THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2013-CP-21-2722
Appellate Case No. 2013-002722

Omega Construction, Inc. .....Respondent,

v.

Crailar, Inc., d/b/a Crailar Technologies, Inc., f/k/a
Naturally Advanced Technologies US, Inc. .....Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN GRANTING RESPONDENT A TEMPORARY INJUNCTION?

2. IF NOT, DID THE CIRCUIT COURT ERR IN REQUIRING APPELLANT TO PROCURE A BOND?

STATEMENT OF THE CASE

Crailar and Omega entered into a certain Agreement (the "Design-Build Contract") on or about May 23, 2012, for Omega to provide certain design and construction work and services to a facility located in Pamplico, Florence County, South Carolina. (R. p. 17, ¶7). Various disputes arose during and following Omega's work on the project. Crailar produced a certain flax fiber at the Facility.

Omega filed a lawsuit in Florence County on October 16, 2013, seeking damages for breach of contract and in quantum meruit. As a third cause of action, Omega sought a temporary restraining order and temporary injunction, alleging that due to the closure of Crailar's facility, it would not have an adequate remedy at law to recover the final payment due under the Design-Build Contract. (R. p. 18-19)

Also on October 16, 2013, Omega filed a Motion for Temporary Restraining Order and Temporary Injunction. On October 23, 2013, Judge Michael G. Nettles executed a Temporary Restraining Order, without notice to Crailar, restraining Crailar from selling or moving such amounts of materials from the Pamplico Facility as would be sufficient to satisfy the alleged outstanding amounts claimed by Omega. (R. p. 3)

A hearing on the Motion for Temporary Injunction was held on October 31, 2013 before Judge William H. Seals, Jr. Following the hearing, Judge Seals granted the Motion for Temporary Injunction. Judge Seals requested a formal order be drafted by Omega, which took additional time. (Judge Seals' Law Clerk's email, Oct. 31, 2013, R.

p. 482) Because the Temporary Restraining Order was set to expire on November 2, 2013, Judge Seals granted an Order Extending the Temporary Restraining Order for ten days on November 1, 2013. (R. p. 5) Because of delays in finalizing the Temporary Injunction Order, an additional ten day extension was granted on November 14, 2013. (R. P. 7) On November 26, 2013, an Order Granting Temporary Injunction and/or Requiring Bond (the "Order") was entered by the Circuit Court. (R. p. 9)

The Order required that Crailar (1) be restrained from moving three pieces of equipment from the Pamplico Facility and (2) post a bond in the amount of $190,246.75 in order to protect Omega's claim in the underlying lawsuit.

Immediately following entry of the Order, Omega informed Crailar by letter dated November 27, 2013, that the amount of the debt claimed in the Complaint had been recalculated, and that the proper amount of the bond should be lowered to $93,725.10. (Letter dated Nov. 27, 2013, R. p. 490) Omega never informed the Circuit Court that the Order should be revised to reflect the lesser amount of security required. Crailar worked diligently to procure a bond, but due to financing and other issues, and after several attempts with bonding companies, was unable to obtain a bond. After obtaining new financing, Crailar was able to obtain an Irrevocable Letter of Credit in the amount of $93,725.10, which was filed with the Florence County Clerk of Court on January 15, 2014.

This appeal followed entry of the Order by filing and serving a written Notice of Appeal for on December 23, 2013.

ARGUMENT

I. STANDARD OF REVIEW

An order granting a preliminary (or temporary) injunction is immediately appealable under S.C. CODE ANN. § 14-3-330(4). See, e.g., Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 588-89, 694 S.E.2d 15, 18 (2010).

The granting of preliminary injunctive relief is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 282, 531 S.E.2d 518, 520-21 (2000); Fuller-Ahrens P'ship v. S. C. Dep't of Highways & Pub. Transp., 311 S.C. 177, 182, 427 S.E.2d 920, 923 (Ct. App. 1993). An abuse of discretion occurs where the trial court is controlled by an error of law or where the court's order is based on factual conclusions without evidentiary support. Pic-A-Flick Video, 340 S.C. at 282, 531 S.E.2d at 521. See also Compton v. S. C. Dep't of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011) ("Whether to grant a preliminary injunction is left to the sound discretion of the trial court and will not be overturned unless it is clearly erroneous.").

