THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson Jr., Circuit Court Judge

Case No. 2015-CP-10-3325 & Case No. 2017-CP-10-05055
Appellate Case No. 2018-001413

Phillip DeClemente, a/k/a Alec Rochford, Appellant,

v.

Assistive Technology Medical Equipment Services, LLC; Jeffrey Reed; Murrell G. Smith, Respondents,

And

Phillip DeClemente, a/k/a Phillip Goodpaster, Appellant,

v.

Assistive Technology Medical Equipment Services, LLC (ATMES); Jeffrey Reed; Murrell G. Smith, Respondents.

FINAL REPLY BRIEF OF APPELLANT

Cameron L. Marshall, Esquire
7 Gamecock Avenue, Ste. 707
Charleston, South Carolina 29407
Attorney for Appellant

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Respondents make five erroneous arguments in support of Judge Nicholson's two reversible orders. Three arguments pertain to the grant of summary judgment in Appellant's 2015 breach of contract suit, and two arguments pertain to Judge Nicholson's dismissal of Appellant's 2017 declaratory judgment suit. Each of Respondents' arguments has been disproven in Appellant's Initial Brief, and each is here further refuted, sequentially.

Erroneous Summary Judgment Order in 2015 Breach of Contract Lawsuit

In support of the Court's improper grant of Respondents' summary judgment motion in Appellant's 2015 breach of contract claim, which seeks damages for Respondents' admitted breach of their Promissory Note, Respondents first argue that the Court properly ruled that the statute of limitations began to accrue when Respondents served Mr. DeClemente with their illegal lawsuit, alleging fraudulent failure to disclose tax liability. This argument fails because Judge Nicholson applied the wrong law in his statute of limitations calculation. In a suit for breach of a contract which contains a maturity date, the maturity date controls the statute of limitations. *See, CoastalStates Bank v. Hanover Homes of South Carolina,* 408 S.C. 510, 517, 759 S.E.2d 152, 156 (Ct. App. 2014) (citing 38 Am. Jur. 2d *Guaranty* §96, at 1040 (2010), "the statute of limitations on an action on absolute guaranty, which is conditioned only on the debtor's default, begins to run when the obligation matures and the debtor defaults.").

The maturity date of Respondents' $265,000.00 Promissory Note for money Respondents owe Mr. DeClemente is March 1, 2013. (R. pp. 107-109). Judge Dennis properly ruled that Appellant's breach of contract suit was timely filed on June 11, 2015,

265 days prior to the expiration of the three-year statute of limitations. The ruling was based upon a matter of law, not fact. Judge Nicholson later reversed Judge Dennis's ruling by order dated July 2, 2018, which granted Respondents' summary judgment motion based upon statute of limitations. However, Judge Nicholson's summary judgment order makes no reference to the Promissory Note's maturity date, nor does the order acknowledge the existence of Judge Dennis's prior order resolving the statute of limitations issue. *Compare* (R. pp. 49-51) *with* (R. pp. 5-10). Incidentally and inconsequentially, as noted in Appellant's Initial Brief, even Judge Nicholson's improper application of the discovery rule fails to put Mr. DeClemente in violation of the statute of limitations. (Appellant's Initial Brief, pp. 9-12).

Second, Respondents argue that the circuit court's summary judgment order should be affirmed because DeClemente's arguments for reversal are wrong or are barred because they were not preserved below. Respondents make no showing of law or fact supporting the claim that DeClemente's arguments are wrong. Respondents' argument that Judge Nicholson's order should be affirmed because DeClemente did not argue maturity date in circuit court is meritless. A review of the transcript from the hearing on December 11, 2017 shows that counsel informed Judge Nicholson that the statute of limitations issue had previously been ruled upon by Judge Dennis and was the law of the case. (R. p. 637, lines 12-22). The record does not reflect why Respondents made *another* motion to end the case based upon statute of limitations when the issue had already been ruled upon by Judge Dennis. Judge Nicholson said during the summary judgment hearing that he was not aware of Judge Dennis's ruling and that he had not read the order or

transcript of the hearing, but Judge Nicholson said he would read Judge Dennis's order prior to issuing his summary judgment ruling. (R. p. 640, lines 18-20; p. 642, lines 16-19).

