

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
W. Jeffrey Young, Presiding Judge

Case No. 2011-CP-43-1418

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SC COURT OF APPEALS

Berry, Quackenbush & Stuart, P.A.,.....Appellant,

v.

BEI Sensors & Systems Company, Inc., d/b/a BEI Duncan Electronics, and The Commercial
Collection Corporation of New York, Inc.,.....Defendants,

Of Whom The Commercial Collection Corporation of New York, Inc. is theRespondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

A. Are there material facts to be determined by the fact finder that the Respondent engaged in practices which constitute tortious interference with Appellant's contract?

B. Can Respondent, as the agent for a disclosed principal, be liable for tortious interference with contractual relations between such principal and Appellant?

STATEMENT OF THE CASE

This suit was instituted by Berry, Quackenbush & Stuart, P.A. (hereinafter referred to as “Law Firm” or “Appellant”), by filing and serving a Summons and Complaint, stating causes of action for breach of contract and interference with contractual rights, to which the two defendants separately served timely responses. Law Firm filed an Amended Complaint (R.p. 10) to which the Defendant, The Commercial Collection Corporation of New York, Inc. (hereinafter referred to as “Commercial” or “Respondent”), responded by an Answer to Amended Complaint and Counterclaim (R.p. 15). Law Firm served a Reply to Commercial’s Counterclaim (R.p. 22).

Following the exchange of discovery requests and responses, Commercial served and filed a Motion for Summary Judgment (R.p. 26), together with Affidavit of Frank J. Vecchio (R.p. 79). The Defendant, BEI Sensors & Systems Company, Inc. d/b/a BEI Duncan Electronics (hereinafter referred to as “BEI Sensors”), had previously served and filed a Motion for Summary Judgment. These motions were scheduled and noticed for hearing together on December 17, 2012.

Law Firm responded to both motions by Affidavit of Leonard R. Jordan, Jr. (R.p. 83) and Memorandum in Opposition to Motions for Summary Judgment.

A joint hearing on the two motions for summary judgment was held in Sumter on December 17, 2012, attended by the attorneys of record for the three litigants.

By Order Granting Summary Judgment to Defendant Commercial Collection Corporation of New York, which was filed on March 6, 2013 (R.p. 1), Commercial’s Motion was granted. The motion of the other Defendant, which is not a subject of this appeal, was denied (decided in favor of Law Firm).

Law Firm timely served its Notice of Appeal to this Court on April 3, 2013.

Commercial subsequently served Respondent’s Motion to Dismiss Appeal. In response, Law

Firm served Appellant's Response to Respondent's Motion to Dismiss Appeal and Memorandum. By Order filed on July 2, 2013, Commercial's Motion to Dismiss Appeal was denied.

STATEMENT OF FACTS

1. Law Firm was retained to collect a debt owed to BEI Sensors by Fluid Power of the Carolinas, Inc. (hereinafter referred to as "Fluid Power"), of Pinewood, South Carolina, in the principal amount of \$27,600.00 (plus interest) (R.p. 81).

2. Fluid Power was indebted to BEI Sensors for credit sales made by BEI Sensors between September 2008 and April 2009.

3. On May 26, 2010, Commercial, acting on behalf of BEI Sensors, approached Law Firm about collecting the debt owed to BEI Sensors by Fluid Power. Commercial proposed a contingency-fee arrangement, which Law Firm accepted (R.pp. 11, 15, 79, 83).

4. Between May 2010 and February 2011, Law Firm took steps, pre-litigation, to attempt to collect the debt owed by Fluid Power, including making demands for payment, investigating the debtor and its assets and creating a strategy to collect the debt (R.p. 83).

5. During said 9-month period, Commercial failed to cooperate with Law Firm; and as a consequence, Law Firm was substantially delayed and hindered in its collection efforts (R.pp. 83, 86-87). Commercial was Law Firm's sole point-of-contact regarding this collection matter (R.p. 13), and it was deliberate and negligent in performing its duty to BEI Sensors by failing to cooperate with Law Firm.

6. Ultimately, Law Firm's strategy for collection of the debt involved the filing of two (2) separate suits: one a routine collection suit to obtain a money judgment against Fluid Power; and one

under the Statute of Elizabeth to invalidate a 2009 deed whereby Fluid Power conveyed several parcels of real property to its sister company, MLR Fluid Power, Inc., for no consideration, after incurring the debt to BEI Sensors (R.pp. 83-84).

