

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

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**APPEAL FROM RICHLAND COUNTY
Court of Common Pleas**

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 2013-002806

Emser Tile, LLC. Respondent,

v.

John D. Cattano Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

(1) The Trial Court properly applied the applicable standard regarding summary judgment to the facts and reasonable inferences that were presented as to application by the Respondent of payments and credits so that summary judgment was properly granted.

(2) The Trial Court properly found that Appellant made no specific factual showing and that there was an absence of evidence to support the assertion that employees of Congaree Triton Acquisitions, LLC did not have authority to direct the application of credits and payments to the open account for which Appellant was the guarantor.

STATEMENT OF THE CASE

This case was initiated by a Complaint (R. p6-16) filed by Emser Tile, LLC, in the Court of Common Pleas for Richland County on June 27, 2012. The Complaint sought a money judgment against the Appellant in the principal sum of Fifty-Five Thousand Two Hundred Sixty-Three and 24/100 (\$55,263.24) Dollars plus interest and attorney's fees, based upon an application for credit and personal guaranty signed by John D. Cattano, dated March 5, 2011 on behalf of Triton Stone and Congaree Triton Acquisitions LLC for open account sales to Congaree Triton Acquisitions LLC.(R. p6-7) The guaranty is an unconditional guaranty of payment of any and all indebtedness of Congaree Triton Acquisitions LLC to Emser Tile, LLC.

Triton Stone Group and its franchisees, sell natural stone products. On March 11, 2011, Congaree Triton Acquisitions, LLC purchased the franchises for Triton Stone of Charlotte and Triton Stone of Myrtle Beach, operating as Triton Stone Group and continued to operate the franchises for Charlotte and Myrtle Beach up to and until Congaree Triton Acquisitions, LLC filed a Petition in Bankruptcy on January 26, 2012. Congaree Triton Acquisitions, LLC is not a party to this action.

On/or about October 10, 2012, the Appellant appearing pro se, filed an Answer, Defenses and Demand for a Jury Trial (R. p17-18) along with a Third Party Complaint.(R.p19-40) On/or about October 23, 2012 the Appellant served the Respondent with Defendant's Third Party Complaint but did not serve any of the Third Party Defendants. On October 26, 2012, Emser Tile, LLC filed a Reply (R. p41) to Cattano's Answer generally and specifically denying that Cattano was entitled to any

off-set or recoupment of any affirmative relief whatsoever. On/or about February 19, 2013, Respondent served Appellant with Request for Admissions (R. p 42-43) and on/or about March 23, 2013 Respondent received Defendant's Answers to Plaintiff's Request for Admission. (R. p44) On August 23, 2013 Respondent filed a Motion for Summary Judgment (R. p 45) together with Affidavit of Respondent's employee, Patrick Lytle (R. p 46-52) in support of its Motion. On September 23, 2013, Appellant filed its Affidavit in opposition to Plaintiff's Motion for Summary Judgment.(R. p .53-54) A hearing on the Motion for Summary Judgment was held on this matter on October 8, 2013. At the hearing on the Motion, Respondent submitted its Affidavit of Attorney's fees. (R. p 54-55) The Honorable G. Thomas Cooper, Jr., Judge of the Fifth Judicial Circuit, entered Summary Judgment (R. p 2-5) in favor of the Respondent in the principal sum of Fifty-Five Thousand Two Hundred Sixty-Four and 24/100 (\$55,264.24) Dollars, together with interest of 18% per annum from the date of the last invoice of October 22, 2011 to October 8, 2013 totaling Nineteen Thousand Five Hundred Eleven and 00/100 (\$19,511.00) Dollars; Court costs of One Hundred Ninety and 00/100 (\$190.00) Dollars and attorney's fees of Three Thousand and 00/100 (\$3,000.00) Dollars for a total of Seventy-Seven Thousand Nine Hundred Sixty-Five and 24/100 (\$77,965.24) Dollars.

Appellant filed and served his Notice of Appeal (R. p 57) to the Court of Appeals for the State of South Carolina on December 19, 2013.

The Trial Court properly applied the applicable standard regarding summary judgment to the facts and reasonable inferences that were presented as to application by the Respondent of payments and credits so that summary judgment was property granted.