Respondents' argument that a prevailing party must "preserve" a correct favorable ruling is novel and without legal support. (Respondents' Initial Brief pp. 11-12). Judge Dennis's denial of Respondents' motion for dismissal, based upon the Promissory Note's maturity date, in conjunction with the transcript of the summary judgment hearing before Judge Nicholson, during which DeClemente's counsel referenced Judge Dennis's order, plainly prohibits Judge Nicholson from reversing Judge Dennis's order correctly applying the statute of limitations. (R. pp. 49-51; pp. 637-643).

Notwithstanding the unambiguous record and Judge Dennis's controlling order, Respondents alternatively argue that Judge Nicholson was allowed to go beyond the pleadings' four corners in considering their motion for summary judgment. While evidentiary considerations at the summary judgment stage are more broad than evidentiary considerations at the Rule 12(b) dismissal stage, Respondents' argument that Judge Nicholson considered "different issues and different facts" is incorrect. (Respondents' Initial Brief, p. 10). Both Judges considered the same issue: when did the statue of limitations expire? And both Judges considered the exact same evidence: the Promissory Note, which Respondents admit to having breached. (Respondents' Initial Brief, pp. 10-11). Judge Dennis applied the correct law to the statute of limitations issue, maturity date. Judge Nicholson overruled Judge Dennis and incorrectly applied the wrong law to the statute of limitations issue by the applying the discovery rule.

Aside from the considerable amount of jurisprudence discussing the issue, (Appellant's Initial Brief, pp. 7-9), the Promissory Note clearly mandates that DeClemente is permitted to bring suit for Respondents' default at any time up until three years after the Note's maturity date.

Section 6, provision C of the Promissory Note, titled "No Waiver By Note Holder," provides that DeClemente is not required to demand payment of the Note's balance in the event Respondents should begin to miss payments. (R. p. 108). This section provides that Appellant reserves the right to demand payment at any time during which Respondents are in appears. (R. p. 108). The language of this section is clear and unambiguous:

> Even if, at a time when ATMES, LLC is in default, Note Holder does not require ATMES, LLC to pay immediately in full as described above[1], Note Holder will still have the right to do so if ATMES, LLC is in default at a later time.

(R. p. 108). Furthermore, Respondents waived their rights of Presentment and Notice of Dishonor under Section 8 of the Promissory Note. (R. p. 109).

Section 8 of the Promissory Note, entitled "WAIVERS," states:

> ATMES, LLC and any other person who has obligations under this Promissory Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid. (R. p. 109).

[1] Section 5, provision B of the Promissory Note provides Appellant with the *option* of giving Respondent notice of default on an individual installment. (Promissory Note, § 6(B)).

Unambiguously, Section 8 further ensures DeClemente's contractual right to sue Respondents for their breach of the Promissory Note at any time within three years after the instrument's maturity date.

The Promissory Note establishes the parties' agreement that the contract's maturity date marks the date upon which of the statute of limitations began to accrue. The Promissory Note is clear and unambiguous. *E.g., Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("Basic contract law provides that when a contract is clear and unambiguous, the language alone determines the contract's force and effect.").

It is not the judiciary's role to review frivolous issues which are explicitly addressed and settled by a party's own contract. *See, Maybank v. BB&T Corp.*, 416 S.C. 541, 574, 787 S.E.2d 498, 515 (2016) ("[A] court's ultimate duty is confined to interpreting the contractual provisions agreed to by the parties.") and *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) ("The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.").

