

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR THE LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge
Circuit Court Case No. 2018-CP-32-1854

RECEIVED

DEC 02 2019

SC Court of Appeals

Appellate Case No.: 2019-001181

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

v.

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

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This matter is before the court on appeal by Appellant, Twin Bridge Logistics, LLC n/k/a Twin Bride Transport, LLC (herein after "Appellant") from the Order of the Honorable R. Keith Kelly entered on June 21, 2019 granting in part and denying in part the motion for partial summary judgment made by Respondent Fisher Tank Company (herein after "Respondent"). The Respondents motion was supported by the Affidavit of Paul Windhan, the Appellant's Responses to Respondent's Request for Admissions and excerpts from the Rule 30(b)(6) Deposition of the Appellant. Appellant submitted the Affidavit of Glenn LaMotte in Opposition to the Motion for Partial Summary Judgment. The motion was heard by the Court on February 29, 2019 at which time the parties presented written memoranda of law and made oral arguments to the Court.

Thereafter, the Court entered its order in which it found that the following facts were 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.

(S.J. Order pp 3-4)

Based on the foregoing the Court found that there were no genuine issues of fact and that the Respondent was entitled to judgment as a matter of law as follows:

- (1) Appellant's claims of negligent bailment and bailment for mutual benefit are barred by the applicable statute of limitations;
- (2) There was no agreement between the parties which provided for the payment of interest, therefore, Respondent was entitled to summary judgment on the Appellant's claims for interest based on the alleged contract; and
- (3) There was no written agreement between the parties or statute which provided for the recovery of attorney's fees and costs by the Appellant, therefore the Respondent was entitled to summary judgment as to the Appellant's claims for attorney's fees.

The Appellant did not make a motion to reconsider, alter or amend the Summary Judgment Order pursuant to SCRCF Rule 59(e) prior to filing its notice of appeal.

ARGUMENT

I. THE LOWER COURT DID NOT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT TO THE RESPONDENT.

Summary judgment should be granted where the pleadings, depositions, and admissions 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) SCRPC. The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Stevens & Wilkinson of S.C. Inc. v. City of Columbia, 409 S.C. 568, 762 S.E.2d 696 (S.C., 2014) To survive summary judgment a plaintiff cannot rest upon the mere allegations or denials of his pleading but rather must provide specific facts showing that there is a genuine issue for trial. S.C.R.C.P. Rule 56(e). While "the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party, it, is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine" McMaster v. Dewitt, M.D. & Carolina Psychiatric Servs., P.A., 411 S.C. 138, 143,767 S.E.2d 451, 454 (Ct. App., 2015).

In granting the Respondent's motion for partial summary judgment, the court found that based on the Appellant's Admissions to the Respondent's Request to Admit and the affidavits submitted by the parties in support and in opposition to the motion, there was no genuine issue as to the undisputed facts set forth herein above. Based on these undisputed facts the Respondent is entitled to judgment as a matter of law for the reasons set forth below. Accordingly, the Court did not err in granting the Respondent's motion for partial summary judgment.

II. THE LOWER COURT PROPERLY FOUND THAT THE APPELLANT'S CLAIMS OF NEGLIGENCE AND BAILMENT FOR MUTUAL BENEFIT WERE BARRED BY THE STATUTE OF LIMITATIONS AND THAT THE RESPONDENT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The Appellant's claims for negligence and bailment for mutual benefit arise out of the theft of Appellant's step deck trailer which was stolen from the Defendant's facility in Lexington on November 10, 2009. (S.J. Order p. 3; Plaintiff's Responses to Defendant's Request for Admissions, and Affidavit of Glenn LaMotte In Opposition to Motion Partial Summary Judgment). Appellant alleges that the Respondent breached its duty to exercise reasonable care to safeguard the trailer by moving the trailer out of the Respondent's locked building and fenced enclosure and storing it in an unsecured area. (Plaintiff's Complaint ¶¶ 35 and 42) Appellant further alleges that the theft of the trailer resulted from the breach of this duty by the Respondent (Compl. ¶¶ 36 and 43). In its responses to the Request for Admissions served by the Respondent, the Appellant admitted:

