to D&T, Appellants commenced this action on June 19, 2012. (*See* R. p. 27). At the time Appellants filed their lawsuit, they could find no record that D&T had registered to do business in this state and no listing of D&T's registered agent.[3] (R. p. 28, ¶4).

STATEMENT OF THE CASE

As summarized in the trial court's November 13, 2012 order,

> [Appellants] brought this action as a declaratory judgment action, asking the court to rule that applicable deed restrictions in D&T's chain of title prohibited the operation of a fireworks store on D&T's property. Plaintiffs also sought . . . "preliminary and permanent injunction[s] prohibiting and enjoining D&T from selling fireworks' on [the Property]."

[3] In fact, D&T had registered to do business, but the Secretary of State's online record keeping was not up-to-date.

Appellants' lawsuit was based upon the Deed Restriction and South Carolina Code § 6-29-1145, which prohibits a municipality from issuing development permits when it has actual notice of restrictive covenants prohibiting the intended use of the property. (R. p. 27). Appellants alleged that they were "other property holders," as described in the Enabling Act, entitled to provide notice of violation under § 6-29-1145 and to enjoin York County from issuing permits to D&T in derogation of the Deed Restriction. (R. p. 33). D&T was joined as a necessary party under S.C. Code Ann. § 15-53-80, since it had an interest which would be affected by the declaration Appellants sought. (R. p. 28).

Given the apparent haste with which D&T had been working to finish and open its store, Appellants sought temporary injunctive relief. (R. pp. 358-361). Because D&T had no apparent registered agent in South Carolina, Appellants' motion proceeded without notice to D&T. (*See* R. pp. 3-6). (noting appearances of counsel). Plaintiffs relied upon their Verified Complaint and upon the Affidavit of Records Custodian of York County, which established D&T's permit applications history. (R. p. 3; R. pp. 377-383). After reviewing evidence presented in support of Plaintiffs' motion for a temporary restraining order, the trial court issued a preliminary injunction against York County and a temporary restraining order against D&T. (R. p. 6). Not only did the court's injunction prohibit York County from issuing further permits to D&T, but it also temporarily restrained D&T from continuing construction activities on the Property. Id. A week later, the trial court modified its injunction to release any restriction on D&T's construction activities. (R. pp. 7-9). The court's injunction continued as to York County in all respects. Id. In its order modifying TRO, the trial court admonished D&T that it could continue construction "at its own risk" that it may never receive a certificate of occupancy for its planned fireworks store. (R. p. 8).

By order dated September 28, 2012, the trial court determined that Appellants did not have a private right of action against D&T under S.C. Code Ann. § 6-29-1145, and dismissed D&T from the lawsuit. (R. p. 17). York County, however, remains enjoined from issuing a certificate of occupancy to D&T until such time as the Deed Restriction is lifted or declared invalid.

Following its dismissal from this action, D&T sought an award of damages and attorneys' fees, alleging that it was wrongfully enjoined by the trial court's original TRO. (R. pp. 19-20). By Order dated November 13, 2012, the court found and concluded:

> [t]he Order Modifying Temporary Restraining Order dissolved the TRO against D&T. The Order Granting Motion to Dismiss dismissed Plaintiffs' claims against D&T with prejudice. These ruling establish that Plaintiffs were not entitled to issuance of the TRO, and that D&T was "wrongfully enjoined.

(R. pp. 18-21 at pp. 2-3). Following an evidentiary hearing on the amount of D&T's damages, the trial court awarded D&T damages in the amount of $7,825.00 for wrongful injunction, and attorney's fees in the amount of $8,433.68. (R. p. 26). This appeal followed.

STANDARD OF REVIEW

"It goes without saying that an injunction is an equitable remedy. On appeal in an equitable matter, this court should reverse any ruling of the trial court that is based upon an error of law or upon a factual conclusion that has no evidentiary support." South Carolina Dept. of Trans. v. First Carolina Corp., 372 S.C. 295, 300, 641 S.E.2d 903, 906 (2007); Lewin v. Lewin, 396 S.C. 349, 352, 721 S.E.2d 1, 4 (Ct. App. 2011). In conducting its review, the appellate court is not bound by the trial court's findings of fact and may make its own findings based upon the evidence in the record. McCain v. Brightharp, 399 S.C. 240, 246, 730 S.E.2d 916, 919 (Ct. App. 2012).

