

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Twin Bridge Logistics, LLC n\k/a Twin Bridge
Transport, LLC,

Plaintiff,

vs.

Fisher Tank Company, f/k/a Fisher Tank
Company, Inc.

Defendant.

IN THE COURT OF COMMON PLEAS

C/A No.: 2018-CP-32-1854

ORDER GRANTING IN PART AND
DENYING IN PART
DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

This matter came before the court on February 20, 2019 for a hearing on the Defendant's Motion for Partial Summary Judgment. Present at the hearing were W. Joseph Moore, Jr. of Gertz & Moore, LLP, attorneys for the Defendant and William H. Edwards, of Moore Taylor Law Firm, P.A. attorneys for the Plaintiff.

The Plaintiff's complaint in this matter asserts various claims arising out of an alleged oral agreement pursuant to which the Plaintiff claims to have provided transportation and related services to the Defendant. The claims asserted by the Plaintiff include, but are not limited to, breach of contract arising out of the failure of the Defendant to pay for services which Plaintiff claims to have provided pursuant to the agreement, breach of contract by the Defendant in terminating the agreement, attorney's fees and interest. In addition, the Plaintiff's complaint includes causes of action against the Defendant for negligence and bailment for mutual benefit arising out of the theft from the Defendant's property of a trailer which belonged to the Plaintiff.

The Defendant's motion seeks partial summary judgment as to the claims asserted by the Plaintiff as follows:

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SC Court of Appeals

1. As to the Plaintiff's cause of action for breach of contract on the grounds that the alleged oral agreement between the parties is incapable of being performed within a year and is therefore barred by the Statute of Frauds.
2. As to the causes of action for negligence and bailment for mutual benefit on the grounds that the claims are barred by the three (3) year Statute of Limitations.
3. As to the Plaintiff's claim for interest on the grounds that there is no written contract or other agreement between the parties signed by the Defendant wherein the Defendant agreed to pay interest on the amount or terms claimed by the Plaintiff; and
4. As to the Plaintiff's claim for an award of attorney's fees on the grounds that there is no written contract or other agreement between the parties signed by the Defendant wherein the Defendant agreed to pay attorney's fees.

The Defendant submitted the Plaintiff's Responses to Defendant's Request to Admit, portions of the Rule 30(b)(6) Deposition of the Plaintiff and the Affidavit of Paul Windham in support of its motion. The Plaintiff submitted the Affidavit of Glenn LaMotte In Opposition to the Motion for Partial Summary Judgment.

STANDARD OF REVIEW

Summary judgment should be granted where the pleadings, depositions, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56 (c) SCRCP.

UNDISPUTED FACTS

Based on a review of the request for admission, deposition testimony and the affidavits submitted by the parties, the following facts are not in dispute:

1. The Plaintiff is in the business of providing freight carrier services. (Rule 30(b)(6) Deposition of Plaintiff)
2. The Plaintiff provided hauling services to the Defendant Fisher Tank from approximately 2004 until 2012. (Affidavit of Glenn LaMotte In Opposition to Motion Partial Summary Judgment)
3. No written contract existed between the parties for the hauling services provided by the Plaintiff to the Defendant. (Rule 30(b)(6) Deposition of Plaintiff, Plaintiff's Responses to Defendant's Request for Admissions, Affidavit of Paul Windham and Affidavit of Glenn LaMotte In Opposition to Motion Partial Summary Judgment)
4. There is no written contract, agreement or other document signed by the Defendant wherein the Defendant agreed to pay interest, costs of collection or attorney's fees. (Rule 30(b)(6) Deposition of Plaintiff, Plaintiff's Responses to Defendant's Request for Admissions and Affidavit of Paul Windham)
5. The step-deck trailer which is the subject of the Plaintiff's claims for negligence and bailment for mutual benefit was stolen from the Defendant's facility in Lexington on November 10, 2009. (Plaintiff's Responses to Defendant's Request for Admissions, and Affidavit of Glenn LaMotte In Opposition to Motion Partial Summary Judgment)
6. The Defendant did not make a demand for payment arising out of the theft of the trailer until April 15, 2013, which demand was denied by the Defendant. (Rule 30(b)(6) Deposition of Plaintiff).
7. This action which includes the claims for Negligence and Bailment for Mutual Benefit arising out of the theft of the trailer was filed by the Plaintiff on July 2, 2014 and served on October 14, 2014.

LAW AND ANALYSIS

A. Statute of Frauds:

S.C. Code § 32-3-10 provides that a verbal contract which cannot be performed within one year is unenforceable as a matter of law. S.C. Code § 32-3-10 (3), See *Springob v. Univ of S.C.*, 407 S.C. 490, 757 S.E.2d 384 (S.C. 2014) Partial performance by the parties can remove the oral contract from the Statute of Frauds. *Settlemyer v. McCluney*, 359 S.C. 317, 596 S.E.2d 514 (S.C. Ct. App. 2004).

Based on the deposition testimony and the affidavits submitted in connection with the motion, there are genuine issues as to the partial performance of the parties, which would remove the agreement from the Statute of Frauds. Accordingly, I find that the Defendant is not entitled to partial summary judgment on the basis of the Statute of Frauds and the Defendant's motion is denied to the extent it seeks partial summary judgment based on the Statute of Frauds.