The only purpose of an injunction is to preserve the status quo to avoid possible irreparable injury to a party pending litigation. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). A court will not enter a temporary restraining order or temporary injunction except as an extraordinary and drastic measure to preserve the status quo of the parties until the court can address the ultimate issue or issues in a case. Strategic Resources Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006); see also LeFurgy v. Long Cove Club Owners Assoc., 313 S.C. 555, 558, 443 S.E.2d 577, 578 (Ct. App. 1994) (noting "the remedy of injunction is a drastic one and

should be cautiously applied only when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected").

The party seeking injunctive relief bears a heavy burden of demonstrating "facts and circumstances warranting an injunction." Id. at 544, 627 S.E.2d at 689; Calcutt v. Calcutt, 282 S.C. 565, 320 S.E.2d 55 (Ct. App. 1984). The party seeking to obtain injunctive relief bears the burden of establishing that: (1) it would suffer irreparable harm if the injunction is not granted; (2) it is likely to succeed in the litigation; and (3) it has no adequate remedy at law. Strategic Resources Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006); Scratch Golf Co. v. Dunes West Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004).

II. THE CIRCUIT COURT ERRED: BECAUSE OMEGA FAILED TO ABIDE BY A CLEAR CONDITION PRECEDENT TO BRINGING A LAWSUIT, OMEGA WAS NOT ENTITLED TO RECEIVE ANY RELIEF FROM THE COURT

The Design-Build Contract contains a dispute resolution clause which requires that the parties participate in mediation as a condition precedent to arbitration or the taking of **any** legal or equitable action. Section 4.3 of the Design Build Contract states as follows:

> Any Claim arising out of or related to the Design-Build Contract, shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable or other binding dispute resolution proceedings by either party.

(Article 4.3, Terms and Conditions, Exhibit A to the Design-Build Contract, R. p. 344)

In addition, the Design-Build Contract requires that any claims not resolved through mediation must be submitted to arbitration. (Article 4.4, Terms and Conditions; Article 6, Design-Build Contract, R. p. 345)

In blatant disregard of the clear and unambiguous dispute resolution clause set forth in the Design-Build Contract requiring mediation as a condition precedent to taking any action as to a claim under the Design-Build Contract, Omega commenced this lawsuit without requesting that Crailar participate in mediation. Omega never made a written request for mediation, as required per Section 4.3.2 of the Terms and Conditions, prior to the filing of the Complaint.[1]

South Carolina courts universally enforce the rule that a contract between sophisticated business parties must be enforced as written. Parties have the right to make their own contracts, and when such contracts are capable of clear interpretation, the Courts are confined to strict enforcement thereof. Bruce v. Blalock, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962). Put simply, the contract's clear condition precedent to filing suit (requesting and completing mediation) has not been met. As an agreement between two sophisticated parties, the provision at issue must be given its plain and simple meaning. McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect."). See also Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997) ("The court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.").

If a contract contains a condition precedent, this condition must either occur or be waived prior to the next required step in a contract taking place. See McGill at 187-88,

[1] On February 7, 2014, Omega finally delivered a demand for mediation to Crailar. Because this demand was delivered after the filing of the lawsuit, and after an order for injunction was entered, the making of such a demand does not cure the defect at issue. In order to satisfy a condition precedent in a contract, the condition must be met prior to the secondary action (here, the filing of a complaint).

672 S.E.2d at 575. Courts from around the country agree that dismissal of a lawsuit for violation of such a condition precedent is appropriate. See Houseboat Store, LLC v. Chris-Craft Corp., 692 S.E.2d 61, 64-65 (Ga. Ct. App. 2010) (holding that given that plaintiff failed to allege in its complaint that it had complied with the mediation provision prior to filing the instant lawsuit, the trial court's dismissal on this ground was proper); Santana v. Olguin, 208 P.3d 328, 335 (Kan. Ct. App. 2009) (holding that trial court properly dismissed claim for failure of condition precedent, rather than directing parties to participate in mediation); Loancraft v. First Choice Loan Svcs., Inc., No. 12–cv–10138, 2012 WL 628617, at *3 (E.D. Mich., Feb. 27, 2012) (dismissing without prejudice for failure to mediate as a condition precedent to filing suit); L. White & Co., Inc. v. Culpeper Mem'l Hosp., Inc., 81 Va. Cir. 27, at *3 (Va. Cir. Ct. 2010) (holding that because the plaintiff failed to mediate, the case should be dismissed and not stayed, as a decision to stay the case would rewrite the parties' agreement); 3-J Hospitality, LLC v. Big Time Design, Inc., 09-61077-CIV-MARRA, 2009 WL 3586830 (S.D. Fla. Oct. 27, 2009) (Where the parties' agreement requires mediation as a condition precedent to arbitration or litigation, the complaint must be dismissed) citing Kemiron Atlantic, Inc. v. Aguakem Intern., Inc., 290 F.3d 1287 (11th Cir. 2002); Brosnan v. Dry Cleaning Station Inc., 2008 WL 2388392 (N.D. Cal. 2008) ("Failure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a lawsuit warrants dismissal."); Mortimer v. First Mount Vernon Indus. Loan Ass'n, No. 03–cv–1051, 2003 WL 23305155 (D. Md. May 19, 2003) (granting a motion to dismiss based on the plaintiff's failure to honor a contractual mediation clause).