ARGUMENT

It is undisputed that Charlotte Triton Acquisitions, LLC ordered and received the goods and merchandise designated on the Statement of Account attached to Plaintiff's Complaint at an agreed upon price of Fifty-Five Thousand Two Hundred Sixty-Three and 24/100 (\$55,263.24) Dollars (see Plaintiff's Request for Admissions, Defendant's Answers to Plaintiff's Request for Admissions (R. p 42-44)) It is undisputed that Congaree Triton Acquisitions, LLC acquired the franchises Triton Stone of Charlotte and Triton Stone of Myrtle Beach on March 11, 2011, (Defendant's Third Party Complaint and Exhibit attached(R. p 19-40)), and it is undisputed that at the time of the purchase, the two acquired businesses owed Respondent Fifty-Six Thousand Eight Hundred Seventy Seven and 90/100 (\$56,877.90) Dollars (Affidavit of Patrick Lytle (R. p 46-052)). It is undisputed that Congaree Triton Acquisition, LLC ordered and received from the Respondent certain goods and merchandise from June 16, 2011 through October 22, 2011. (Plaintiff's Request for Admissions – Defendant's Answers to Plaintiff's Request for Admissions(R. p 42-44)). It is undisputed that on April 12, 2011 Congaree Triton Acquisition, LLC's employee, Annie Jones, approved application of payment from Congaree Triton Acquisition, LLC for invoices dated 01/07/11 to 02/04/11 totaling Twenty-Two Thousand Seventy-One and 45/100 (\$22,071.45) Dollars (Affidavit of

Patrick Lytle(R. p 46-52)). It is also undisputed that a credit totaling Forty-Seven Thousand Five Hundred and 00/100 (\$47,500.00) Dollars was applied to invoices dated 01/21/11 (Affidavit of Patrick Lytle(R. p 46-52)). Appellant contends that these credits totaling Fifty-Four Thousand Nine Hundred Ninety-Six and 62/100 (\$54,996.62) Dollars should not have been applied to the pre-acquisition debt of the companies acquired.

In reviewing a grant of Summary Judgment, our Appellate Court applies the same standard as the Trial Court under Rule 56(c) SCRPC Quail Hill V. County of Richland 387 S.C., 234, 692, SE 2d, 505. Summary Judgment is proper if, viewing the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party, the pleadings, depositions, Answers to Interrogatories, Admissions, and Affidavits, if any, show there is no genuine issue of material fact. Under Rule 56 (c) S.C.R.C.P., the party seeking Summary Judgment has the initial burden of demonstrating the absence of a genuine issue of material fact; however, with respect to an issue upon which the non-moving party has the burden of proof, the moving party may discharge his responsibility by pointing out to the Trial Judge that there is an absence of evidence to support the non-moving party's case. In determining whether a genuine issue of fact exists the evidence and all factual inferences drawn from it must be viewed in the light most favorable to the non-moving party. It is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine. Durkin V. Hanson, 313 S.C. 343, 346, 437 S.E. 2d 550, 552 (Ct. App. 1993).

It is the law of this State that a creditor must apply payments as instructed by the debtor but absent a written designation of instructions from the debtor the creditor may

apply payments in its own discretion. The South Carolina Supreme Court has held that the debtor has the right to direct the application of payments to any one or more of his debts, but should no direction be given him, then the creditor may apply the payment in such a manner as pleases him Johnson V. Broome 179 S.E. 315 (S.C. 1935) 175 S.C. 385. It is recited in American Oil Company V. Brown Paving Company, 298 F. Supp. 528 (D.S.C.1969), that “a creditor must apply the payments as instructed by the debtor; absent instructions from the debtor, a creditor may apply them as he chooses, between secured and unsecured debts, including past-due accounts; and, if neither creditor nor debtor allocates, the Court will apply the payments as justice requires, generally to the advantage of the creditor in the absence of supervening equities, see also Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 S. C. 658 1906. The Appellant does not contend that he instructed the Respondent to apply the credits in any particular manner, and thus there is no genuine issue that the Respondent could apply the credit as it chose.

While the Appellant asserts in Defendant’s Affidavit in Opposition to Plaintiff’s Motion for Summary Judgment (R. p 53-54) that “no employee of the new company had authority to bind Congaree Acquisitions, LLC to pre-acquisition debts, and only the officers of Congaree Acquisitions, LLC, John D. Cattano as the chief finance officer and Carroll A. Campbell, III, as chief executive officer had the authority to authorize the payment of pre-acquisition debts”, in fact the Appellant, in his Third Party Complaint asserts the buyers and sellers in the Asset Purchase Agreement contemplated that creditors of Triton Stone of Myrtle Beach, Inc. and Triton Stone of Charlotte, Inc., would present demands for payment of pre-existing debts to Congaree Triton Acquisitions, LLC

and the Asset Purchase Agreement required the sellers to indemnify Congaree Triton Acquisitions, LLC in the event it was forced to make any payment on old debt and other pre-closing liabilities.(Third Party Complaint, paragraph 25 and paragraphs 33 and 34 of the Third Party Complaint(R. p 22) (R. p 24)). Thus, Appellant acknowledges that he along with his co-managing member, made payments on pre-acquisition debt owed to vendors. The allegations of the Appellant's Third Party Complaint and the Asset and the Asset assert that Congaree Triton Acquisitions, LLC was forced by the Third Party Defendants to pay debts of Triton Stone of Myrtle Beach and Triton Stone of Charlotte, (Paragraph 40 and 41 of Defendant's Third Party Complaint (R. p 25)) and the cause of action is based in part on this fact. Appellant asserts in the Third Party Complaint (paragraph 25(R. p 22)), that the sellers in the Asset Purchase Agreement contemplated that creditors of the sellers would present demands for payment of pre-existing debt. These admissions contradict Cattano's claim in his Affidavit that no employees had authority to authorize the payment of pre-acquisition debt. In a nutshell, the Appellant's Third Party Complaint acknowledges that he was required to pay debt that was owed prior to the time that Congaree Triton Acquisitions, LLC, came into being, in order to get new credit. The S. C. Supreme Court held that a Defendant cannot both admit and deny the facts; and once it is admitted, the admission stands. Atlantic Coastline Railroad Company V. Little 195 S.C. 455, 12S.C. 2d 7.