ARGUMENT

> The trial court erred in concluding that D&T had been wrongfully enjoined because the trial court based its decision solely on the ultimate outcome of the litigation, the trial court failed to consider equitable factors such as Plaintiffs' good faith in seeking the injunction, and the trial court failed to recognize the legitimate use of an injunction to preserve the status quo until the parties' legal rights could be fully investigated and determined.

The trial court committed reversible error when it concluded D&T was entitled to recover damages and attorney's fees for having been "wrongfully enjoined." (*See* R. pp. 19-20). Although the trial court and D&T's counsel both readily acknowledged that Appellants had pursued preliminary injunctive relief in complete good faith,[4] the trial court concluded that its injunction against D&T was "wrongful" solely because D&T was ultimately successful in having the injunction lifted and the claims against D&T dismissed with prejudice. Id. In the trial court's view, Appellants' pursuit of preliminary injunctive relief was little more than a "winner take all" game of chance, secured by a bond – "I think the law in essence . . . is you pay your money and you take your choice. And you may or may not win; we all know that." (R. p. 164, l. 8 – 13). Contrary to the trial court's ruling, however, courts of this state have never looked to the "ultimate termination of [a] case on the merits" to determine whether preliminary injunctive relief was appropriate. Transcon. Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 489, 167 S.E.2d 313, 315 (1969); Garlington v. Copeland, 43 S.C. 389, 21 S.E. 317, 320 (1895). It was error,

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[4] COUNSEL FOR D&T: "I am not here today to say that the Plaintiff or its Counsel didn't meet their requirements under Rule 11 to assert suffering that was either based on existing law or a good faith modification, and facts that they believe to be in existence . . . . I'm not here to impute any malevolence to the Plaintiffs or their Counsel.

COURT: "Well, let me say this. I don't think the term wrongful, in this context, imputes any moral failure, or ethical failure."

COUNSEL FOR D&T: "I don't think it imputes any Rule of Evidence failure."

COURT: "That's right."

. . .

COURT: "Well, wrongful means, in this context, ultimately had no basis founded on common law or statute."

(R. pp. 176-177).

then, for the trial court to measure the alleged "wrongfulness" of Appellants' TRO against the "ultimate termination of the case on the merits."

There is no doubt that preliminary injunctive relief is an extraordinary remedy, which lies within the sound discretion of the trial court. Mailsource, LLC v. M.A. Bailey & Assoc., Inc., 356 S.C. 363, 367, 588 S.E.2d 635, 637-38 (Ct. App. 2003), modified on other grounds by Poynter Inv., Inc. v. Century Bldrs. of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010). Nor is there any question that parties seeking injunctive relief must proceed in good faith and with "due regard for the rights of the court [and] the defendant." Coosaw Mining Co. v. Carolina Mining Co., 75 F. 860 (C.C.S.C. 1896). However, parties seeking preliminary injunctive relief are not required to win their case on the merits. Instead, to obtain preliminary injunctive relief, a plaintiff need only make a prima facie showing of entitlement. Poynter Inv., Inc. v. Century Bldrs. of Piedmont, Inc., 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010). In fact, "[t]he merits of the case are not to be considered." Transcon. Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969).

To safeguard against abuses and to protect those who are *wrongfully* enjoined, Rule 65 requires that a party seeking injunctive relief post a bond in "such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." RULE 65 (c) S.C.R.C.P. By its plain language, Rule 65 does not allow a defendant who was *wrongly* enjoined to recover damages from the bond. Rather, the Rule's bond requirement protects only those parties who have been "wrongfully enjoined."

The trial judge concluded that the alleged "wrongfulness" of Appellants' TRO must be determined by the ultimate termination of the case on the merits. "In other words, you might

think you [are entitled to injunctive relief], but you might lose at the end." (R. p. 163, l. 23-25). In drawing that conclusion, the trial court placed too much emphasis on the ultimate outcome of the case, and overlooked a subtle distinction between a "wrongfully" granted injunction and one that, in hindsight, was determined to have been "wrongly" granted by the court. The trial court's rationale is not supported by the case law of South Carolina.