1. The thief of the its trailer from the Respondent's property occurred on or before November 10, 2009. (Plaintiff's Responses to Defendant's Request for Admissions #2)
2. That the Appellant knew that the trailer had been stolen as of November 10, 2009.(Plaintiff's Responses to Defendant's Request for Admissions #2)
3. The Appellant filed an incident report with the Lexington County Sheriff's Department on November 10, 2009, a copy of which was attached as an exhibit to the Request for Admissions. (Appellant's Responses to Defendant's Request for Admissions #1)

Likewise, in the Affidavit of Glenn LaMotte in Opposition to Respondent's Motion for Partial Summary Judgment, Mr. LaMotte acknowledged that he learned in November 2009 that the trailer was stolen after it was allegedly moved by Respondent from inside the locked enclosure and left outside the unlocked fence. (Affidavit of Glenn LaMotte in Opposition to Motion for Partial Summary Judgment ¶ 7).

Taking the facts in a light most favorable to the Appellant, the Appellant, by its own admissions, knew in November of 2009 of the alleged breach by the Respondent of its duty to safe guard the trailer by moving it from a locked building to an unsecured area and of the resulting theft of the trailer. However, the Appellant waited four years and seven months to commence its action.

A. Statute of Limitations:

S.C. Code § 15-3-20 (A) provides that "[c]ivil actions may only be commenced within the time periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute." S.C. Code Ann § 15-3-20 (A) (2005)

The Appellant's claims for negligence and for mutual bailment are subject to the statute of limitations set forth in S.C. Code § 15-3-530(4) (2005) which 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.

S.C. Code Ann § 15-3-530(4) (2005). "The fundamental test . . . in determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it. (internal citations omitted) Stated differently, [a] cause of action accrues at the moment when the Plaintiff has a legal right to sue on it." Grillo v. Speedrite Products, Inc., 340 S.C. 498, 502, 532

S.E. 2d 1 (Ct. App 2000) citing Brown v. Finger, 240 S.C. 102, 111, 124 S.E.2d 781, 785 (1962).

The legislature and courts have modified the strict rule expressed in Brown, by adopting and applying a discovery rule to various claims. "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, 411 S.C. at 143, 767 S.E.2d at 454.. The injured party must act with some promptness where the facts and circumstances of the injury place a reasonable person of common knowledge on notice that a claim against another person might exist." Dorman v. Campbell, 331 S.C. 179, 185, 500 S.E.2d 786, 789 (Ct. App 1998) quoting Snell v. Columbia Gun Exchange, Inc. 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). The fact that the injured party may not comprehend the full extent of its damages is immaterial. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996).

The Appellant had actual notice that its trailer was stolen from the Respondent's location no later than November 10 2009 at which time the Appellant also knew of the alleged breach of Respondent's duty to safeguard the trailer. Accordingly, the application of the discovery rule would make no difference in the present action. The Appellant had actual notice of on November 10, 2009 of the alleged breach of duty and of the resulting loss of its property. The Court correctly found that the statute of limitation began to run on that November 10, 2009 and that the Appellant had three (3) years from that date to commence this action.

The Appellant argues that the statute of limitations did not start to run until it recovered the trailer in 2012 and determined the extent of the damage to the trailer. As noted above the knowledge, or lack thereof, of the full extent of the party's damages, is immaterial to

determining when the cause of action arose. Dean, 468 S.E.2d at 645. The relevant date as noted in Brown v. Finger, 240 S.C. 102, 111, 124 S.E.2d 781, 785 (1962) is the date on which the Appellant had the right to assert a claim against the Respondent. If the Appellant's argument is adopted and the trailer had not been found, the statute may have never run despite the Appellant having actual notice of the alleged breach of duty by the Respondent and of the resulting loss of the trailer. Accordingly, the Court correctly found that the statute of limitation began to run on November 10, 2009 and that the Appellant had three (3) years from that date to commence this action.