7. In February 2011, after it concluded that Commercial was hindering the litigation-approval-process, Law Firm, with the approval of Commercial, communicated directly with BEI Sensors by telephone (R.p. 84).

8. After a full discussion of Law Firm's collection strategy, including the need to obtain a title examination to prepare the Statute of Elizabeth claim, BEI Sensors approved the strategy for Law Firm to proceed to file two suits against Fluid Power (R.p. 84).

9. Immediately following receipt of BEI Sensors' approval, Law Firm ordered a title examination and drafted two Complaints to be instituted against Fluid Power (R.p. 85).

10. Drafts of the two Complaints were sent by Law Firm to Commercial (still the point-of-contact) via email on February 15, 2011, for review and comment as to content and to obtain the execution of Verifications to attach to each of the Complaints (R.p. 85).

11. The title abstractor's fee (including related costs), in the amount of \$181.12, was billed to Commercial on February 16, 2011 (R.pp. 77, 85).

12. On April 20, 2011, BEI Sensors, by telephone, informed Law Firm that it had been waiting on Commercial to communicate with it regarding instituting the suits to collect the debt (R.p. 84). In other words, nine (9) weeks after it received the two Complaints from Law Firm, Commercial had still not passed them along to BEI Sensors to execute the Verifications.

13. After numerous attempts to obtain approval of the content of the Complaints and to obtain executed Verifications, which attempts extended from mid-February through May 2011, Law Firm was informed by Commercial on June 7, 2011, that BEI Sensors had elected, without comment,

not to sue Fluid Power (R.p. 85). In other words, even after Law Firm reminded Commercial by email on April 20, 2011, that BEI Sensors, was waiting on Commercial to communicate (R.p. 84), another six (6) weeks passed without any communication from Commercial to BEI Sensors; and as a consequence, BEI Sensors terminated the contract with Law Firm.

14. The termination (breach) by BEI Sensors of its contract with Law Firm was without cause. In fact, Commercial indicated a belief that BEI Sensors had "worked out something directly with the debtor" (R.p.85).

15. Throughout the relevant time frame, Commercial only infrequently responded to communications received from Law Firm. Between May 2010 and May 2011, Commercial failed to respond to 70% of the emails (approximately 35 of the approximately 50) sent by Law Firm to Commercial requesting information and assistance (R.pp. 86-87).

16. According to BEI Sensors, its file reflects that there were no communications (zero!) from Commercial to BEI Sensors subsequent to the letters and emails exchanged between them in late-2009 (R.pp. 38, 45-49). In other words, according to BEI Sensors, its file contains no evidence of any communications whatsoever exchanged between Commercial and BEI Sensors after Law Firm was retained.¹

17. After Law Firm worked this account for thirteen (13) months, and even after BEI Sensors specifically approved, and instructed Law Firm to proceed with, Law Firm's strategy of filing two suits against Fluid Power, to which instructions Law Firm promptly reacted by examining the title to certain real property and preparing and submitting two Complaints, BEI Sensors

¹Notwithstanding the position of BEI Sensors, it appears that there may have been two emails sent by Commercial to BEI Sensors in January 2011 (R.p. 84), and that, after the contract was breached by BEI Sensors, there were other communications between Commercial and BEI Sensors (R.p. 84).

effectively called it quits (breached its contract with Law Firm) (R.p. 85), although Law Firm remained willing to proceed aggressively with the collection effort on a contingency-fee basis (R.p. 85).

18. After June, 2011, Law Firm kept pressing BEI Sensors and Commercial to file suit without further delay, as the statute of limitations was to expire shortly on the earlier credit sales made by BEI Sensors to Fluid Power starting in September 2008 (R.p. 82).

19. Law Firm, in an effort to revive the collection efforts, proposed a plan to absolve BEI Sensors completely of all law suit-related expenses, but BEI Sensors rejected this proposal (R.p. 86).

20. When it became obvious that the decision by BEI Sensors to quit the collection of the debt (breach its contract with Law Firm) was irreversible, Law Firm filed this suit.

21. The costs advanced by Law Firm with regard to the title examination, in the amount of \$181.12, which were billed to Commercial on February 16, 2011, remained outstanding until after this suit was filed. These costs were part of the damages claimed by Law Firm in its Amended Complaint (R.p. 12). BEI finally remitted payment of Law Firm's bill in September 2011 (R.p. 85).

22. The debt owed by Fluid Power remained collectable well after BEI Sensors made the decision to quit the collection efforts. (The statute of limitations has since run.)

