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,

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On October 16, 2013, Respondent Omega Construction, Inc. ("Omega") filed a Summons and Complaint in the Florence County Court of Common Pleas, and properly served the same. (R. pp. 15-22). Among other relief, Omega sought a temporary injunction. Omega also filed a Motion for Temporary Restraining Order and Temporary Injunction pursuant to Rule 65(a) and (b), SCRCP, supported by the affidavits of Brock Hennings and Greg Marshall. (R. p. 23). Omega filed the appropriate bond with this request. (R. pp. 97-100).

Judge Michael G. Nettles issued a Temporary Restraining Order on October 23, 2013. (R. p. 3). The trial court promptly scheduled a hearing within the 10 day required period. This hearing was scheduled for October 31, 2013, and Crailar received timely notice of the hearing. Judge William H. Seals heard arguments on the Temporary Injunction, and granted Omega's motion. Judge Seals extended the Temporary Restraining Order for two 10 day periods in order allow the parties to establish and agree upon sufficient security for the Injunction. (R. pp. 5-8, 487-489.

On or about November 20, 2013, Crailar filed a Motion to Dismiss or in the Alternative to Compel Mediation and Arbitration and to Stay. (R. p. 209).

The Order Granting Temporary Injunction and/or Requiring Bond was filed on November 26, 2013. (R. p. 9). This Order secured the Temporary Injunction with three pieces of equipment, and required Crailar to post a bond in an amount sufficient to satisfy Omega's claim. On December 23, 2013, Crailar filed its Notice of Appeal.

Arguments on the Motion to Dismiss were heard on January 15, 2014. The trial court denied the Motion to Dismiss, which was basically an argument by Crailar to lift the Temporary Injunction (which was filed six days after Crailar filed its Motion to Dismiss). The parties agreed and the trial court ordered that the action be stayed pending mediation, and if necessary, arbitration, of the parties' disputes. This order specifically directed that "the Temporary Injunction entered on November 26, 2013 shall remain in force and effect." (Order Denying Motion to Dismiss and Granting Motion to Stay, filed on January 31, 2014, to be included in Supplemental Record on Appeal).

FACTS

On or about May 23, 2012, Omega, as Design-Builder, entered into Design-Build contract with Crailar. This contract set forth Omega and Crailar's rights and obligations with respect to the design and construction of Crailar's manufacturing facility located in

Pamplico, South Carolina ("Pamplico Facility"). (R. pp. 389, 392, 461). Despite timely demands for payment, Crailar failed and refused to pay the amounts due and owing to Omega under the contract. (R. pp. 390, 425, 462).

Omega made several attempts to reach an agreement with Crailar concerning the debt owed in order to avoid legal action leading up to the sudden closure of the Pamplico Facility. (R. p. 465). These included discussions about Crailar's intent to enter into an Escrow Agreement to protect Omega's interest. The parties discussed this by telephone and through email communications, and even exchanged drafts of the Escrow Agreement. (Supplemental Affidavit of Greg Marshall pp. 465, 468-479).

On October 1, 2013, Greg Marshall, Omega's Chief Financial Officer, learned through another contractor that was owed money by Crailar that Crailar had suddenly and without notice closed the Pamplico Facility. Mr. Marshall attempted to contact officials at Crailar by telephone and electronic mail to ascertain the status of the company and its intent/ability to pay what it owed to Omega. Through Guy Prevost, Crailar's Corporate Controller and Compliance Officer, Mr. Marshall confirmed this information. Mr. Marshall learned that Crailar had halted production in the Pamplico Facility and intended to move its production operations overseas into a facility that Crailar had already acquired. Although Mr. Prevost indicated that Crailar would like to "retool" the Pamplico Facility and resume operations there at some time in the future, he offered no written guarantees of payment or return of operations to the United States. Mr. Prevost indicated that there were approximately 12.5 million pounds of raw flax material at the Pamplico Facility that would need to be processed by Crailar to produce finished goods inventory. (R. p. 390).

Mr. Marshall also spoke with Ryan Leverenz, Crailar's Director of Corporate Communications. Mr. Leverenz indicated that he had spoken to Guy Prevost, and was told that Omega did not have to worry about the balance owed on the contract, and that legal action was not necessary. Omega needed written assurances of this statement, but none were forthcoming. (R. p. 465). Despite verbal assurances that Crailar intended to return operations to the Pamplico Facility at some point, Mr. Levernz offered no substantive guarantee of payment or protection of the amounts owed to Omega. (R. p. 465).

