THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

L. Casey Manning, Presiding Judge

Case No.: 2012-CP-40-0249

Branch Banking and Trust Company.....Respondent,

v.

Graphic Express, LLC; Lanny R. Gunter, II; and Harry B. Benenhaley.....Appellants.

APPELLANTS' FINAL BRIEF

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STATEMENT OF THE CASE

This is an appeal from an Order of the Honorable L. Casey Manning, Presiding Judge of the Fifth Judicial Circuit, granting Respondent's Motion for Summary Judgment. (Motion for Summary Judgment; R. 55; R. 1) Appellants received notice of Judge Manning's Order on September 14, 2012 and timely filed a Notice of Intent to Appeal with the Court on October 9, 2012 (R. 72).

STATEMENT OF FACTS

Appellant Larry R. Gunter, II and his wife (not a party to this Appeal) are the owners of a wholesale distribution company, Bob's Novelties, Inc. Bob's Novelties sold college logo merchandise (primarily but not exclusively Carolina/Clemson related), including but not limited to ladies handbags, flip-flops and car flags to Wal-Mart, K-Mart, CVS and Walgreen's, among others. Appellant Graphic Express, LLC was formed as the "screen printing branch" of Bob's Novelties. Appellant Gunter owned fifty percent of Graphic Express, LLC along with Appellant Harry Benenhaley, who also owned fifty percent of the company.

In June of 2006, as the result of a solicitation by Chip Amaker and other representative and employees of the Respondent, Bob's Novelties prepared and submitted a BB&T Bankcard Corporation Commercial Card Application. On October 19, 2009, as a direct and proximate result of this existing and ongoing business relationship, Appellant Graphic Express, LLC executed a Promissory Note in the amount of $82,000.00 with BB&T (R. 4). Contemporaneous with the execution of the promissory note, Appellant Graphic Express, LLC executed a BB&T Security Agreement putting up as collateral, "equipment, including all accessions thereto and all manufacturer's warranties therefore, and all parts and tools therefore..." (R. 15-20). Appellants

Gunter and Benenhaley also executed personal guarantees. (Complaint dated January 11, 2012; R. 11-20).

After execution of the note with BB&T, Bob's Novelties, Inc went into default under the terms of its commercial credit account with BB&T. Appellant Graphic Express, LLC also went into an alleged default under the terms of the October 11, 2009 Promissory Note. (R.4). As the result of these alleged defaults, BB&T seized assets, inventory and equipment of Bob's Novelties, Inc. pursuant to the terms of the October 11, 2009 Security Agreement. At the same time, BB&T also seized all of the assets, equipment, and inventory of Graphic Express, LLC. (R 80, Lines 5-8). This seizure effectively put Appellant Graphic Express, LLC out of business R. 79, Lines 2-25; R. 80, Lines 1-12)

At no time subsequent to this seizure of the assets and equipment of Appellant Graphic Express by the Respondent were Appellants given any information as to disposition of Graphic Express property in Respondent's possession. Respondent did not provide any accounting of the of the Bob's Novelties and Graphic Express equipment assets, inventory or equipment. (R.79 Lines 2-25; R. 80, Lines 1-12)

On or about January 11, 2012 Respondent brought suit against the Appellants to foreclose the October 2009 Promissory Note (R.4). Respondent's Complaint sought recovery of Fifty Thousand Two Hundred Sixty Three and 06/100 ($50,263.06) dollars allegedly due and owing under the terms of the October 19, 2009 note. (R.4). Respondent's Complaint captioned "Collection-Non-Jury) contains two causes of action, a First Cause of Action "crafted" as "Suit on a Note" and a second cause of action captioned "Suit on Guaranty." (R.4). Respondent's Complaint makes reference to the Security Agreement executed between the parties to this Appeal but makes no mention of the goods, inventory or collateral put up as security for the note.

(R.4). Respondent's Complaint makes no mention of any offset or reduction in money owed as a result of any disposition of goods, inventory or equipment of Appellants seized by Respondent. Respondent denied the allegations contained in Plaintiff's Complaint. (R.36).

