

STATE OF SOUTH CAROLINA)
)
 COUNTY OF FLORENCE)
)
 Walt Parker,)
)
 Plaintiff,)
)
 vs.)
)
 John C. Curl,)
)
 Defendant.)
)
 _____)
 John C. Curl,)
)
 Third-Party Plaintiff,)
)
 v.)
)
 Palmetto Floor Covering Installation, LLC)
 and Florence Custom Countertops, Inc.,)
)
 Third-Party Defendants.)
 _____)

IN THE COURT OF COMMON PLEAS
 Civil Action No. 2018-CP-21-2958

**FINDINGS OF FACTS AND
 CONCLUSIONS OF LAW**

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 SC Court of Appeals

This matter came before the undersigned to conduct a non-jury trial of the allegations set forth in the plaintiff's complaint pursuant to SCRPC Rule 39(b). The non-jury trial was held on March 20 and March 21, 2019.

After considering all the relevant and admissible evidence, the Court makes the following findings of fact and reaches the related conclusions of law.¹

¹ To the extent that any of the Court's findings of fact constitute conclusions of law, or its conclusions of law constitute findings of fact, they are so adopted.

FINDINGS OF FACT

Curl and Parker Purchase FCT

1. On April 30, 2007, John Curl ("Curl") and Parker ("Parker") purchased 100% of the outstanding stock in Florence Carpet & Tile, Inc. ("FCT") from Charles Carnell ("Carnell") for a purchase price of \$1,080,000 ("Purchase Price"). This purchase occurred four months into the Corporation's fiscal/tax reporting year (the calendar year 2007). At the time of this purchase, Curl and Parker agreed that Curl owned 53% of FCT and Parker owned 47%.

2. This ownership split was memorialized in the minutes of a shareholders meeting for FCT on April 30, 2007.

3. At the time of the purchase, Walt Parker was unemployed and had been unemployed for over a year. Accordingly, the purchase was bankrolled based upon the strength of Curl's financial statements and the new owners planned for Parker to run the Corporation's daily operations. Both Curl and Parker personally guaranteed the loans.

4. Based upon the financial strength of Curl, Charles Carnell owner financed \$540,000 of the Purchase Price and Branch Bank and Trust ("BB&T") loaned FCT the remaining \$540,000.

Daily Operations of FCT and Performance Incentive for Parker

5. As noted, Parker and Curl agreed that Parker would be the President of FCT in charge of the day to day operations. To help incentivize Parker's management of the Corporation, Curl communicated with Porter Stewart, Esquire, before the closing with Carnell and requested that he prepare corporate minutes of the first meeting of the Shareholders of FCT which would contain an incentive proposal.

6. In the first meeting minutes of Curl and Parker as Shareholders, Curl set forth a performance incentive proposal to transfer 3% of his (Curl) shares to Parker if certain conditions were met. Those minutes (“Minutes”) specifically state:

At this meeting, in consideration of their mutual promises and the sums of Five (\$5.00) Dollars in hand paid as acknowledged, the shareholders agreed that John C. Curl as fifty three (53%) per cent shareholder and Walter A. Parker as forty seven (47%) per cent shareholder, would agree for a transfer of share ownership from Curl to Parker within the period of the first five years of one per cent of share ownership from Curl to Parker for each complete fiscal year of operation of said corporation at a profit as determined by the accountant for the corporation, up to a total of 3 percentage points, the effect of which would be to allow for an ownership of fifty (50%) per cent to Curl and fifty (50%) per cent to Parker if the corporation operated at such profit for a minimum of three of the first five years.

7. The Minutes (and the incentive proposal therein) set forth the terms of an agreement (“Agreement”) between Curl and Parker as to the transfer of additional shares from Curl to Parker.

8. Because Curl unilaterally provided the proposal terms to attorney Porter Stewart and because Stewart acted solely as a scrivener of the Minutes, the Court finds that Curl was the drafter of the Agreement.

9. Both Parker and Curl were directors of FCT. Furthermore, both Parker and Curl were officers of FCT. Parker served as President while Curl served as Secretary.²

10. The Court finds that the terms of the Agreement are ambiguous in two respects. It is ambiguous as to whether the financial results for FCT for the partial fiscal year 2007 are to be included in the incentive formula. The Agreement is also ambiguous as to whether or not Parker was entitled to receive a one percent interest ownership transfer from Curl for each single profitable year regardless of the total number of profitable years or was the transfer of shares by

² There was conflicting testimony as to whether Plaintiff’s wife, Allison Parker, was a director of FCT. However, the Court finds this to be largely unimportant to its resolution of the issues before it.

Curl contingent on a minimum total of three years profitability for FCT. The FCT tax returns suggest an operational profit for the years 2007, 2010 and 2011.

Daily Financial Management and Tax Filing

11. As the daily operations manager, Parker was in charge of the finances of FCT and in directing the preparation of the Company's tax returns.