B. Appellant's Claim of Negligence is barred by the three (3) year statute of limitations:

The elements of a cause of action for negligence are (1) a duty owed by the Respondent to the Appellant, (2) the Respondent breached the duty through a negligent act or omission; and (3) resulting in damages proximately caused by the breach of duty. Newton v. South Carolina Public Railways Com'n, 312 S.C. 107, 439 S.E.2d 285 (Ct. App., 1993) "In a negligence action, the statute of limitations accrues at the time of the negligence or when the facts and circumstances would put a person of common knowledge on notice that there might be a claim against another party." True v. Monteith 327 S.C. 116, 119, 489 S.E. 2d 615, 616 (1997) citing Kreutner v. David 320 S.C. 283, 465 S.E. 2d 88 (1995).

As note above the Appellant knew in November of 2009 of the alleged breach by the Respondent of its duty to safe guard the trailer by moving it from a lock building to an unsecured area and of the resulting theft of the trailer. The alleged negligence and the date that the Appellant had notice of its claim against respondent for the loss of the trailer both occurred on or before November 10, 2009. Accordingly, the Court correctly held that the three (3) year statute

of limitations on the Appellant's claim of negligence began to run on the November 10, 2009 and that the claim was barred with the Appellant waited until July 2014 to commence its action.

C. Appellant's Claim for Breach of Bailment for Mutual Benefit is barred by the three (3) year statute of limitations.

Bailment is the delivery of personal property for a particular purpose, upon an expressed or implied agreement that the property will be returned to the bailor, or otherwise dealt with according to the bailor's directions. Home Indemnity Company v. Harleysville Mutual Insurance Company, 252 S.C. 452, 166 S.E.2d 819 (1969). The Bailee is not an insurer of the Bailor's property left in the possession of the Bailee but is liable only for damage which is the proximate result of his negligence. 8 CJS Bailments § 57 (2017). The bailment contract imposes on the Bailee a duty of care, the breach of which constitutes a tort. Dixon v. Besco Engineering Inc 320 SC 174, 463 S.E.2d 636 (Ct App 1995). "In a bailment case the theft itself constitutes injury or loss to the bailor and there is no act of a third party intervening between any negligence of the bailee and the injury or loss." Fortner v. Carnes, 258 S.C. 455, 189 S.E.2d 24 (1972).

In the Affidavit submitted in opposition to the respondent's motion for partial summary judgment, Appellant alleges that it left its step deck trailer in the possession of the Respondent on November 6, 2009 so that it could be loaded over the weekend for a delivery on Monday morning. On Monday the Appellant was notified that the trailer was no longer in the possession of the Respondent and had been stolen. The Appellant states that it believes that the trailer was moved by the Respondent from a locked building in a secure area and left outside the locked fence. (Affidavit of Glenn LaMotte in Opposition to Motion for Partial Summary Judgment ¶ 7). The Appellant was aware in November 2009 that the trailer had been stolen after having been allegedly been moved by the Respondent to an area outside of the locked fence. The Appellant

therefore, was on notice that it had a claim against the Respondent for breaching its duty to exercise reasonable care in safeguarding the trailer.

The Appellant was notified on November 9, 2009, that the Respondent was not in possession of the trailer and therefore could not return it to the Appellant as anticipated by the agreement between the parties when the Appellant delivered the trailer on November 6, 2009. According, the alleged breach of the bailment agreement occurred when the Respondent as Bailor failed to return the trailer to the Appellant as Bailee as agreed on Monday November 9, 2009.

The Appellant's claims against the respondent arising out to the bailment accrued in November 2009 and the Appellant had three (3) years to commence an action against the Respondent to recover for said breach. The Appellant failed to commence its action within the three year period as required by S.C. Code §§ 15-3-20 (A) and 15-3-530. Accordingly, the Court did not err in determining that the Respondent was entitled to judgment as a matter of law and in granting its motion for partial summary judgment on the Appellant's claim of bailment for mutual benefit.

III. LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO THE APPELLANT'S CLAIMS FOR INTEREST

A. Appellant's Claim for Interest Based on Late Payment by Respondent.

The Respondent also moved for partial summary judgment on the Appellant's claims for interest. In its complaint the Appellant attempted to allege a cause of action for conversion based on the failure of the Respondent to pay for services rendered in a timely manner. The Appellant claimed that as a result of the alleged conversion of the payments the Appellant was entitled to

recover interest on the payments. (Plaintiff's Complaint ¶¶ 25-31). In its answer and amended answer the Respondent not only denied the allegations in paragraphs 25 through 31 of the complaint, but the Respondent also asserted that the Appellant's claim was not an action for conversion but was an action to collect a debt. (Respondent's Amended Answer ¶¶ 13 and 32 - 36). In the Appellant's 30(b)(6) deposition the Appellant claimed that it was seeking to recover interest on the amounts allegedly owed by the Respondent at a rate of eighteen (18%) percent per annum. (See also Respondent's First Set of Request for Admissions #18 including Exhibit B attached thereto and Appellant's Response)

"[T]here can be no conversion where there is a mere obligation to pay a debt. Thus, where there is merely the relationship of debtor and creditor, an action based on conversion of the funds representing the debt is improper. 18 Am.Jur.2d Conversion § 10 p. 164 (1965)" Owens v. Andrews Bank & Tr. Co., 265 S.C. 490, 497, 220 S.E.2d 116, 119 (1975). Prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties. Vaughn Development, Inc. v. Westvaco Development Corporation, 642 S.E.2d 757, 372 S.C. 576 (Ct. App., 2007). As a general rule, prejudgment interest is not recoverable on an unliquidated claim in the absence of agreement or statute. Builders Transport, Inc. v. South Carolina Property and Cas. Ins. Guar. Ass'n, 415 S.E.2d 419, 307 S.C. 398 (Ct. App., 1992).

The Appellant failed to present any affidavits of other documentation at the hearing to substantiate the amount of funds allegedly held by the Respondent as late payment for the Appellant's services, the duration the Respondent allegedly held the payments beyond the due date for the payment or that the Appellant made a demand for the payments. Appellant's claim

for interest as damages for conversion based on the alleged delays by the Respondent are not liquidated. Likewise, there was no agreement between the parties which specified the date on which the payments were due or provided for the payment on interest. (Affidavit of Paul Windham in Support of Motion for Partial Summary Judgment).

Since there is no agreement Appellant's claim for interest is subject to SC Code §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." SC Code Ann. §34-31-20(A) (2020). "[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 (Ct. 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. 642 S.E.2d 757, 642 S.E.2d 757 (S.C. App 2007). "it is well settled in this state that the award of prejudgment interest is a function of the trial court and has never been held to be an issue of fact requiring submission in a jury trial." Bickerstaff v. Prevost, 670 S.E.2d 660, 380 S.C. 521 (Ct. App. 2009) *citing* Smith-Hunter Const. Co. v. Hopson, 365 S.C. 125, 616 S.E.2e 419 (2005); and Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993).

The Appellant has failed to present any affidavits or other evidence in response to the Respondent's summary judgment motion to establish the existence of a claim for liquidated

amount, of the existence of an account stated or of an agreement to by the Respondent to pay interest. Accordingly, the Court correctly held that the Appellant was not entitled to recover interest on its contractual claims and properly entered summary judgment against the Appellant.

B. Appellant's Argument That it Is Entitled to Interest Arising out of Conversion of the Trailer.

In its brief the Appellant claims that it is entitled to interest as a measure of damages for the conversion of its trailer. The Plaintiff's complaint does not assert a claim for conversion of the trailer or for interest as measure of damages for the loss of the trailer. Likewise, the issue of interest for the conversion of the trailer was not presented at the hearing on the Respondent's motion for summary judgment and was not ruled upon by the Court in its order. The Appellant did not make a motion, pursuant to Rule 59(e) SCRPC, to reconsider, alter or amend the Order Granting the Respondent's Motion for Partial Summary Judgment to give the lower Court an opportunity to consider and rule upon this measure of damages. The Appellant's claim for conversion of the trailer and for interest as a measure of damage is presented for the first time in the Appellant's Brief. It is well settled that a party may not raise an issue for the first time on appeal. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (S.C., 2011).

