

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

Walt Parker,
Plaintiff,

C/A No.: 2018-CP-21-02958

v.

John C. Curl,
Defendant/Third-Party Plaintiff,

**ORDER DENYING
RECONSIDERATION**

v.

Palmetto Floor Covering Installation, LLC,
and Florence Custom Countertops, Inc.,
Third-Party Defendants.

RECEIVED
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SC Court of Appeals

This matter came before the Court by way of Plaintiff's Motion for Reconsideration of the Court's April 26, 2019, Order denying Plaintiff's requested relief. The Court finds that for the reasons stated below that the Court will delete certain scrivener's errors in its prior order, and will substitute an amended order to that effect, but will leave the substance of its prior order in place. Therefore, the Court grants Plaintiff's motion in part and denies Plaintiff's motion in part.

FACTUAL AND PROCEDURAL HISTORY

The Court will not dwell long on the factual background which was adequately addressed in the Court's April 26 order. However, this case concerns a business relationship between

Plaintiff and Defendant which soured. Plaintiff and Defendant had agreed to purchase 100% of the outstanding stock of Florence Carpet & Tile, Inc. (FCT) a South Carolina corporation. At the close of the stock purchase Plaintiff and Defendant agreed to split the ownership of the stock with Defendant owning 53% of the stock and Plaintiff owning 47%. The parties further agreed by way of a shareholders meeting that should certain financial benchmarks be met that Plaintiff would be entitled to receive up to 3% interest in FCT. This would have brought the parties to a 50/50 stock split between them. The parties disputed whether or not the benchmarks had been met and, therefore, whether Plaintiff was entitled to have a transfer of the 3% interest from the Defendant. Plaintiff initiated this case requesting for a declaratory judgment that Plaintiff was entitled to the 3% ownership of the stock and an injunction stating that Defendant was enjoined from denying Plaintiff ownership interest of 50% in FCT. Furthermore, Plaintiff filed for a temporary restraining order and temporary injunction prohibiting the call of a shareholders meeting until the issue of the ownership of FCT's stock could be resolved. On November 9, 2018, the Court issued its temporary restraining order to that effect and November 19, 2018, the Court converted the temporary restraining order to a temporary injunction. The parties proceeded to a bench trial on the issue of the stock ownership. The trial was held on March 20-21 before the undersigned. At the conclusion of the trial the undersigned ruled from the bench that Plaintiff was not entitled to the relief he requested and the Court entered its written order on April 26, 2019. Plaintiff moved for reconsideration pursuant to Rule 59, SCRPC, on May 8, 2019, and the Court convened a hearing on the Motion to Reconsider on June 19, 2019.

LEGAL STANDARD

There is no South Carolina case law concerning the correct standard to be used when considering a motion to alter or amend a judgment pursuant to Rule 59(e). However, "Since our

Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.” *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991). The Fourth Circuit has laid out three grounds for federal district courts to consider when applying Rule 59(e), FRCP. “Although Rule 59(e) does not itself provide a standard under which a district court may grant a motion to alter or amend a judgment, we have previously recognized that there are three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” *Pacific Ins. Co. v. Am. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998).

ANALYSIS

A. Scrivener Error

The Court finds that the order did contain one scrivener’s error in the findings of fact. At paragraph 17 the Court stated “In 2011, Parker created an installation company called Palmetto Floorcovering Installation, LLC (“Palmetto Floor Covering”). Curl co-owned this company with Rob Simmons.” This is incorrect. Palmetto Floor Covering was instead owned by Plaintiff, Walt Parker, and by Rob Simmons. The Court will amend the order to so reflect the true ownership of Palmetto Floor Covering. The Court grants Plaintiff’s Motion to Reconsider as to this ground.

B. Failure of Defendant to Pled Unclean Hands

Plaintiff argues that the Court erred in denying relief due to the inequitable conduct that the Court found to have been committed by the Plaintiff. Plaintiff argues that as this is an affirmative defense the Court should not have considered the issue as Defendant failed to raise it in his

answer. The Court disagrees with Plaintiff in several regards.¹ As a first matter the Court's order, while using the phrase "unclean hands" to denote the inequitable conduct that Plaintiff engaged in, was not based on the affirmative defense of unclean hands.