12. Parker and Curl each signed each of FCT's tax returns for those years when they were prepared by FCT's accountant.

13. Parker has failed to have FCT's 2016 and 2017 tax returns prepared.

14. Parker knew the profitability of FCT for the year 2011 on or before September 14, 2011, the date when the 2011 tax return was filed by FCT's accountant following Parker's signature.

15. In May of 2015 Curl informed Parker and his attorney that no additional shares were owed to Parker since FCT was not profitable during the first five years of operation.

16. Until this litigation was filed, Parker never demanded that Curl transfer additional shares in FCT to him.

Competing Businesses and Usurped Opportunities

17. In 2011, Parker created an installation company called Palmetto Floorcovering Installation, LLC ("Palmetto Floor Covering"). Curl co-owned this company with Rob Simmons. Parker had FCT to pay Palmetto Floor Covering for installation services that could have been performed by FCT employees. Moreover, FCT had the necessary employees to install the flooring products it sold.

18. In 2011, Parker created a company called Florence Custom Countertops, Inc. ("FCC") to manufacture and sell natural stone countertops. Curl was not an owner of FCC. Parker operated FCC out of the FCT business location at 1706 Pamplico Hwy., Florence, South Carolina.

19. Although Curl requested that Parker discontinue the operations of FCC, which Curl viewed as a competing business, Parker never closed FCC and it continued to operate as of the trial date.

CONCLUSIONS OF LAW

1. Parker has labeled the first cause of action of his complaint as one for breach of contract and he requests a declaratory judgment pursuant to S.C. Code Ann. Section 15-53-10 et. seq. In the prayer of his Complaint, Parker does not seek damages but rather requests that this Court compel Curl "to sign the necessary papers to reflect the true ownership" of the Corporation. Based upon the requested relief, I find that this is an equitable action for specific performance. In essence Plaintiff request that this Court order Defendant to fulfill his contractual obligation to transfer the 3% interest in FCT.

2. Specific performance is the requirement that a party fulfill a precise contractual obligation. *Time Warner Cable v. Condo Serv., Inc.*, 381 S.C 275, 282, 672 S.E.2d 816, 819 fn. 3 (Ct. App. 2009). While Plaintiff has framed his cause of action as one for breach of contract and requests injunctive relief it is clear that he seeks specific performance. "It is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'" *Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (quoting *Standard Fed. Sav. & Loan Ass'n v. Mungo*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991)).

3. “The discretion to grant or refuse specific performance is a judicial discretion to be exercised in accordance with special rules of equity and with regards to the facts and circumstances of each case.” *Id.* at 281, 672 S.E.2d at 819 (quoting *Guignard v. Atkins*, 282 S.C. 61, 66, 317 S.E.2d 137, 140 (Ct. App. 1984)).

4. “A court may order specific performance if: (1) a valid contract exists between the parties; (2) no adequate remedy at law exists for the breach; (3) specific performance is equitable between the parties; and (4) no fraud, accident, or mistake infects the contract. *Time Warner Cable*, 381 S.C. at 281, 672 S.E.2d at 819. It is undisputed that the parties in this case had a valid contract between them. Furthermore, the Court finds that there was no fraud, accident, or mistake which infects the contract.

5. An action for specific performance is one in equity and should be granted only if there is no adequate remedy at law and a decree of specific performance of the contract would be equitable between the parties. *Ingram v. Kasey's Assocs.*, 531 S.E.2d 287 (S.C. 2000).

6. Defendant has asserted the defense of the statute of limitations found in S.C. Code Ann. § 15-3-530(1). However, as this action sounds in equity as one for specific performance the statute of limitations does not apply. *See Parr v. Parr*, 268 S.C. 58, 67, 231 S.E.2d 695, 699 (1977) (citing, *inter alia*, *Blackwell v. Ryan*, 21 S.C. 112 (1884))

7. Any ambiguity in the terms of that Agreement will be construed against Curl as he is the party responsible for drafting the contract. “Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage.” *Ecclesiastes Prod. Ministries v. Outparcel Assoc., LLC*, 374 S.C.

483, 499-500, 649 S.E.2d 494, 502 (Ct. App. 2007) (quoting *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981)).

8. The Court finds that the terms of the agreement as they relate to the transfer of the shares was that Plaintiff was entitled to 1% for each year that the corporation was profitable and that such transfer was not conditional on there being 3 years of profitability total. Furthermore, the Court finds that the term as to the first fiscal year, when construed against Curl, was the first fiscal year that FCT was owned by Plaintiff and Defendant. Therefore, the first full fiscal year for FCT was 2007.

9. Because the issue in this matter concerns the ownership of 3% of the stock in a closely held company, there is no adequate remedy at law for Parker. See *Stafford v. Southern Vanity Magazine*, 231 S.W.3d 530 (Tex. Ct. App. 2007); and *U.S. Dimension Products, Inc. v. Tassette, Inc.*, 290 A.2d 634 (Del. 1972). It is very difficult to place a value on the 3% of stock at issue in this case since that percentage ultimately determines who controls FCT. See *Lineberger v. Welch*, 290 A.2d 847 (Del. Ch. 1972).