After Respondent moved for Summary Judgment, the Parties argued the Respondent's Summary Judgment motion on or about September 4, 2012. (R.75-8). Counsel for Appellants informed the Court that it was the Appellants' position that any debt due and owing to Respondent was satisfied as a matter of law due to the fact Respondent had seized assets of the Appellants without providing the necessary accounting, notice of sale as required by South Carolina Law. (R. 78, Lines 18-25; R. 79, Lines 2-8). The Trial Court rejected Appellants' arguments and ruled as a matter of law there were no genuine issues of law and that Respondent was entitled to an Order granting it Summary Judgment against Appellants in the amount of Fifty Thousand Two Hundred Sixty Three and 06/100 ($50,263.06) dollars (R.1) The Court also awarded Respondent Attorney's fees of Four Thousand Three Hundred Fifteen and 75/100 dollars. This appeal followed (R. 72)

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri,* 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP: 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. *Fleming v. Rose,* 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

In determining whether a triable issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party.

Sauner v. Pub. Serv. Auth. Of S.C., 354 S.C.397, 581 S.E.2d. 161 (2003). Even if evidentiary facts are not disputed, if only the conclusions to be drawn from them are, summary judgment should be denied. *Baugus v. Wessinger,* 303 S.C.412, 401 S.E.2d. 169 (199)). Summary judgment is not appropriate when further inquiry into the facts is desirable to clarify the application of law. *Tupper v. Dorchester County,* 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING RESPONDENT SUMMARY JUDGMENT

The Trial Court ignored questions of law and fact in granting the Respondent's Motion for Summary Judgment. South Carolina Code Section 36-9-610 gives the secured party the right to sell, lease, license or otherwise dispose of any or all of the collateral in its possession. This disposal must be made in a commercially reasonable manner. Further, the secured party or creditor is required to give the debtor notice of this sale or disposition. However, Code Section 36-9-611 requires the creditor to notify the debtor of the disposition of the collateral. The purpose of this notice requirement is to allow the debtor to discharge the debt, and redeem the collateral, produce another purchaser, or see that the sale is conducted in a commercially reasonable manner. *Brockbank v. Best Capital Corp.,* 341 S.C. 372, 534 S.E.2d. 688 (2000).

In exercising its rights, Respondent was required to "scrupulously adhere to procedures contained in Article 9." "*Brockbank v. Best Capital Corp.,* 341 S.C. 372, 534 S.E.2d. 688 (2000). In an action for deficiency judgment, a secured party has the burden of proving compliance with all statutory requirements conditioning his or her right to such a judgment, including compliance with a notice provision. *General Motors Acceptance Corporation v. Carter,* 290 S.C. 216, 349 S.E.2d. 342 vacated 293 S.C. 466, 361 S.E.2d. 210, appeal dismissed 293 S.C. 465, 361 S.E. 2d. 510 (Ct. App. 1986). Failure to give notice creates a rebuttable presumption that the collateral

was worth the indebtedness and the burden is on the secured party to overcome presumption with evidence that the value of the collateral was less than debt. Only if creditor rebuts this presumption may he or she maintain an action for a deficiency. *Republic National Bank v. D.L.P. Industries,* 314 S.C.108, 441 S.E.2d. 827 (1994).

The Trial Court erred in determining that there were no issues of material fact and in granting the Respondent's Motion for Summary Judgment. The Trial Court ignored numerous unresolved issues of fact in granting the Respondent's Motion for Summary Judgment. Respondent clearly had a security interest in the equipment of the Appellant Graphic Express. (Complaint; R.4). At the time of default, Respondent, apparently pursuant to this security agreement, seized the equipment, and also the inventory, goods and equipment of Appellant Graphic Express, effectively putting it out of business.