B. Statute of Limitations as to Plaintiff's Claims for Negligent Bailment and Bailment for Mutual Benefit:

South Carolina Code § 15-3-530(5) requires that "an action for taking, detaining or injuring any goods or chattels including an action for the specific recovery of personal property "must be brought within three (3) years of the accrual of the cause of action or else be forever barred." "Under the discovery rule, the statute begins to run when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *McMaster v. John H Dewitt, MD. & Carolina Psychiatric Servs., P.A.*, 767 S.E.2d 451, 454 (S.C. App., 2015). The Plaintiff's claim for negligent bailment arose on the day the Plaintiff was informed that its trailer had been stolen from the Defendant's property.

Industrial Welding Supplies, Inc. vs. Atlas Vending Co., Inc. 272 S.C. 293, 251 S.E.2d 741 (1979).

It is undisputed that the Plaintiff had actual knowledge that his trailer was stolen from the Defendant's location on November 10, 2009. The alleged negligence of the Defendant which led to the loss of the trailer occurred when the trailer was stolen. Pursuant to S.C. Code § 15-3-530(5) the Plaintiff had three years from November 2009, until November 2012, to commence its action against the Defendant or the claims would be forever barred. However, the Plaintiff did not commence this action until July 2014.

There is no issue of fact that the Plaintiff failed to commence this action within three (3) years of the date the Plaintiff learned that his trailer had been stolen. The Affidavits and Plaintiff's Responses to the Defendant's Request to Admit clearly establish that the Plaintiff failed to commence the action within three (3) years of the date the trailer was stolen. Accordingly, I find that the Plaintiff's claims for Negligence and Bailment for Mutual Benefit are barred by the Statute of Limitations and that the Defendant is entitled to judgment as a matter of law. Accordingly, the Defendant's motion for partial summary judgment as to the Plaintiff's Fifth Cause of Action for Negligence and Sixth Cause of Action for Bailment for Mutual Benefit is granted and the claims are dismissed with prejudice.

C. Plaintiff's Claims for Interest:

As noted above it is undisputed that no written agreement exists between the parties whereby the Defendant agreed to pay interest on the amounts claimed by the Plaintiff. The Plaintiff's claims for interest is therefore is subject to SC Code Ann §34-31-20(A) which states, "[i]n all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest

shall be at the rate of eight and three-fourths percent per annum." "[T]he essential elements of an account stated are (1) that the account is actually stated; and (2) that the parties either expressly or impliedly agreed that it is a true statement and is due to be paid then or at some other specified time. The burden [is] on [the proponent] to prove agreement to the account as stated." *Southern Welding Works, Inc. v. K & S Const Co.*, 286 S.C. 158, 165 (S.C. App., 1985) The recovery of prejudgment interest is only permitted "if the sum is certain or capable of being reduced to certainty." *Vaughn Development, Inc. v Westvaco Development Corporation* 372 S.C. 576, 642 S.E.2d 757 (S.C. App 2007).

While partial performance is sufficient to remove the alleged oral contract between the parties from the Statute of Frauds, it is not sufficient to establish an agreement to pay interest, the amount owed or the terms of payment. It is undisputed that there was no agreement as to the amount or for the payment of interest. Accordingly, I find that the Defendant is entitled to judgment as a matter of law as to the Plaintiff's claims of entitlement to contractual interest and the Defendant's motion for partial summary judgment as to the Plaintiff's claims for interest based on the alleged contract is granted.

D. Plaintiff's Claims for Attorney's Fees:

It is well established in South Carolina that attorneys' fees are not recoverable unless authorized by contract or statute. *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 557 S.E. 2d 708 (S.C. App 2001); *Duke Power Co. v. South Carolina Public Service Com'n*, 284 S.C. 81, 326 S.E.2d 395 (S.C.1984); *Hegler v. Gulf Ins. Co.* 270 S.C. 548, 243 SE2d 443 (S.C. 1978).

Partial performance of the alleged oral contact between the parties, is not sufficient to establish an agreement to pay attorney's fees. It is undisputed that there was no contract

between the parties which provides for the recovery of attorney's fees by the Plaintiff in this action. The Plaintiff has also failed to allege any statute which provides for the recovery of attorney's fees. Accordingly, I find that the Defendant is entitled to judgment as a matter of law as to the Plaintiff's claims for the recovery of attorney's fees and the Defendant's motion for partial summary judgment as to the Plaintiff's claims for attorney's fees is granted.

ACCORDINGLY, IT IS ORDERED that the Defendant's motion for partial summary judgment is denied in part and granted in part as follows;

IT IS ORDERED that the Defendant's motion is denied to extent it seeks partial summary judgment pursuant to the Statute of Frauds (S.C. Code § 32-3-10) as to the Plaintiff's contract claims;

IT IS ORDERED that Defendant's motion for partial summary judgment is granted as to the Plaintiff's Fifth Cause of Action for Negligence and Sixth Cause of Action for Bailment for Mutual Benefit on the grounds that the claims are barred by the Statute of Limitation set forth in S.C. Code § 15-3-530(5) ;

IT IS ORDERED that the Defendant's motion for partial summary judgment is granted as to the Plaintiff's claims for the interest and attorney's fees;

IT IS THEREFORE ORDERED, that the Plaintiff's Fifth Cause of Action for Negligence, Sixth Cause of Action for Bailment for Mutual Benefit, claim for interest and claim for attorney's fees are hereby dismissed with prejudice.

AND IT IS SO ORDERED.



Lexington Common Pleas

Case Caption: Twin Bridge Logistics LLC , plaintiff, et al VS Fisher Tank Company
, defendant, et al
Case Number: 2018CP3201854
Type: Order/Summary Judgment

It is so Ordered.

s/ R. Keith Kelly - 2165