10. Although appropriately raised by Curl at trial, Parker's claim is not barred by the doctrine of laches. "Laches is the neglect for an unreasonable and unexplained amount of time, under circumstances permitting diligence, to do what in law should have been done." *Mid-State Trust, II v. Wright*, 323 S.C. 303, 307, 474 S.E.2d 421, 423 (1996). Whether laches applies in a given case is highly fact-specific so that each case must be judge on its own merits. *Id.*, 474 S.E.2d at 423-24. "[T]he party asserting laches must show it has been materially prejudiced by the other party's delay." *Id.*, 474 S.E.2d at 423.

11. Any delay by Parker in bringing this action to demand the issuance of the 3% from Curl was reasonable under the circumstances. Both parties failed to pay attention to corporate

formalities and it is unclear as to whether Curl or Parker were ever issued any shares of stock. Furthermore, Curl has been unable to demonstrate any material prejudice.

12. After having listened to the evidence, observing the demeanor of the parties, and their testimony, I find that it would be inequitable to order specific performance – a transfer of the Curl shares to Parker. This conclusion is based upon the unclean hands of Parker as the Court finds in the following respects (all such actions are a breach of his fiduciary duty and duty of loyalty to FCT and Curl³):

- a. Parker breached the fiduciary duty that he owed to his fellow shareholder Curl by operating FCC and Palmetto Floor Covering, competing businesses to FCT;
- b. Parker usurped corporate opportunities available to FCT;
- c. Parker and FCC acted as a wholesaler to FCT which amounted to self-dealing;
- d. Parker allowed FCT's employee Lisa Shelton to work for FCC while FCT paid her;
- e. Parker had his business Palmetto Floor Covering charge FCT for installation services that could have been performed by FCT employees.
- f. Parker has failed to timely file the tax returns for FCT despite his position as the daily operations manager with the ability to provide the supporting documentation necessary for the preparation of FCT's tax returns. As of the day of the trial Parker had still failed to have the 2016 and 2017 tax returns prepared;

³ Parker as both an officer and director of FCT owed fiduciary duties to both FCT and to Curl individually. *See* S.C. Code Ann. § 30-8-300, -420; *see also* § -420 South Carolina Reporters' Comments ("After detailed discussion and analysis, the decision was made to retain mention in this provision of a direct duty owed to shareholders."). These duties are the statutory codification of common law duties that long been recognized in South Carolina. *See Black v. Simpson*, 94 S.C. 312, 77 S.E. 1023 (1913).

- g. Parker has failed to provide required documentation to FCT's creditor Synovus Bank who has repeatedly requested that Parker provide FCT's tax returns;
- h. Parker has failed to timely pay FCT vendors and its lessor Curl Properties, LLC while at the same time continuing to pay himself and his wife's salary and benefits.

In sum, Parker has come into this Court seeking equity but he has done so with "unclean hands." As such he is barred from obtaining the requested equitable relief of specific performance and for a permanent injunction.

12. "A party with unclean hands is precluded from recovering in equity." *Anderson County v. Preston*, 420 S.C. 546, 578, 804 S.E.2d 282, 298 (Ct. App. 2017) cert. granted March 29, 2018. "A party will have unclean hands where the party behaves 'unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.'" *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 756 (Ct. App. 2005) (internal citations omitted).

13. Specific performance is not a remedy that either party can demand as of right, but instead is one that will only be granted when strictly equitable and just. *Kirkley v. Jones*, 550 S.E.2d 686, 690 (Ga. Ct. App. 2001). "Specific performance is an equitable remedy, committed to the [trial] court's sound discretion. As an equitable remedy, it may be denied to a party whose own conduct is inequitable." *United States v. Bedford Assoc.*, 657 F.2d 1300, 1314 (2nd Cir. 1981). "This is so even though the plaintiff's conduct was not so egregious as to constitute a defense in law." *Id.*

14. Here Plaintiff has acted unfairly towards Defendant by breaching the fiduciary duties he owed to him and to FCT. He who seeks equity must come in equity to gain relief. Therefore,

considering all the facts and circumstances of this case, it would be inequitable of this Court to order specific performance of the contract.

15. The preliminary injunction in this case being no longer necessary ought to be, and hereby is, dissolved.

CONCLUSION

For the foregoing reasons, it is therefore **ORDERED, ADJUDGED, AND DECREED** that the Plaintiff's request for specific performance for the transfer of shares from the Defendant to the Plaintiff is **DENIED**. The Plaintiff's request for a permanent injunction is likewise **DENIED**. The preliminary injunction issued by this Court on November 19, 2018, is hereby dissolved effective immediately.

AND IT IS SO ORDERED!

Dated April 25, 2019

/s/ Michael G. Nettles

Florence, South Carolina

Presiding Judge, Twelfth Judicial Circuit



Florence Common Pleas

Case Caption: Walt Parker VS John C Curl

Case Number: 2018CP2102958

Type: Order/Other

So Ordered

s/ The Honorable Michael G. Nettles #2140

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