23. At the time of the hearing on the defendants' motions for summary judgment, Fluid Power was an on-going business, with as approximately 25 employees and annual sales of approximately \$2,900,000.00 (R.p. 86), and its sister company, MLR Fluid Power, Inc., still owned the business real property, which was readily attachable under a Statute of Elizabeth action (R.p. 86).

24. Commercial, which had exhausted its own collection efforts before referring the collection matter to Law Firm, served, at all relevant times, as the middleman between BEI Sensors and Law Firm, and Commercial's duty was to pass along information to and relay responses

between, Law Firm and BEI Sensors (R.p. 2).

25. Law Firm routinely communicated with Commercial via email requesting information and assistance related to the collection matter. Commercial routinely (and from all appearances deliberately) failed to take steps to respond to and cooperate with Law Firm's reasonable requests for assistance, thereby causing significant delays in the collection process (R.p. 86).

26. Law Firm concluded, in hindsight, that Commercial's failure to cooperate and to perform its duty (to facilitate communications) as BEI Sensor's agent was intentional (R.p. 13).

27. But for the actions and inactions of Commercial, BEI Sensors, likely, would not have become frustrated or disgruntled and would not have decided to quit on collecting the debt owed to it by Fluid Power.

28. By its actions and inactions (related to communications between Law Firm and BEI Sensors), which delayed and hindered Law Firm's collection efforts rather than facilitating such efforts, Commercial breached its duty and tortiously interfered with, and effectively sabotaged, Law Firm's collection efforts and its contract with BEI Sensors, which interference caused damages to Law Firm (R.p. 86).

STANDARD OF REVIEW

The grant of summary judgment motion is reviewed under the same standard applied by the trial court pursuant to Rule 56(c), SCRPC. Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 14 n. 2, 677 S.E.2d 612, 614 n. 2 (Ct. App. 2009). Rule 56(c), SCRPC, provides that summary judgment shall be granted when "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 a judgment as a matter of law.” At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.” S.C. Prop. & Cas. Guar. Ass’n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). Rather, “[t]he purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder.” Matsell v. Crowfield Plantation Comm. Servs. Ass’n., Inc., 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

An adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth specific facts showing there is a genuine issue for trial. Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). Nonetheless, “in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 329-330, 673 S.E.2d 801, 802 (2009). “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” Id. at 329-30 and 802.

“The burden of clearly establishing the absence of a genuine issue of material fact is upon the party seeking summary judgment.” Myatt v. RHBT Fin. Corp., 370 S.C. 391, 395, 635 S.E.2d 545, 547 (Ct. App. 2006).

ARGUMENTS

A. Are there material facts to be determined by the fact finder that the Respondent engaged in practices which constitute tortious interference with Appellant's contract?

For purposes of the subject motion for summary judgment, as all inferences drawn from the evidence must be viewed in the light most favorable to Law Firm, it must be accepted and presumed, as alleged in Law Firm's Amended Complaint and Affidavit (R.p. 83), that Commercial interfered with the performance of a contract between Law Firm and BEI Sensors by effectively preventing Law Firm from performing the contract in a timely fashion and is liable for resulting damages, as stated in Restatement (Second) of Torts §766A:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Once interference is presumed, the inquiry can then shift to whether or not Commercial's actions and inactions were outside of the scope of its agency relationship with BEI Sensors.

As stated in Dutch Fork Development Group II, LLC v. SEL Properties, LLC, 27139, (SCSC, August 22, 2012), ". . . an agent may be liable for tortious interference, just as if the agent were an outside third party, if the allegedly interfering acts were conducted outside the scope of the agent's authority." In other words, an agent, who may otherwise be held liable for his own acts if he wrongfully interfered with a contract, may escape liability if there is evidence establishing that he was acting for a disclosed principal within the scope of his authority.

There is no issue in dispute as to whether Commercial assumed the agency-related contractual responsibility of facilitating communications between BEI Sensors and Law Firm. As stated in the appealed Order, this routine responsibility of "passing along information to the Plaintiff,

and . . . relaying the response of BEI Sensors & System Company, Inc.” was Commercial’s duty to its principal, BEI Sensors (R.p. 5). The lower court concluded that Commercial acted as agent for BEI Sensors “in relaying communications from the Plaintiff to BEI Sensors & Systems Company, Inc. and in relaying responses thereto.” (R.p. 3).

