

STATE OF SOUTH CAROLINA,)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON)

CASE NO. 2018-CP-10-00785

CRAIG CHAPPELL, on behalf of himself and)
Others similarly situated,)

Plaintiff(s),)

v.)

**ORDER GRANTING SUMMARY JUDGMENT IN
FAVOR OF DEFENDANTS LADLES FRANCHISING,
INC., LADLESSOUPS, LLC, SUE ALLEN & TRACY
ALLEN**

Ladles Soup-James Island LLC; Ladlessoups,)
LLC; Ladles Soup At Cane Bay, LLC; Ladles)
Soups at Citadel Mall LLP; Ladles Soups)
Calhoun LLC; Ladles Soups Cane Bay LLC;)
Ladles Soups Coosaw LLC; Ladles Soups)
Downtown Charleston, LLC; Ladlessoups)
Fresh Fields LLC; Ladles Soups @ Freshfields)
Village, LLC; Ladlessoups Mainstreet, LLC;)
Ladles Soups Moncks Corner LLC; Ladles)
Franchise Development, LLC; Ladles Franchising,)
Inc.; Ladles Fort Mill, LLC; Ladles Knightsville)
LLC; Ladles West Ashley; Teri Owens; Sue Allen,)
Tracy Allen, Steve Traeger, Erik Dyke, Julie Dyke)
Stan Sutton, Carol Sutton, Jack Dalter, Kellie)
Henderson; Jane Doe 1-25 (Unknown Operating)
Company and Management Company Owners);)
John Doe 25-40 (Management Personnel).)

Defendants.)

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SC Court of Appeals

Date of Hearing: January 6, 2020
Plaintiff's counsel: Benjamin LeClercq, Esq. & David Ashley, Esq.
Defendant's counsel: Kerry W. Koon, Esq. & M. Evan Lacke, Esq.
Court reporter: Joyce C. Rueger

STATEMENT OF THE CASE & BACKGROUND

The Plaintiff's allegations are that Defendants improperly retained credit card tips rather than passing them on to him and other employees.

This action was filed on February 14, 2018, and styled as a class action, however, no class has ever been certified and Plaintiff's belated Motion for Class Certification was denied by this Court's Order dated January 7, 2020.

A Motion to Intervene or in the Alternative to Amend the Complaint by successive proposed amendments was denied by Order dated January 7, 2020.

The causes of action pled by the Plaintiff are:

1. Violation of the South Carolina Wage Act, Section 41-10-10, et seq.;
2. Breach of Contract; and
3. Conversion.

The matter came before me on the above named Defendants' Motion for Summary Judgment on January 6, 2020, on which date counsel for all parties appeared.

The pleadings relevant to the motion are:

- 1.) The above named Defendant's Motion for Summary Judgment filed August 26, 2019, supported by deposition excerpts, the Affidavit of Sue Allen dated August 16, 2019, the Affidavit of Tracy Allen dated November 13, 2018, and the Affidavit of Sue Allen dated November 13, 2018;

2.) The moving Defendants' Supplemental Memorandum with certain additional deposition exhibits filed October 25, 2019;

3.) Plaintiff's Memorandum in Opposition to the moving Defendant's Motion for Summary Judgment filed December 31, 2019, attaching deposition exhibits, other pleadings and an affidavit from Lanie Charpia.

4.) The moving Defendants' Response to the Plaintiff's Memorandum in Opposition dated January 3, 2020, supported by additional deposition excerpts relevant to Plaintiff's opposition memorandum and exhibits.

Ladles Franchising, Inc. is a South Carolina Corporation which operates as a traditional franchisor and has contracted by written Franchise Agreements with the various restaurant entities named in the Complaint. The Franchise Agreement was entered into the record by both Plaintiff and moving Defendants (eg. Exhibit "A" to the Affidavit of Sue Allen of August 16, 2019). The Franchise Agreement is typical in that it provides for royalties to be paid by the franchisees, requires adherence to standards of restaurant appearance, hours of operation, menu, safety standards and procedures and other matters. The Franchise Agreement is totally devoid of any terms regarding the franchisees' employee compensation or tipping practices.

Ladlessoups, LLC is a dormant limited liability company whose sole member is Sue Allen and which formerly operated the West Ashley Ladles located on Bees Ferry Road. It was the initial Ladles restaurant. The West Ashley location was last operated by Ladlessoups, LLC in September 2017 (Affidavit of Sue Allen of August 16, 2019, page 2). Corey Paul purchased the West Ashley restaurant from Ladlessoups, LLC on September 1, 2017, and has since operated independently as CT Foods, LLC (Depo. of Corey Paul, page 95, lines 6-12, page 97, lines 16-25).

Sue Allen is the CEO of Ladles Franchising, Inc.

Tracy Allen is Sue Allen's husband and is the President of Ladles Franchising, Inc. Tracy Allen has never been an agent or officer of any of the Ladles Soups' franchisees named in the lawsuit (Affidavit of Sue Allen of August 16, 2019, page 2).