Had the Appellant plead a cause of action for conversion of the trailer the claim would have been barred by the statute of limitation on the same grounds and for the same reasons as set forth herein above. "Conversion has been defined in our case law as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the exclusion of the owner's rights. Ray v. Pilgrim Health & Life Ins. Co., 206 S.C. 344, 34 S.E.2d 218 (1945). Conversion may arise by some illegal use or misuse, or by illegal detention of another's chattel. Castell v. Stephenson Finance Co., 244 S.C. 45, 135 S.E.2d 311 (1964)".

Owens, 220 S.E.2d 119. If the Appellant had a claim against the Respondent for conversion arising out of the theft of the trailer, which the Respondent disputes, the cause of action arose on November 10, 2009 when the bailment agreement terminated and the Respondent was unable to return the trailer to the Appellant. Appellant had actual notice of the circumstances and of its rights concerning the trailer on later than November 10, 2009. Accordingly, the statute of limitations began to run on that date and the Respondent had until November 10, 2012 to commence this action. However, the Appellant did not commence its case until July 2, 2014. The Appellant failed to commence the action to pursue its claim within the statute of limitations and the claim is therefore barred. Accordingly, even had the Appellant asserted the claim and made the argument in the lower court the result would be the same.

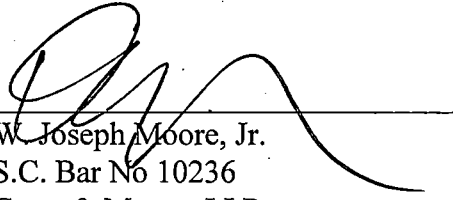
CONCLUSION

The lower court in granting the Respondent's motion for partial summary judgment correctly held that the Appellant failed to commence its claims for negligence and mutual bailment within the applicable statute of limitation and that the Respondent was entitled to judgment as a matter of law.

Likewise, the lower court correctly found that the Appellant was not entitled to interest on the amounts claimed because the Appellant's claims were not liquidated or on a stated account and that there was no agreement between the parties for the payment of interest.

Accordingly, the order of the court granting summary judgment as to these issues should be affirmed.

Respectfully submitted,



December 2, 2019

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STATE OF SOUTH CAROLINA
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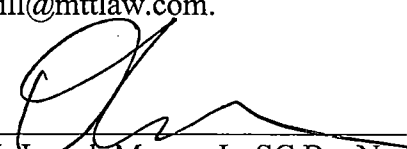
Certificate of Service

The undersigned, attorney for Respondent, hereby certifies, that on this 2nd day of December, 2019, I served the Initial Brief for the Respondent and Respondent's Designation of Matter to be Included in the Record on Appeal on counsel of record in this matter, by depositing a copy of same in the United States Mail, with sufficient first class postage affixed thereto, and addressed as follows:

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together with a copy by electronic mail to counsel at will@mttlaw.com.

December 2, 2019


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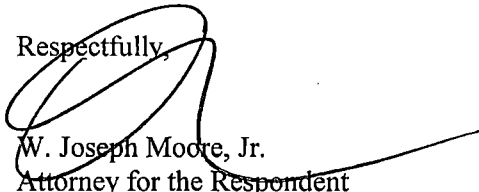
Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of the following in the above referenced matter:

1. Initial Brief of Respondent
2. Respondent's Designation of Matter to Be Included in the record on Appeal
3. Certificate of Service.

Please file the originals and return a clocked copy to me in the envelope provided.

Respectfully,


W. Joseph Moore, Jr.
Attorney for the Respondent

cc: William H. Edwards, Esquire