The Appellant does not contradict the assertion by Respondent that Congaree Triton Acquisitions, LLC's employees consented to the application of credits to the oldest invoices, but his Affidavit simply asserts that the employees did not have authority

to authorize these payments. As set forth above, without a specific designation by the Appellant, it does not matter whether the employees had authority and there remains no genuine issue.

The Trial Court properly found that Appellant made no specific factual showing and that there was an absence of evidence to support the assertion that employees of Congaree Triton Acquisitions, LLC did not have authority to direct the application of credits and payments to the open account for which Appellant was the guarantor.

As an additional sustaining ground, the Respondent contends that the admitted employees of Appellant had the apparent authority to apply the credits as they did.

Under South Carolina law, the elements which must be proven to establish apparent agency are: 1) that the purported principal consciously or impliedly represented another to be his agent; that there was reliance upon the representation; and that there was a change of position to the relying parties detriment. Graves V. Serbin Farms, Inc., 306 S.C. 60, 63, 409 S. E. 2d, 769, 771. "Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal, which reasonably interpreted causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him. Frazier V. Palmetto Homes of Florence, Inc., 323 S.C. 240,473 S.E. 2d 865. Agency may be implied or inferred and may be substantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal." Fernander V. Thigpen, 278 S.C 140, 143, 293 S.E. 2d 424,426 .

In the case at hand, the Appellant refers to the individuals who applied the payments as employees, and thus the agency relationship is conceded. (Affidavit of John Cattano in opposition to Plaintiff's Motion for Summary Judgment (R. p 53-54)). The Appellant does not dispute that Annie Jones, Nick Boord and Mandy Naman, named in the Affidavit of Patrick Lytle, are employees of Congaree Triton Acquisitions, LLC. It is clear from the e-mails attached to Patrick Lytle's Affidavit, that the Respondent relied on the employees' agreement to apply the credits in a specific manner. Lastly, the Respondent changed its position to its detriment by selling additional goods on a credit basis to Congaree Triton Acquisitions, LLC.

The doctrine of apparent authority provides that the principal is bound by the acts of its agent when it placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs is led to believe that the agent has certain authority and they in turn deal with the agent based on that assumption. Fochtman V. Clanton's Auto Auction Sales., 233 S.C. 581, 106 S. E. 2d 272.

An agency relationship may be established by evidence of actual or apparent authority. While actual authority is that which is expressly conferred upon an agent by the principal, apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing. Moore V. North American Van Lines, 310 S.C. 236, 239, 423 SE 2d 116, 188 (1992).

In the case of Williams V. Texas Co. 202 S.C. 333, 245 S.E. 2d 873, the South Carolina Supreme Court cited with approval the rule stated in CJS Agency Section 95, page 1203-1204:

the authority of the agent is to be tested and determined by the character bestowed upon the agent and not by the instructions given him by the principal, so far as innocent third parties are involved, so that acts or transactions may be within the sphere wherein an agent can impose liability on the principal outside of the the agent's authority as qualified by private instructions. Third persons may deal on the faith of such apparent authority without being bound by such limitations, it being sufficient to render the instructions negatory that the agent's acts in the premises are reasonable and such as would ordinarily be done by the person having the authority apparently exercised by the agent, or, more briefly stated that they come within the scope of his apparent authority. Knowledge or notice of the limitations upon apparent authority is essential to charge those dealing on the faith of such authority with the consequences of the limitations.

The Affidavit of Plaintiff's employee Patrick Lytle (R.p 46-54), makes clear that the employees of Congaree Triton Acquisitions, LLC, Annie Jones, Nick Boord, and Mandy Naman, specifically authorized the application of credits against specific invoices.

CONCLUSION

The Appellant has admitted the sale and delivery of goods for which Respondent brought suit and that he signed a guarantee of payment. The Respondent has not presented evidence that instructions were given by Defendant Cattano or any officer of the corporation regarding the application of payment or credits. It is undisputed that the individual employees of Congaree Triton Acquisitions, LLC specifically designated the invoices against which the credits were to be applied. There therefore is no genuine issue as to any material fact.

For the foregoing reasons, it is respectfully submitted that the Trial Court's Order for Summary Judgment should be affirmed.



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CERTIFICATE OF COUNSEL

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

April 7, 2014


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