MOTION FOR SUMMARY JUDGMENT

The Defendants move for summary judgment on the ground that Plaintiff was never their employee, never had any other contractual relationship with any of them and they never came into possession of the credit card tips Plaintiff claims.

Plaintiff alleges that he was employed by the James Island location, owned by Ladles Soup-James Island, LLC which is located at 1175-A Folly Road, Charleston, South Carolina 29412 (Complaint, paragraph 4a and paragraph 14). Ladles Franchising, Inc. has never employed the Plaintiff (Sue Allen affidavit of August 16, 2019, page 2). The Plaintiff never received a paycheck from any Ladles related entity other than Ladles Soup- James Island, LLC (Chappell deposition, page 81, lines 16-21).

Other than his employer/ employee relationship with Ladles Soup-James Island, LLC Plaintiff has neither alleged, nor provided evidence of, any other contractual relationship with any Defendant.

Ladles Franchising, Inc. has never employed waiters, servers, cooks, cashiers, receptionists or other employees who might receive tips (Affidavit of Sue Allen of August 16, 2009, page 2).

It is elementary that a Plaintiff may not sue a business under Section 41-10-10, et seq. (Wage Statute) for which he has never worked. Section 41-10-80(C) governing civil actions for unpaid wages provides:

“(C) In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action in an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney’s fees as the Court may allow...”

It is obvious from this subsection that an employee may only recover for unpaid wages from his own employer, as there can be no unpaid wages due from a person or entity for whom one has provided no labor or services.

While there is no definition of “employee” in the statutory scheme, there is one for “employer” found in Section 41-10-10:

“(1) ‘Employer’ means every person, firm, partnership, association, corporation, receiver, or other officer of a court of this state, the state or any political subdivision thereof and any agent or officer of the above classes employing any person in this state.”

In *Lewis v. InfoSafe Corp.*, 320 S.C. 188, 463 S.E. 2nd 641 (Ct. App. 1995), the Court of Appeals interpreted the wage statute to impose liability on individual officers and agents who “knowingly permit **their corporation**” to violate the act. *Id.* at 463 S.E. 2nd 644 (Emphasis added). It is obvious that only officers and agents of the actual employer entity may be held liable under Section 40-10-10, et seq. None of the moving Defendants fit within the purview of officers and agents of “their corporation” as contemplated by *Dumas*. Any claims of officer and agent liability under the statute as interpreted by *Dumas* are necessarily limited to officers and agents of Ladles Soup -James Island, LLC, Plaintiff’s employer.

Teri Owens, a member of Ladles Soup-James Island, LLC, testified that she and her husband are the owners of Ladles Soup -James Island, LLC and that neither Suzie (Sue) Allen or Tracy Allen own any interest in Ladles Soup-James Island, LLC, and neither is a manager or agent of Ladles Soup-James Island, LLC (Owens’ deposition, page 69, lines 1-17). No evidence to the contrary has been offered.

Plaintiff has argued that paragraph 9 of the Franchise Agreement establishing a marketing fund to which the franchisees contribute, somehow establishes Ladles Franchising, Inc. as a general agent of the franchisees, sufficient to impose liability under Section 41-10-10 et seq. This argument is at best attenuated and far-fetched, especially in light of paragraph 5a of the Franchise Agreement which provides in pertinent part:

a. Independent Contractors.

It is understood and agreed that this Agreement does not create a fiduciary relationship between you and us, that we and you are and shall be independent contractors, and that **nothing in this agreement is intended to make either you or us a general or special agent, legal representative, joint venturor, partner or employee of the other for any purpose or to grant either you or us the right to direct or supervise the daily affairs of the other...** (Emphasis added).

Teri Owens confirmed that Ladles-Soup, James Island, LLC operates as an independent contractor separate and apart from Ladles Franchising, Inc. (Owens deposition, page 69, line 24 – page 70, line 15).

Neither may Plaintiff sue these Defendants for breach of contract since he has no contractual relationship with any of them.

As to Plaintiff's Third Cause of Action for Conversion, there is no evidence in the record that any of the moving Defendants ever came into possession of credit card tips that Plaintiff claims. Conversion is the illegal use, misuse or detention of another's chattel. *American Credit v. Nationwide Mutual*, 378 S.C. 623, 663 S.E. 2nd 492, 495 (2008). Without evidence of possession by these Defendants, conversion by them is impossible.

It was suggested that Ladles Franchising, Inc. may have charged its percentage royalty fee on gross receipts including credit card tips. The evidence demonstrates otherwise. Sue Allen testified in her deposition that although each store may have a different royalty percentage, the

percentage is calculated on "...their sales of their product, less any discounts that they wouldn't have received money for, less taxes, and less tips." (Sue Allen deposition, page 66, line 23 – page 67, line 3).

Teri Owens, the immediate employer, testified that Ladles-James Island, LLC does not pay the franchisor a percentage of tips (Owens' deposition page 33, lines 1-20).