Omega has clearly failed to meet a condition precedent to filing suit contained in the underlying contract. The contract language is clear an insusceptible to differing

interpretations. Conducting mediation was clearly required prior to the "institution of legal or equitable" action. Omega sought equitable relief, prior to fulfilling this contractual requirement. It therefore should have been barred from obtaining any equitable relief. Courts cannot and should not re-write the agreed pre-suit terms of a contract negotiated between sophisticated business parties. Without having requested or conducted mediation prior to seeking injunctive relief, Plaintiff is not permitted to seek an equitable remedy. Granting such equitable relief was a clear error of law and an abuse of discretion.

Because of this clear violation of and failure to meet a negotiated term that requires a certain event to take place prior to seeking arbitration, or a legal or equitable remedy, no equitable relief should have been granted.

III. THE CIRCUIT COURT ERRED: OMEGA HAD AN ADEQUATE REMEDY AT LAW

The Circuit Court held that Omega had an inadequate remedy at law because it would have difficulty enforcing its judgment if it had to go outside of South Carolina to attempt to execute upon it. The Circuit Court erred in delineating between difficulty in collecting on a judgment versus whether an adequate remedy exists. An adequate remedy does in fact exist, as pled by Omega: a judgment for breach of contract.

Furthermore, the Supreme Court has held that a preliminary injunction is not the appropriate remedy for difficulty in enforcing a monetary judgment. See Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc., 361 S.C. 117, 603 S.E.2d 905 (2004). As stated by the Supreme Court:

> This argument that [plaintiff] asserted – that once it receives a money judgment from its contract and tort action, it may have difficulty *collecting* from [defendant] because [defendant] may 'take its assets and run' out of the state – is not proper justification for why a preliminary injunction

should be issued but rather is justification for the statutory remedy of attachment."

Id. at 122, 603 S.E.2d at 908.

As in Scratch Golf, a preliminary injunction is not appropriate. Omega has an adequate remedy at law: (1) seeking attachment under the attachment statute, and (2) obtaining a judgment. Case law from other states is in accord. See Franz v. Calaco Dev. Corp., 751 N.E.2d 1250 (Ill. App. Ct. 2001) ("The injury plaintiff complains of, breach of contract and breach of fiduciary duty, is capable of being measured and corrected by an award of money damages. Therefore, plaintiff clearly has an adequate remedy at law."); Weinstein v. Aisenberg, 758 So. 2d 705 (Fla. Dist. Ct. App. 2000) ("Even where the party seeking injunctive relief alleges that the opposing party may dissipate bank assets, a judgment for money damages is adequate and injunctive relief is improper, notwithstanding the possibility that a money judgment will be uncollectible"); Chunchula Energy Corp. v. Ciba-Geigy Corp., 503 So. 2d 1211 (Ala. 1987) (holding that an injury is not immediate because the counterclaim plaintiff had not even obtained a judgment).

It is clearly established that Omega had an adequate remedy at law, and the Supreme Court has clearly indicated that an injunction is not appropriate when a party is concerned about collecting a monetary award. The Circuit Court abused its discretion in granting injunctive relief when Omega had a clear and adequate remedy at law, and no equitable relief should have been granted.

IV. THE CIRCUIT COURT ERRED: THERE WAS A LACK OF EVIDENCE TO SUPPORT THAT OMEGA WAS LIKELY TO SUCCEED ON THE MERITS

To justify the issuance of injunctive relief, the Plaintiff bears the heavy burden of establishing the merits of their case such that it appears that it will likely prevail in litigation. Strategic Resources Co., 367 S.C. at 544, 627 S.E.2d at 689.