Long before the enactment of Rule 65 S.C. R. Civ. P., courts in this state required a party seeking preliminary injunctive relief to post a bond. *See, e.g.,* Coosaw Mining Co. v. Carolina Mining Co., 75 F. 860 (C.C.S.C. 1896). The purpose of an injunction bond was typically to pay "any and all damages [defendants] may suffer . . . if it shall be finally determined that the [plaintiffs were] not entitled" to injunctive relief. Id. at 861-62. However, even in those early cases, courts recognized that the ultimate outcome of litigation did not necessarily determine whether a wrongly enjoined party was entitled to recover against an injunction bond. As early as 1896, the United States Circuit Court for the District of South Carolina reasoned:

> That the injunction was dissolved is not, of itself, evidence that [the plaintiff] was not equitably entitled to it, and though [an injunction] may have been improvidently granted, and for that cause be dissolved before answer, that will not, if the case be fairly presented . . . entitle the defendant to whom [a bond] is given to look to [the bond] for damages.

Coosaw Mining, 75 F. at 867; *see also* Garlington v. Copeland, 43 S.C. 389, 21 S.E. 317 (1895)("The fact that the plaintiffs failed to establish their claim against the defendant does not necessarily show that the injunction was improperly granted in the first instance. . . .").[5] Instead,

[5] The quoted sentence, in its entirety, is illuminating:

> The fact that the plaintiffs failed to establish their claim against the defendant does not necessarily show that the injunction was improperly granted in the first instance, **for a case may be conceived of in which a court of equity, as a precautionary measure, and in the interest of justice, might grant an injunction to preserve matters in statu quo until the parties could have the opportunity of having what they honestly conceived to be their rights investigated.**

those early cases allowed recovery against an injunction bond only where the plaintiff's application for injunction was "disingenuous, mala fide or made without due regard to the rights of the court or the defendant . . . ." Coosaw Mining at 867. Courts asked to award damages from an injunction bond were instructed to consider such factors as whether "the bill [for injunction] present[s] grounds for relief which have no existence," or whether the applicant "distort[ed] or falsely colored facts" or omitted facts "which would have had an important bearing against granting the injunction." Coosaw Mining at 867; *see also* Garlington, 21 S.E. at 320 (affirming denial of damages from injunction bond, in part, because "plaintiff litigated in the best of faith, and . . . its claims were not sham and pretensive."). Thus, a plaintiff's motivations and its conduct before the court, not the ultimate outcome of the case, were critical considerations in whether or not the plaintiff was liable for damages arising from an improvidently granted injunction. The rule announced in Coosaw Mining and Garlington is entirely consistent with the South Carolina Supreme Court's oft-repeated admonition that injunctive relief is to be granted or denied "without regard to the ultimate termination of the case on the merits." Transcon. Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 489, 167 S.E.2d 313, 315 (1969).

More recent South Carolina cases, many of which were cited by the trial court, have not actually considered the threshold issue of whether an injunction was "wrongfully" obtained. Instead, those cases focused on what damages may be recovered *once a court determined* that a "plaintiff was not entitled"[6] to an injunction or *once a court found* that a defendant had been

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Garlington v. Copeland, 43 S.C. 389, 21 S.E. 317, 320 (1895) (emphasis added).

[6] S.C. Code § 10-257 (1952), which preceded South Carolina's adoption of the Rules of Civil Procedure, required a party seeking injunctive relief to post a bond that would pay "to the party enjoined such damages . . . as he may sustain . . . if the court shall finally decide that the plaintiff was not entitled thereto."

"wrongfully enjoined or restrained."[7] *E.g.* Hyler v. Wheeler, 240 S.C. 386, 126 S.E.2d 173 (1962); Chambron v. Lost Colony Homeowners Ass'n, 317 S.C. 43, 451 S.E.2d 410 (1994).[8] In both Hyler and Chambron, the appellants apparently conceded that they had "wrongfully" obtained injunctive relief, or at least that issue was not addressed in the reported opinions.