As was noted in the Court's April 26 order this case is, in essence, one for specific performance. The Court devoted great detail to the legal requirements in order for a Plaintiff to be entitled to specific performance.² "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." *Time Warner Cable v. Condo Serv., Inc.*, 381 S.C. 275, 281, 672 S.E.2d 816, 819 (Ct. App. 2009) (quoting *Guignard v. Atkins*, 282 S.C. 61, 66, 317 S.E.2d 137, 140 (Ct. App. 1984)). The special rules of equity surrounding specific performance require that the order be equitable when considering all of the fact and circumstances of the transaction. "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 (emphasis added). Here the Court did indeed find that Plaintiff had met requirements 1, 2, and 4. There was indeed a valid contract between the parties, the Court found that there was no adequate remedy at law, and the Court found no fraud, accident, or mistake. However, the Court explicitly found that, under these circumstances, to order specific performance would be inequitable as between these parties. This requirement that specific performance be equitable under the circumstances is separate and distinct from the

¹ Defendant has argued that this ground is not properly before the Court since it was not fully raised until Plaintiff filed his Supplemental Memorandum in Support of Plaintiff's Motion for Reconsideration. However, the Court finds that Plaintiff fifth ground for reconsideration in his Motion for Reconsideration was sufficient to bring this issue before the Court.

² While Plaintiff did not style his complaint as one for specific performance this is essentially the relief he requested by asking the Court to order the Defendant to comply with the contract and to convey the 3% interest to the Plaintiff.

defense of unclean hands. It is an obligation imposed on the Plaintiff, as the party bearing the burden of proof for specific performance, to prove and not one on the Defendant.

Consideration of Plaintiff's inequitable conduct is fully in accord with the law of this state. As explained by the Supreme Court "For many years it has been held that the Court of Equity will refuse to lend its aid to one who has been guilty of inequitable conduct in the subject matter. We think that this maxim aptly fits the present case. The equitable status of the [plaintiff] is the primary consideration." *Masonic Temple, Inc. v. Ebert*, 199 S.C. 5, 18 S.E.2d 584, 591 (1942). The Supreme Court again used this maxim to deny a plaintiff's request for specific performance where his conduct was inequitable vis-à-vis the defendant and where the defendant had not pled unclean hands. *See Flowers v. Roberts*, 220 S.C. 110, 66 S.E.2d 612 (1951). Plaintiff's invitation is for the Court to ignore his inequitable conduct, his breach of his fiduciary duties to FCT, and would essentially convert the granting of specific performance into a remedy as of right. However, "The rule is well settled 'that specific performance is not a matter of absolute right, but rests in the sound discretion of the Court, guided by established principles, and is exercised by a consideration of all the circumstances of each particular case.'" *Masonic Temple*, 199 S.C. 5, 18 S.E.2d at 590; *see also Wright v. Patrick*, 262 S.C. 434, 441, 205 S.E.2d 175, 179 (1974).

Furthermore, the overwhelming weight of authority in this country is that a Court of Equity may take cognizance of a Plaintiff's inequitable conduct when deciding whether to grant specific performance. *See, e.g., Lee v. Crane*, 120 So.2d 720, 703-04 (Ala. 1960) (Specific performance may be denied based on inequitable conduct); *Quinn v. Mar-Lees Seafood, LLC*, 871 N.E.2d 511, 525 (Mass. App. Ct. 2007) (Judge may refuse specific performance if there is a finding of inequitable conduct on the part of the Plaintiff); *Polonsky v. McIlwaine*, 324 A.2d 729, 731-32 (N.H. 1974) ("It is well established law that if plaintiff's conduct in obtaining a contract 'has

been unconscientious, inequitable or characterized by bad faith, a court of equity will refuse him the remedy of specific performance.”); *Kilarjian v. Vastola*, 877 A.2d 372, 376 (N.J. Super. Ct. Ch. Div. 2004) (“The party seeking specific performance must ‘stand in conscientious relation to his adversary; his conduct in the matter must have been fair, just and equitable, not sharp or aiming at unfair advantage.”); *Oliver v. Ball*, 136 A.3d 162, 166 (Pa. Super. Ct. 2016) (“Inequity or hardship may be a valid defense in an action for specific performance and such decree refused if in the exercise of a sound discretion it is determined that, under the facts, specific performance would be contrary to equity or justice.”).