Other than the finding of the lower court that Commercial's duty was to relay communications between Law Firm and BEI Sensors, there is a complete absence in the record of any evidence defining Commercial's duties or scope of authority on behalf of, and delegated by, BEI Sensors. Although it concluded that Commercial’s duties or responsibilities were limited to relaying communication, the lower court made no findings about what these responsibilities actually entailed. It is clear that Commercial accepted this responsibility (to facilitate communication) and that this responsibility (duty) was important and necessary to the performance of the contact by Law Firm.

“Scope of authority” involves power. “‘Scope of authority’ is defined as ‘[t]he range of reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal’s business.’ *Black’s Law Dictionary* (9th ed. 2009).” Dutch Fork, supra.

The lower court failed to identify the range of power (scope of authority) that Commercial had, as no evidence thereof was presented, and the scope of authority remains a factual issue which can only be addressed at trial.

If “scope of authority” involves “power” delegated to an agent by the principal, and if the usual inquiry is whether or not the agent exercised the power within (or outside) the authority delegated to it, then “scope of authority” has nothing to do with the circumstances of this case. Commercial did not exercise any “power.” It failed to perform its duties and responsibilities (limited to relaying communication).

As held in Dutch Fork, supra, “Without an identifiable scope of authority, we are left to

speculate whether [agent's] actions exceeded his authority. . . ." This is a threshold matter. Commercial must identify its scope of authority. The failure of Commercial to present evidence in this regard requires the court to speculate about Commercial's scope of authority. When considering a motion for summary judgment, speculation must be avoided.

Did Commercial's actions and inactions fall within its "scope of authority?" Law Firm's claim is that Commercial did not perform routine acts to facilitate communications between Law Firm and BEI Sensors. How can such failure to perform be construed as "within" some undefined scope of authority? Without evidence of the scope of authority, and without evidence that Commercial's actions and inactions were within such scope of authority, it cannot be concluded that Commercial acted within its scope of authority when confronted with Law Firm's allegations.

There is a complete absence of any evidence which demonstrates that the complained of actions and inactions of Commercial were within Commercial's scope of authority, and there is a complete absence of any evidence which demonstrates that the said complained of actions and inactions were not outside Commercial's scope of authority. This absence of evidence must be viewed in a light most favorable to Law Firm, as the non-moving party, resulting in a singular conclusion that the actions and inactions of Commercial were, potentially, outside of Commercial's scope of authority and leaving a final decision on this issue to the fact finder.

Whether or not Commercial, the agent, acted within its scope of authority is a question to be answered by the fact finder. As stated in Whittle v. Southern Bell Tel. & Tel. Co., 306 S.C. 163, 166, 410 S.E.2d 575, 576 (Ct. App. 1991), citing Matheson v. American Telephone & Telegraph Co., 137 S.C. 227, 135 S.C. 306 (1926), "a jury question existed regarding whether a telephone company agent alleged to have trespassed on the plaintiff's premises acted within scope of authority."

The actions and inactions complained of (the deliberate and negligent failure to facilitate

communications) are outside the speculated scope of Commercial's agency relationship with BEI Sensors. As alleged in the Amended Complaint, Commercial failed "to act in good faith in furtherance of the contract between BEI and the Plaintiff" (R.p. 13) with regard to the flow of communication, which "ultimately contributed to the decision of BEI to stop the collection effort" (R.p. 13), and Commercial acted intentionally and without justification to effectively sabotage the efforts made by, and the tactics designed by, Law Firm to collect the debt owed by Fluid." (R.p. 13).

Commercial's wrongful actions and inactions, which interfered with the contract, were that, while it served in the position of being the middleman or point-of-contact for both parties, it routinely (intentionally) failed to forward (pass along), and otherwise properly react to, communications between the parties to the contract.

Commercial failed to respond to 70% of Law Firm's emails, thereby hindering its timely performance of the contract (R.pp. 86-87). Commercial asserts, to the contrary, that it "passed along all of the communications from the Plaintiff to BEI Sensors & Systems, Inc." (R.p. 2). This conflicting evidence creates a genuine issue of material fact in dispute. When deciding a motion for summary judgment, the court does not weigh conflicting evidence.

Commercial's position that it regularly communicated with BEI Sensors conflicts with BEI Sensor's file, which contains no evidence whatsoever of any communications being exchanged between Commercial and BEI Sensors after Law Firm was retained (R.pp. 38, 45-59). (None; zero!) As Commercial presumably disagrees with the inferences to be made from the fact that the file of BEI Sensors contains no evidence of any such communications, such position would also create a genuine issue of material fact in dispute.