It does not appear that South Carolina's enactment of Rule 65 S.C. R. Civ. P. has changed the standard by which courts in this state should consider whether a party was "wrongfully enjoined." In fact, annotations to the most recent publication of South Carolina's Rules of Civil Procedure still cite Coosaw Mining as the law of this state:

> The fact that an injunction is dissolved does not automatically authorize the recovery of damages on the bond, when the injunction was obtained in good faith and the person enjoined were not put to any disadvantage, since equity demands that matters remain in status quo until an authoritative construction can be had of a doubtful act.

SOUTH CAROLINA RULES OF COURT: KEY RULES, VOL. IA – STATE (WEST 2013)(citing Coosaw Mining, 75 F. 860 (C.C.S.C. 1896)). Even under Rule 65, the question of whether an injunction was "wrongfully" obtained does not turn on the ultimate merits of the case, but rather upon other considerations such as the plaintiff's good faith in seeking the injunction. Neither Coosaw Mining nor Garlington have been overturned, and the rule announced in those cases apparently remains the law of this state. Where, as in this case, a party pursues preliminary injunctive relief, "in the best of faith, and . . . its claims [are] not sham and pretensive," the enjoined party is not automatically entitled to recover damages from an injunction bond simply because the litigation is ultimately resolved in the enjoined party's favor.

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[7] Rule 65(c) S.C.R. Civ. P. requires a bond as security "for the payment of such costs and damage as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

[8] The trial court relied heavily on Hyler and Chambron in concluding that D&T had been "wrongfully enjoined." (R. p. 19).

In ruling that D&T had been wrongfully enjoined, the trial court refused to consider equitable considerations such Appellants' good faith in seeking an injunction. Instead the trial court focused exclusively on the merits of the case, *in spite of* Plaintiffs' good faith: "I am not trying to attribute to [Plaintiffs] any bad faith, anything immoral or illegal. . . . I think the law in essence . . . is you pay your money and you take your choice. And you may or may not win; we all know that." (R. p. 164, l. 8 – 13). The trial court's reasoning, and its refusal to consider equitable factors such as Plaintiffs' good faith in pursuing preliminary injunctive relief, constitutes reversible error.

Given the record in this case, and the standard of appellate review in equitable matters, this court should set aside the trial court's finding that D&T was "wrongfully enjoined." Both the trial court and counsel for D&T readily conceded that Plaintiffs had not acted in bad faith to seek a temporary restraining order, given the information known and available to Plaintiffs on June 21, 2012. (R. p. 176, l. 11 – 25). Like the trial court, Counsel for D&T focused exclusively on D&T's ultimate success in vacating Plaintiffs' TRO as the singular measure of whether D&T was "wrongfully enjoined."

The trial court committed reversible error when it refused to recognize Plaintiffs' good faith basis for obtaining a TRO, and when it held that dismissal of the TRO automatically entitled D&T to a finding that it had been wrongfully enjoined. Given that Plaintiffs' bona fides and good faith are not in dispute, the trial court's determination that D&T was wrongfully enjoined should be reversed.

CONCLUSION

The trial court erred when it concluded that D&T had been wrongfully enjoined, simply because D&T ultimately set aside the court's temporary restraining order. Contrary to the trial

court's ruling, South Carolina law does not automatically award damages to a defendant that succeeds is setting aside an injunction. Instead, courts must consider equitable factors such as a plaintiff's good faith in seeking injunctive relief, its candor with the tribunal, and its legitimate interest to preserve the status quo while its rights are investigated and decided by the court. Where, as here, a plaintiff seeks injunctive relief in good faith and its claims are not a "sham or pretensive," it is reversible error to judge the "wrongfulness" of plaintiff's efforts through the lens of hindsight. Because the trial court failed to consider the equitable factors set forth in Coosaw Mining and Garlington, and because Plaintiffs' good faith and 'bona fides' are not in dispute, this court should reverse and set aside the trial court's judgment in its entirety.

October 16, 2013

Respectfully Submitted,

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Appellate Case No.: 2013-000604

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief complies with Rule 211(b).

October 16, 2013.

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CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens Ballou & Carroll, LLC certifies that the Appellant's FINAL BRIEF AND FINAL REPLY BRIEF were served upon other counsel of record by depositing same in the United States Mail, with sufficient postage affixed and addressed as follows:

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The is the 17 day of October, 2013

L. Melia Sweatt