Brock Hennings, Senior Project Manager of Omega, upon learning of Crailar's sudden closure, attempted to contact Tom Robinson at Crailar by telephone to ascertain the status of the company and its intent/ability to pay what it owed to Omega. Through Tom Robinson, Crailar's Chief Operating Officer, Mr. Hennings learned that Crailar closed its operations on September 30, 2013 and laid off all of its employees. Mr. Robinson stated that the closure was intended to be temporary, for the purpose of "retooling" the Pamplico Facility. Mr. Robinson indicated that some of the equipment in the facility had already been repossessed. He offered no written guarantees of payment or return of operations to the United States. (R. p. 462).

At the time Crailar filed its suit, there were approximately 12.5 million pounds of raw flax material, approximately 510 bales of decorticated flax fiber, farm equipment, motorized plant equipment, and installed and uninstalled production equipment located at the Pamplico Facility. (R. pp. 391, 427-460).

Omega was not aware of the precise value of these materials and equipment, but sought to enjoin the use of no more than necessary to satisfy the contract amount. To that end, Greg Marshall made a good faith effort to independently establish the values to the best of his knowledge, information, and belief. (R. p. 466). The trial court ultimately enjoined only those assets sufficient to cover Omega's losses. (R. p. 9). Once Omega obtained information concerning salvage value credits on its claim, it promptly notified Crailar of the reduction of the bond amount from $190,246.75 to $93,725.10.

Despite the fact that the Order Granting Temporary Injunction directed Crailar to immediately post a bond upon issuance of the November 26, 2013 Order, it has failed and refused to do so. Immediately prior to the hearing on its Motion to Dismiss on January 15, 2014, Crailar filed a letter of credit from a foreign bank, which it apparently has intended to unilaterally substitute for the relief required by the trial court. (Irrevocable Standby Letter of Credit from Bank of Montreal, Toronto, Ontario, Canada, to be included in Supplemental Record on Appeal). To date, it has not filed the bond required by the trial court.

STANDARD OF REVIEW

To obtain a temporary injunction, the plaintiff must show that (1) it will suffer irreparable harm if the injunction is not granted, (2) it will likely succeed on the merits of the case, and (3) there is an inadequate remedy at law. The decision whether to grant a temporary injunction is within the sole and sound discretion of the trial court. Absent an abuse of discretion, the decision will not be overturned. Peek v. Spartanburg Regional Healthcare System, 367 S.C. 450, 626 S.E.2d 34, 36 (Ct. App. 2005); see also AJG Holdings, LLC v. Dunn, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009). Further, a trial court does not abuse its discretion by basing its decision on conflicting evidence, if evidence in the record reasonably supports the trial court's decision. IAC, Ltd., 160

S.W.2d 191, 196 (Tex. Ct. App. 2005). The trial court should balance the equities by looking at the particular facts of each case and determining which side is more entitled to equitable relief. AJG Holdings, 674 S.E.2d at 509-510.

I. The trial court properly issued the temporary injunction to Omega, and Crailar's arguments concerning any condition precedent in the contract had no legal effect on the trial court's decision.

Crailar spends much of its brief arguing that the trial court should have rejected Omega's motion for temporary injunction because of certain mediation and/or arbitration provisions in the contract.

The sole purpose of a temporary injunction is to preserve the status quo and void possible irreparable harm to the moving party. Powell v. Immanual Baptist Church, 261 S.C. 219, 199 S.E.2d 60 (1973). It is entered without prejudice to the parties' rights pending a hearing on the merits, and when other issues are brought to trial, they are determined without reference to the temporary injunction. The South Carolina Court of Appeals has expressly held that "a court can, and should, grant a preliminary injunction in an arbitrable dispute whenever an injunction is necessary to preserve the status quo pending arbitration." The fact that a court may or may not ultimately order arbitration "does not absolve [it] of its obligation to consider the merits of a requested preliminary injunction." MailSource, LLC v. M.A. Bailey & Associates, 356 S.C. 363, 588 S.E.2d 635, 638 (Ct. App. 2003).

Most important, the trial court declined to rule on the merits of Crailar's claim that mediation and/or arbitration applied. Because this issue was not raised to and ruled upon by the trial court, it is not appropriate to be addressed on appeal. Crailar's subsequent Motion to Dismiss was denied. It should not be allowed to make an end run around a decision that is not subject to immediate appeal.

II. The trial court did not abuse its discretion in finding that Omega established the requisite irreparable harm for the issuance of a temporary injunction.

Whether a wrong is irreparable in the sense to allow equity to intervene is not governed by narrow and artificial rules. Rather, the trial court must balance the equities and look at the specific facts of each case. The purpose of a temporary injunction is to preserve the status quo in order to avoid possible irreparable injury to a party pending litigation. Peek, 626 S.E.2d at 36-37. Therefore, it is disingenuous and overbroad to assert that a contract action can never form the basis for the type of irreparable harm required by the court for issuance of a temporary injunction.