It would therefore be illogical to conclude, as the lower court did (in the appealed Order drafted by Respondent's counsel), that the "complained of acts are not actions outside the scope of

the agency relationship” and are therefore privileged (R.p. 4). How does one infer or conclude from the allegations of the Amended Complaint and Affidavit, wherein Law Firm asserted that: (1) Commercial failed to act in good faith, (2) it regularly failed to respond to 70% of Law Firm's emails, (3) it caused significant delays in the performance of the contract, (4) it failed to communicate with BEI Sensors for 15 weeks after Law Firm sent it the two Complaints, (5) it contributed to principal's decision to terminate the contract and (6) it sabotaged Law Firm's collection efforts, that these “complained of acts” of Commercial are all somehow within the (undefined) scope of Commercial's agency relationship? In any event, these allegations by Law Firm, which have been denied by Commercial (R.p. 18), create several genuine issues of material fact in dispute.

Beyond the scope of authority issue, the lower court effectively determined that Commercial's Motion for Summary Judgment should be granted because Commercial was the agent of a disclosed principal and that there is no basis for a cause of action for tortious interference with contractual relations as Law Firm failed to establish that Commercial gained an independent benefit by interfering with the contract between Law Firm and BEI Sensors (R.p. 3). This conclusion (that no gain or benefit has been established) is correct. Law Firm admits that it is unaware of any independent benefit flowing to Commercial as a consequence of Commercial's wrongful behavior. However, a decision rejecting a cause of action for tortious interference with contractual relations based upon this conclusion is incorrect, for the reason that demonstrating some gain or benefit to the tortfeasor is not an element of a cause of action for tortious interference with contractual rights.

The elements of tortious interference with an existing contractual relationship are: (1) the contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting therefrom. DeBerry v. McCain, 275 S.C. 569,

574, 274 S.E.2d 293, 295 (1981).

Each of the elements of tortious interference with contractual relations is either not in dispute or is fact-driven and is subject to the presentation of evidence to be evaluated by the fact finder, as follows:

(1) The fact that there was a contract between Law Firm and BEI Sensors, which was valid and enforceable, is not in dispute.

(2) As Commercial initiated and memorialized the contract for collection of debt between BEI Sensors and Law Firm (R.p. 81), there is no dispute that Commercial, as wrongdoer, had knowledge of the contract.

(3) BEI Sensors terminated (breached) the contract, without cause, stating only that it determined that the collection efforts had not progressed sufficiently over the last 2 years (R.p.55); and Law Firm claims that Commercial intentionally caused (procured) this breach of contract by hindering the progress of the collection efforts (R.pp. 13, 86).

(4) There is a complete absence of justification for Commercial's actions and inactions. Commercial has presented no evidence of justification, and it has not even asserted that its purpose and motives, as related to its involvement, were proper and justified. There are numerous allegations by Law Firm, in its Amended Complaint and Affidavit, that Commercial's actions and inactions were improper and unjustified (R.pp. 13, 86). Any contrary position by Commercial would create a genuine issue of material fact in dispute.

(5) Law Firm is prepared to present evidence at trial of its damages.

In summary, whether or not Commercial intentionally procured the breach of the contract must, by its nature, involve issues of material fact, which must be determined by the fact finder based upon the evidence presented. As stated in Bocook Outdoor Media, Inc. v. Summey Outdoor

Advertising, Inc., 294 S.C. 169, 177, 178, 363 S.E.2d 390, 394-395 (Ct. App. 1987), “The plaintiff must show that, but for the interference, the contractual relationship would have continued . . . In this case, it was for the jury to decide whether the actions of Summey induced the landowners to abandon their relationship with Bocook which would have continued but for the actions by Summey. . . . [T]he issue of whether particular practices engaged in by these business competitors constituted improper interference was a matter for the jury to decide based upon the evidence presented.”

B. Can Commercial, as the agent for a disclosed principal, be liable for tortious interference with contractual relations between such principal and Law Firm?

It is undisputed that Commercial was acting as agent for BEI Sensors. Its responsibility or involvement (i.e. its duty to its principal) was, effectively, limited or restricted to relaying information and instructions between Law Firm and BEI Sensors (R.p. 2). Commercial, a collection agency, had exhausted its collection efforts before referring the matter to Law Firm; and at all relevant times, acted simply as the middleman between the parties to the contract. Until February 2011, Commercial served as the sole point-of-contact for Law Firm with regard to its contract with BEI Sensors (R.p. 13).

The Amended Complaint does not allege that Commercial is responsible because it was the agent of BEI Sensors. To the contrary, the Amended Complaint seeks to hold Commercial responsible in tort as a consequence of its own actions and inactions notwithstanding its agency relationship with BEI Sensors (R.p. 13).