C. Trial by Consent

In any event the Court expressly finds that the issue of unclean hands was tried by implied consent of the parties. “When issues not raised by the pleadings are tried by the express or implied consent of the parties they are to be treated in all respects as if they had been raised in the pleadings; and such amendment of pleadings as may be necessary to conform them to the evidence and raise such issues may be made upon motion of any party at any time, even after judgment.” *Woods v. Rabon*, 295 S.C. 343, 347, 368 S.E.2d 471, 473-74 (Ct. App. 1988). “If neither party timely objects to evidence raising issues not pleaded, each is deemed impliedly to consent to the trial of such issues.” *Id.*

Here it is plain that this issue was tried by consent. After a careful review of the undersigned’s notes from the trial it seems that the issue of unclean hands was first raised in the Defendant’s summation. While this is not evidence it clearly shows that Plaintiff was on notice that Defendant was seeking to interject the issue of unclean hands into the trial. Furthermore, it was Plaintiff himself who brought forward the issue in the evidentiary stage of the trial. During Plaintiff’s direct testimony he testified that Defendant had asked him not to participate in the

granite countertop business, at least separately, as it competed against FCT. Plaintiff testified on direct that part of the reason he created the other business was to create a job for Lisa Shelton to work at the granite countertop business while being paid by FCT. These are just two examples and again these were elicited by Plaintiff's counsel on direct examination. The Court found that both of these were breaches of Plaintiff's fiduciary duties. Clearly Plaintiff opened the door to the issue of whether he had unclean hands in regards to this case. "The door-opening doctrine applies in both criminal and civil cases." *Gibson v. Wright*, 403 S.C. 32, 43, 742 S.E.2d 49, 55 (Ct. App. 2013). Having put the issue of his own inequitable conduct in front of the Court the Plaintiff may not now complain that he has been prejudiced. "A litigant cannot complain of prejudice by reason of an issue he has placed before the court." *Frazier v. Badger*, 361 S.C. 94, 104, 603 S.E.2d 587, 592 (2004).

The Court finds that the issue of unclean hands, specifically whether Plaintiff's own inequitable conduct would bar specific performance, was tried with the implied consent of all the parties. Therefore, it was totally proper for the Court to have considered the defense of unclean hands and deny equitable relief on that ground.

D. Unclean Hands as it Relates to the Subject Matter

Plaintiff also asserts that even if the defense of unclean hands was properly before the Court that none of the actions complained of went to the subject matter of the contract. The Court finds that this point is not persuasive. It is indeed true that the unclean hands which are complained of must be related in some way to the subject matter of the lawsuit. *Anderson County v. Preston*, 420 S.C. 546, 578, 804 S.E.2d 282, 298-99 (Ct. App. 2017) *cert. granted* Mar. 29, 2018.

However, the Court believes that Plaintiff reads the rule in too restrictive of a manner. Plaintiff's logic runs something like this, the contract was between Plaintiff and Defendant and any

inequitable conduct was direct towards FCT (a third party at least for purposes of this order) and therefore any inequitable conduct was not directed towards the Defendant. This fails because Plaintiff fails to mention that he also owed fiduciary duties directly to the Defendant. As the Court explained in its order Plaintiff owed fiduciary duties not only to FCT but also to Defendant individually. *See* S.C. Code Ann. § 30-8-300, -420; *see also* § 420 South Carolina Reporters' Comments. Plaintiff cannot complain that he *only* breached his fiduciary duties to the corporation because by virtue of doing so he also breached them to Defendant. Simply because Defendant must bring these claims in a shareholders derivative action does not overcome the fact that such fiduciary duties were owed to Defendant directly. There was sufficient evidence that Plaintiff breached fiduciary duties between himself and Defendant. Therefore, the unclean hands that Defendant complained of were directed towards Defendant and not towards a third-party. *See Arnold v. City of Spartanburg*, 201 S.C. 523, 23 S.E.2d 735, 738 (1943).

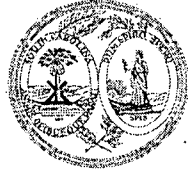
CONCLUSION

The Court finds that as a first matter that Plaintiff's inequitable conduct would bar the awarding of specific performance in this case regardless of whether Defendant pled unclean hands. Furthermore, the Court finds that the parties did indeed try the issue of unclean hands by implied consent and it was thus wholly appropriate for the Court to consider the defense. Finally, the Court finds that as Plaintiff did breach his fiduciary duties to the Defendant that he cannot complain that his inequitable conduct was wholly directed to a third-party. Therefore, the Court **GRANTS** Plaintiff's motion insofar as it relates to the scrivener's errors mentioned above and **DENIES** Plaintiff's motion in all other respects.

AND IT IS SO ORDERED!

August 6, 2019
Florence, South Carolina

/s/ Michael G. Nettles
Circuit Judge



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