Here, the irreparable harm is immediately apparent. Crailar owes a substantial sum to Omega. While simultaneously purporting to negotiate the payment of this debt, it closed operations on its Pamplico Facility, fired its employees, and proceeded to move the operations overseas, all with no word to Omega. Omega only learned of these actions through another contractor. When directly addressed about the closure, Crailar representatives gave only vague assurances that it would make good on its debt. Contrary to Crailar's assertions, the information provided by Omega's affidavits came directly from Crailar officers and/or agents. Crailar thereafter ceased communications with Omega concerning the proposed Escrow Agreement.

Omega, realizing that Crailar was not acting in good faith, brought this lawsuit to protect its interest in the Pamplico Facility. That interest would have been imminently and irreparably harmed by Crailar's sudden shutdown and transfer of its Pamplico Facility operations overseas.

If Crailar had been allowed to remove all materials and equipment from the Pamplico Facility by closing the business, transporting it overseas, selling it, or otherwise, Omega would have been entirely deprived of its recourse against these substantial assets to recover the contract amount due. It would not simply have been difficult, it would have been impossible. The trial court did not err in granting the temporary injunction to maintain the status quo between the parties pending litigation or other disposition of the issues in this case.

III. <u>The trial court did not abuse its discretion in finding that Omega established a likelihood of success on the merits sufficient for the issuance of a temporary injunction.</u>

A plaintiff need not prove an absolute legal right, rather, it must only present a fair question as to the existence of such a right. The determination of whether to grant a temporary injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made. Once the plaintiff has made a showing entitling him to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits. <u>AJG Holdings</u>, 674 S.E.2d at 510; <u>Peek</u>, 626 S.E.2d at 37; <u>see also</u> <u>Atwood Agency v. Black</u>, 374 S.C. 68, 646 S.E.2d 882 (2007).

In addition to requesting the Temporary Injunction, Omega in its Complaint brought causes of action for Breach of Contract and Quantum Meruit. With respect to the contract claim, Omega established by way of the sworn testimony of Brock Hennings and Greg Marshall, as well as the exhibits attached to those affidavits, the existence of the contract between the parties, the parties' course of dealing, and the amount owed. Even though Crailar may dispute the actual amount owed to Omega, Omega has absolutely established its claim for payment in both contract and equity. Omega presented far more than even a fair question to its right to both legal and equitable relief, and it met the burden of this element. The trial court, balancing the equities, did not err in granting relief to Omega.

IV. The trial court did not abuse its discretion in finding that Omega had no adequate remedy at law.

Omega sought relief in its Complaint by way of both legal and equitable causes of action. Omega's recovery, even though in the nature of a money judgment, is not protected by an adequate remedy at law under the unique facts and circumstances of this case, which the trial court can and must take into account.

The Court has held that "[t]he basis for granting equitable relief is the **impracticality** of obtaining full and adequate compensation at law." Nutt Corp. v. Howell Road, LLC, 396 S.C. 323, 721 S.E.2d 447, 449 (Ct. App. 2011) (emphasis added). An "'adequate' remedy at law is one which is **as certain, practical, complete and efficient** to attain the ends of justice and its administration as the remedy in equity." Milliken & Co. v. Morin, 386 S.C. 1, 685 S.E.2d 828, 832 (Ct. App. 2009), citing Santee Cooper Resort, Inc. v. South Carolina Pub. Serv. Comm'n, 298 S.C. 179, 379 S.E.2d 119, 123 (1989) (emphasis added). If imminent and actual harm is threatened and the available legal remedy would result in a judgment in name that is otherwise unrecoverable, the court should not hesitate to exercise its equitable powers. 27 S.C. Jur. Injunctions § 9.

Crailar moved its operations out of the United States. This is not a projected risk; this is a fact that Crailar has admitted. It has given vague assurances that it may resume operations in the United States when and if this becomes fiscally beneficial; however, there is no guarantee that this will ever occur, leaving Omega with a dead, empty facility to secure its unpaid work. Any money judgment obtained by Omega at the conclusion of this case will be unrecoverable, because Crailar no longer has a presence in the state, or even in the country. This empty legal judgment is not certain, practical, complete, or efficient. An injunction prohibiting the removal of these assets was a proper, equitable resolution under the particular facts of this case. Therefore, the trial court did not err in securing the status quo pending the resolution of this case.

CONCLUSION

For the reasons set forth herein, Respondent submits that the trial court properly granted the temporary injunction, and did not abuse its discretion in so doing.

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July 2, 2014

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CERTIFICATE OF COUNSEL

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

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