Commercial’s defense is that it was not a party to the contract between BEI Sensors and Law Firm but was merely an agent for a known principal and that the principal alone (and not the agent) is liable for breach of such contract. This may be a rule or principle under contract claims, but it has

no application here. The subject cause of action is not one in contract. It is one in tort for damages. “. . . [A]n agent is not liable for contracts made on behalf of a disclosed principal . . . This concept does not apply, however, when the agent must answer, not in contract, but in tort. ‘An agent’s liability for his own tortious acts is unaffected by the fact that he acted in his representative capacity.’” Thomas v. Delta Enterprises, Inc., 302 S.C. 351, 352, 396 S.E.2d, 122, 123 (Ct.App. 1990).

“‘An agent’s liability for his own tortious acts is unaffected by the fact that he acted in his representative capacity.’” Gilbert v. Mid-South Machinery Co., Inc., 267 S.C. 211, 221, 227 S.E.2d 189, 193 (1976).

“‘An agent’s liability for his own tortious acts is unaffected by the fact that he acted in his representative capacity. . . All authorities agree ‘that an agent is liable to a third person for damages resulting from the violation of a duty which such agent owes to a third person, and that it matters not whether that violation be one of malfeasance, misfeasance or nonfeasance.’” Lawlor v. Scheper, 232 S.C. 94, 98-99, 101 S.E.2d 269, 271 (1957).

The following principles have been well recognized in South Carolina for two centuries: “(1) Where one acting as agent for another, within the scope of his agency, commits a tort, both the principal and the agent are joint tort-feasors; and (2) the injured party is not obligated to join both joint tort-feasors in this action, but he may sue either singly.” Little v. Robert G. Lassiter & Co., 156 S.C. 286, 287, 153 S.E. 128 (1930).

“The tort is nonetheless a tort to the third person, whether suffered from one acting as principal or agent, and his rights ought to be the same against the one whose neglect of duty has caused the injury. . . Where such duty and neglect thereof appear, it seems utterly unreasonable to say that the negligent person shall not be liable merely because he was the agent or servant or some

other person to whom he might also be liable.” Ellis v. Southern Ry. Co., 72 S.C. 465, 471-472, 52 S.E. 228, 230 (1905).

In Auto Ins. Agency, Inc. v. Interstate Agency, Inc., 525 F.Supp. 1104, 1108 (D.S.C. 1981), the defendant “. . . seeks to invoke the rule that if a contract is made between a party and a known agent acting within its authority on behalf of a disclosed principal, the principal alone is liable for the breach of the contract. . . . Since this action sounds in tort, and not in contract, this rule is not applicable to the present case. An agent’s liability for its own torts is not affected by the fact that it acted on behalf of its principal. . . . A principal does not have the power to confer the authority on an agent to commit a tort.”

Commercial, a wrong-doer, is liable in tort for its “malfeasance, misfeasance or nonfeasance”² notwithstanding that its principal, BEI Sensors, may also be a wrong-doer or that it acted as agent of BEI Sensors.

CONCLUSION

There are genuine issues of material fact in dispute. All evidence, and all reasonable inferences to be drawn from the evidence, must be viewed in the light most favorable to Law Firm. Commercial, acting as agent for BEI Sensors, intentionally stopped, or significantly reduced, the flow of information, instructions and other communications, which were required to flow through Commercial to and from BEI Sensors and Law Firm, thereby breaching its responsibility (duty) to relay information between Law Firm and BEI Sensors and acting outside of its (as yet undefined) scope of authority; and as a consequence of such breach, Law Firm was hindered in its efforts and

²Lawlor v. Scheper, supra.

the matter was delayed unnecessarily to the point that BEI Sensors terminated (breached) the contract with Law Firm. As the record fails to include evidence of Commercial's scope of authority, it must be concluded, when the facts presented are viewed in the light most favorable to Law Firm, that Commercial's actions and inactions were outside of the scope of authority of its agency relationship with BEI and that Commercial is guilty of procuring the breach of the contract and is, therefore, guilty of tortious interference with contractual rights. Law Firm, as the non-moving party, submitted at least a "mere scintilla" of evidence, enough to withstand the Motion for Summary Judgment. The Motion for Summary Judgment should have been denied. The appealed Order should be reversed, and the evidence of Commercial's liability should be evaluated by the fact finder based upon the evidence presented at trial.

Respectfully submitted,



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