At the hearing on the motion requesting injunctive relief, each party presented evidence, through affidavits of employees, as to the claims of breach of contract. Each party claimed that the other had breached or not performed. (Affidavits of D. Greg Marshall and Thomas Robinson, R. p. 389, 204) Yet, out of this, the Circuit Court concluded that Omega was *likely* to succeed on the merits. The Circuit Court reached this factual conclusion without evidentiary support: the evidence shows that the breach of contract claim is heavily contested, and that it is unclear, from the affidavits, which party breached the contract. The affidavits from each party were in contradiction with each other, and there was no evidence to suggest that the affidavits provided by Omega provided greater factual support for Omega's claims than Crailar's affidavits provided for its claims. The Circuit Court's conclusion that Omega was likely to succeed on the merits was clearly erroneous.

V. THE CIRCUIT COURT ERRED: THE ORDER IS BASED ON FACTUAL CONCLUSIONS WITHOUT EVIDENTIARY SUPPORT

The evidence provided by Omega to support that Crailar was leaving the State of South Carolina was unsupported and relied on conjecture and hearsay. The Circuit Court erred in relying on such a statement of supposed "facts," and therefore the conclusions in the Order lacked evidentiary support.

The affidavits filed by Omega is rife with conjecture and unsubstantiated hearsay, and most of the statements are made with lack of any firsthand knowledge. Omega's primary basis for the injunctive relief is that it learned (presumably from a third party) that Crailar was leaving South Carolina. While it is true that the Pamplico Facility is not operating, Crailar has not, to this day, left the state. As stated in its affidavits, Crailar intends to reopen the Pamplico Facility. (Aff. Guy Prevost, Oct. 30, 2013, ¶11, R. p. 117)

That an order for injunction was entered based on the Omega's affidavits is in clear error. There is a lack of factual support for the Order, and the Order must be overturned.

VI. THE CIRCUIT COURT ERRED: IF AN INJUNCTION WAS PROPER, THE COURT HAD NO AUTHORITY TO REQUIRE THAT OMEGA OBTAIN A BOND

The Order requires that Crailar post a bond to secure Omega's claim. The injunction rule requires that Omega, as the party seeking the injunction, obtain a bond, but there is no statutory or common law support for requiring that Crailar procure a bond. See Rule 65(c), SCRCP. The Order requires that three pieces of otherwise unencumbered equipment be covered by the Order. Crailar leased the facility in Pamplico, so no real property could be subject to the Order, and the Court refused to accept Crailar's flax fiber or raw flax stored on-site as collateral. Because Crailar presented evidence that it had no other property that was unencumbered, the Court required that Crailar obtain a bond.

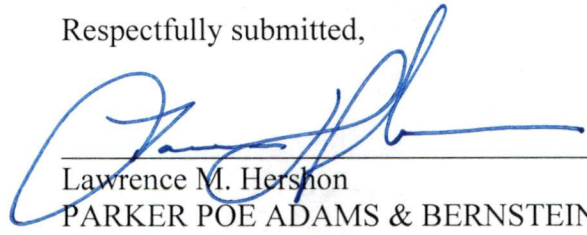
The decision by the Circuit Court to require Crailar to obtain a bond is clearly erroneous and is an abuse of discretion. The Order fails to cite to authority for such requirement. The requirement of obtaining a bond places Omega in an unfair advantage over Crailar in the dispute: by affidavit testimony, Crailar provided evidence, just as Omega provided, that the opposing party had breached the contract. The posting of collateral means that Crailar is without the use of its property, even though it will assert a counterclaim against Omega. In essence, Omega, without meeting any burden of proof, has obtained a lien on assets of Crailar. That the Circuit Court gave more weight to the affidavit provided by Omega was unjustified, and the order to post collateral was made without legal support.

The Order for Crailar to post collateral was improper and was in clear error. To the extent the Court rules that an order for injunction was appropriate, the requirement that Crailar post collateral must be revised and deleted.

CONCLUSION

For the reasons stated above, the Circuit Court erred in granting the Respondent's request for injunctive relief and in issuing the Order Granting Temporary Injunction and/or Requiring Bond. The Circuit Court's Order should be reversed.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Brief of Appellant complies with Rule 211(b) SCACR.

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