The Appellants were never notified about the goods, inventory and equipment seized by the Respondent. No accounting or inventory was received. Respondent never provided Appellants with a Notice of Sale. Appellants have never been provided with any accounting as to funds received from a sale or disposal of the equipment, goods and inventory. Appellants (and the Court) have been presented with no evidence on which to make any determination as to whether the sale of the equipment, goods and/or inventory was made in a commercially reasonable manner. Respondent has never reduced or offset their request/prayer for relief with any amounts that were received from a disposition of the collateral they seized from the Appellants. Respondent presented no evidence before Judge Manning to refute the legal presumption that the value of the collateral was equal to the debt, thereby extinguishing the money sought to recover from Appellants. The Trial Court should have denied the Respondent's Motion for Summary Judgment. The Trial Court's Order granting Respondent Summary

Judgment should be reversed with this case remanded for further proceedings to determine what, if any money is due and owing to Respondent after the seizure and/or potential disposition of Appellants' goods, equipment and inventory by the Respondent.

THE RESPONDENT EXCEEDED ITS SECURITY INTEREST WHEN IT SEIZED THE THEGOODS, INVENTORY AND EQUIPMENT OF APPELLANT GRAPHIC EXPRESS

Further, the Respondent clearly exceeded its Security Interest when it seized the goods, inventory and equipment of Appellant Graphic Express. As set forth above, the Respondent's security interest pursuant to the Security Agreement was limited to the "equipment" of Appellant Graphic Express. (R.11-20). The uncontroverted evidence in the record is that following the Appellant Graphic Express' alleged default, agents or employees of Respondent seized not only the Appellants' equipment, but all of its assets including inventory. (R. 79, Lines 2-25; R. 80, Lines 1-9). Whether or not the Respondent exceeded its rights in seizing all of the Appellants' assets, including its inventory creates a question of fact that was ignored by the Court and also an error of law. The Trial Court therefore erred in granting the Respondent's Motion for Summary Judgment and the Trial Court's Order is clearly erroneous. Further, the question of whether or not the Respondent exceeded its Security Interest creates questions of fact and Summary Judgment was improper.

THE COURT'S ORDER GIVES RESPONDENT AN IMPROPER WINDFALL

The Trial Court's Order effectively grants the Respondent an improper windfall. Following the Appellants alleged default under the terms of the Loan Agreements; the Respondent seized all of the goods, inventory and equipment of Appellant Graphic Express. As set forth above, the Appellants have, despite due and diligent demand, not received any information regarding the condition, location, and disposition of these goods, inventory and equipment.

Respondent brought suit and obtained judgment against Appellants for the entire amount allegedly due and owing on the Promissory Note. This judgment amount was in no way altered or reduced by the value of the inventory, goods and equipment of Appellant Graphic Express seized by Respondent and presently in Respondent's possession. (R.1). Respondent has therefore received not only the money it claims that it is owed under the Note but also the Appellants' goods, inventory and equipment. This amounts to a windfall recovery to the Plaintiff above and beyond what it is owed.

It is well settled that under South Carolina law that the purpose of actual or compensatory damages is to compensate a party for injuries suffered or losses sustained; the goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. See, *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000). *Roberts v. Sheriff Constr. Co.,* 284 S. C. 618, 328 S. E. 2d 123 (Ct. App. 1985).Actual damages above and over this amount, or "wind fall" damages are not favored. See, *McMaster v. Strickland,* 322 S.C. 451, 472 S.E. 2d. 623 (1996). The Trial Court's Order, granting Respondent the full amount due and owing under the Note and allowing the Respondent to keep Appellants' goods, inventory and equipment without any offset of reduction in debt, constitutes a potential windfall recovery by Respondent. Trial Judge's Order granting Respondent Summary Judgment without determining the value of the goods, inventory and equipment seized by Respondent and applying it against the balance Respondent claims is due and owing to it is therefore fatally flawed and should be reversed by this Court.

CONCLUSION

For the reasons set forth above, the Order of the Trial Court granting Respondent Summary Judgment overlooks issues of fact and contains errors of law and should be reversed by this Court.

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October 10, 2013

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellants' Final Brief contains all material proposed to be included by any of the parties and not other material.

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