Third, Respondents argue that DeClemente's suit for breach of the Promissory Note is barred because it is a compulsory counter claim and should have been brought in response to Respondents' 2011 fraud suit against multiple defendants, in which Respondents alleged that the Defendants intentionally withheld tax liability information from Respondents. Respondents' third argument fails to recognize the fact that the breach of contract cause of action *was* brought as a counter claim in 2011. Judge Nicholson,

however, struck Appellant's breach of contract claim, along with his answer and all of his other counter claims, ***without*** prejudice. (R. p. 20). Respondents' compulsory counter claim argument also fails to address the controlling case law, which holds that a defendant held in default is not barred from bringing a separate, but related, lawsuit against the plaintiff in the default case. *South Carolina Property & Cas. Inc. Guar. Ass'n v. Wal-Mart Stores, Inc.,* 304 S.C. 210, 213, 403 S.E. 2d 625, 627 (1991).

Erroneous Dismissal of 2017 Declaratory Judgment Lawsuit

Respondents make two incorrect arguments in support of Judge Nicholson's erroneous dismissal of DeClemente's 2017 declaratory judgment action. First, Respondents argue that the declaratory judgment action is "the same thing" barred by the statute of limitations in DeClemente's second 2015 breach of contract cause of action, which DeClemente filed to recover damages caused by Respondents' breach of the Full and Final Release. (R. pp. 82-83; Respondents' Initial Brief, p. 14-15). That breach of contract cause of action was entirely unrelated to the 2015 breach of contract cause of action seeking the money Respondents owe DeClemente for their breach of the Promissory Note. Because the breach of Release cause of action was dismissed by Judge Dennis on statute of limitations grounds, Respondents incorrectly argue that res judicata bars Appellant's declaratory judgment action, which seeks the court's ruling on enforceability of the Release's Damages Satisfaction Clause. (Respondents' Initial Brief, p. 14-15). Because the Full and Final Release is not a maturity date contract, Appellant agrees that the statute of limitations bars Appellant's suit for breach of the Release. In that cause of action DeClemente sought to recover applicable damages from Respondents

for the damages they caused him by illegally suing him, in violation of the Full and Final Release. Respondents breached the Release when they served DeClemente with their frivolous suit on January 6, 2012. (R. p. 471). DeClemente sued Respondents for breach of the Full and Final Release on June 11, 2015, more than three years after Respondents breached the Release by suing DeClemente (R. pp. 92-124). This is why Appellant has not appealed Judge Dennis's dismissal of that breach of contract claim, which sought compensation for Respondents' breach of the Release.

Contrary to Respondents' argument, res judicata does not apply to Appellant's 2017 declaratory judgment action. DeClemente's 2015 breach of release lawsuit dismissed by Judge Dennis and not appealed, sought compensation for Respondents' breach of the Release's provision barring Respondents' from ever suing DeClemente for any alleged occurrence in any way pertaining to the parties' business partnership. (R. pp. 97-98; pp. 122-124). DeClemente's 2017 declaratory judgment action seeks to have the court determine which party must ***satisfy*** Judge Jefferson's improper damages award in the amount of $875,144. (R. p. 44; R. pp. 501-508). The erroneous damages judgment has been appealed. The issues addressed in the 2015 breach of Release cause of action and those addressed in the 2017 declaratory judgment lawsuit have only one thing in common: both lawsuits seek to enforce a different portion of the same Full and Final Release. But the 2017 declaratory judgment lawsuit, concerning satisfaction of Judge Jefferson's damages award, is factually and legally distinct from the 2015 breach of release cause of action.

Because the two causes of action are unrelated, Respondents are compelled to wrongly argue that ***any*** lawsuit brought by Mr. DeClemente which is based upon the Release is barred by res judicata. The 2015 suit was brought because Respondents breached the contract entitled "Full and Final Release" by suing Mr. DeClemente. The 2017 declaratory judgment suit was not brought because Respondents breached the Release, but was instead brought so that Appellant can avail himself of the protection the Release contract affords him against Judge Jefferson's damages order. The clear difference between the two suits is the reason why Respondents' are compelled to wrongly argue that *any* lawsuit brought by Mr. DeClemente which is based upon the Release is barred by res judicata. This is also why Respondents' brief fails to acknowledge the basis for the 2017 declaratory judgment action. Specifically, Respondents do not address, or even mention, the fact that DeClemente's declaratory judgment action is solely for the purpose of obtaining a ruling as to which party is responsible for *satisfying* the *damages award*. Any acknowledgement by Respondents that the declaratory judgment action seeks a ruling on the issue of which party must satisfy the damages award would constitute Respondents' concession that collateral estoppel and res judicata have no relevance in this case, and that the Court's improper dismissal of the declaratory judgment action requires reversal.

Respondents' second argument in support of affirming Judge Nicholson's erroneous dismissal of the declaratory judgment action is no stronger than the first. Respondents again argue res judicata, but here they argue that DeClemente is attempting to re-litigate the default judgment in the 2011 case. This argument is also meritless. Mr.

DeClemente has *separately* appealed the erroneous default judgment in the 2011 case. (Appellate Case No. 2018-000460). The 2017 declaratory judgment action is not an effort to "*re-litigate his liability in the 2011 case*," as Respondents falsely claim. (Respondents' Initial Brief, p. 14). The default judgment in the 2011 case, pending the appeal, is the law of the case, and holds Mr. DeClemente liable to Respondents for allegedly concealing tax liability incurred by the company Respondents purchased from DeClemente. But that default judgment does not answer the question as to which party is responsible for satisfying Judge Jefferson's erroneous damages award. The question of which party is required to satisfy the damages is answered only by examining the ***damages satisfaction provision*** set forth in the Full and Final Release. Satisfaction of the damages award is the issue raised in DeClemente's 2017 declaratory judgment action, not liability. It is patently incorrect for Respondents to argue that DeClemente is trying to re-litigate the 2011 default judgment when he has separately appealed the default judgment and the declaratory judgment action in no way challenges that judgment. The declaratory judgment action seeks only the court's ruling on whether the Release's damages satisfaction provision is enforceable, requiring Respondents to satisfy the *damages* judgment.

Res judicata is irrelevant to the new cause of action and issue presented in the declaratory judgment lawsuit. Respondents' assertion that the doctrine of res judicata bars the declaratory judgment suit appears to be based upon failure to differentiate between res judicata and collateral estoppel.

The South Carolina Court of Appeals, in *Beall v. Doe,* articulated the difference between these two defenses:

> The doctrines of res judicata and collateral estoppel are, of course, two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. ***Under the doctrine of collateral estoppel … the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit.***

281 S.C. 363, 368-369, 315 S.E.2d 186, 189 n. 1 (Ct. App. 1984) (quoting Stewart, *Res Judicata and Collateral Estoppel in South Carolina*, 28 S.C.L.Rev. 451, 452 (1977)) (emphasis added). As addressed by Appellant in his Initial Brief, South Carolina does not recognize default judgment as the actual and necessary litigation and determination of issues for purposes of collateral estoppel. (Appellant's Initial Brief, pp. 19-23). Since Respondents concede that collateral estoppel doesn't bar DeClemente's declaratory judgment action, they instead argue in favor of the equally erroneous application of res judicata. Ultimately, however, this distinction between the two doctrines is inconsequential, as neither defense is relevant to Appellant's declaratory judgment action.

Conclusion

For the foregoing reasons, the Court should reverse Judge Nicholson's order granting summary judgment in the 2015 breach of contract case and reverse Judge Nicholson's order of dismissal in the 2017 declaratory judgment case.

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Respectfully submitted,

May 28, 2019
Charleston, South Carolina

Cameron Marshall – S.C. Bar #64192
7 Gamecock Avenue, Suite 707
Charleston, SC, 29407
Telephone: (843) 795- 2298
cameron@attorneymarshall.com
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I, Cameron Marshall, counsel for the Appellant, hereby certify the Final Reply Brief of Appellant complies with the provisions of Rule 211 and Rule 267 of the South Carolina Appellate Court Rules.

May 28, 2019
Charleston, South Carolina

Cameron Marshall – S.C. Bar #64192
7 Gamecock Avenue, Suite 707
Charleston, SC, 29407
Telephone: (843) 795- 2298
cameron@attorneymarshall.com
Attorney for Appellant