Corey Paul in his disposition testified that Ladles Franchising, Inc. does not collect royalties based upon credit card tips (Corey Paul deposition, page 93, line 19 – page 94, line 8).

Thus, the record contains no evidence to support the allegation of conversion.

Absent an employer/employee relationship or other contractual relationship, Plaintiff has no standing to bring an action against these Defendants.

"Generally, a party must be a real party in interest to the litigation to have standing." *Sloan Friends of the Hunley*, 369 S.C. 20, 28, 630 S.E. 2nd 474 (2006). A real party in interest is "a party with a real material or substantial interest in the outcome of the litigation" *Id.* at 369 S.C. 28.

In *Bank of America, N.A. v. Draper*, 405 S.C. 214, 746 S.E. 2nd 478, the Court of Appeals, quoting for S.C. Jur. Action Section 23 (1991) stated:

"Rule 17(a) of the South Carolina Rules of Civil Procedure requires that every action be prosecuted 'in the name of the real party in interest' ...the South Carolina Rule with respect to the real party in interest requirement is patterned after the comparable Federal Rule, which has been regarded as embodying the concept that an action shall be prosecuted 'in the name of the party who, by the substantive law, has the right sought to be enforced.'" *Id.* at 405 S.C. 214, 220.

and;

"It is the ownership of the right sought to be enforced which qualifies one as a real party in interest, rather than absolute ownership of specific property." *Id.*

Plaintiff here owns no rights which may be enforced against the moving Defendants and therefore he has no standing to sue them.

In addition to Rule 17(a) considerations, the Court of Appeals has held that in order for the Plaintiff to have standing there must be a justiciable case or controversy and, if not, the Court lacks subject matter jurisdiction. See Lennon v. South Carolina Coastal Council, 330 S.C. 414, 498 S.E. 2nd 906 (Ct. App. 1998), wherein the Court stated:

“Another point of departure is that standing acts as an element of the constitutional requirement that there be a ‘case or controversy’; when thus applied, it acts as a limitation on the subject matter jurisdiction of the federal courts. In this context, objections to standing, unlike 17(a) objections, cannot be waived and may be raised by a federal court.” *sua sponte*” Id. at 330 S.C. 417 (Citation omitted)

and

“South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached.” Id. at 330 S.C. 417-418

Plaintiff has argued that standing should be conferred because he has suffered an injury in that if customers knew that credit card tips were being retained by the restaurant they would be less likely to tip. There is nothing in the record to demonstrate this. There are no customer affidavits, depositions, or other evidence to support such a theory. The Plaintiff's argument is based upon mere speculation and like the Plaintiff's agency argument, is not supported by the record.

In Gibson v. Epting, 426 S.C. 346, 827 S.E. 2nd 178 (2019), the Court gave a very comprehensive statement of the necessity to cite actual evidence in order to avoid summary judgment, stating:

“The summary judgment standard governing Gibson’s claims requires her to produce only a “scintilla” of evidence to avoid judgment as a matter of law, but a scintilla is a perceptible amount. There still must be a verifiable spark, not something conjured by shadows. (Citations omitted) “Scintilla” means, according to 56 C.J. 863, ‘a gleam,’ ‘a glimmer,’ ‘a spark,’ ‘the least particle,’ ‘the smallest trace.’ (Citation omitted) (“[A] scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror.”); (Citation omitted) (“A spark....a minute particle, an atom.”) (Citation omitted). (“When opposing a summary judgment motion, the nonmoving party must do more than ‘simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.’” (Citation omitted)); *Grimsey v. S.C. Law Enf’t Div.*, 415 S.C. 33, 42, 780 S.E. 2nd 897, 901 (2015) (affirming trial court’s grant of summary judgment and noting court of appeals improperly “cherry picked” an isolated portion of the record, placed it out of context, and “elevated what is, at best, a metaphysical doubt into a genuine issue of material fact”); *Main v. Corley*, 281 S.C. 525, 527, 316 S.E. 2nd 406, 407 (1984) (“The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine.”); *Beale v. Hardy*, 769 F. 2d 213, 214 (4th Cir. 1985) (explaining that party opposing summary judgment ‘cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another’). *Id.* at 426 S.C. 352-353.

Here, Plaintiff has failed to demonstrate any genuine issue for trial. Plaintiff’s arguments are based upon mere speculation or metaphysical doubts, such that the moving Defendants are entitled to summary judgment as a matter of law.

Much has been argued about a supposed group wide policy of retaining credit cards tips, however the evidence shows that compensation of employees and tipping procedures are exclusively a matter for the individual franchisees, without control by these Defendants. In Plaintiff’s own deposition he acknowledged that he knows of no other practice regarding tips other than that of his own James Island location (Chappell deposition, page 45, lines 1-13, page 46, line 19 – page 47, line 4). He further stated that his knowledge of any group wide policy

would be based solely on speculation (Chappell deposition page 77, lines 6-12). He acknowledged that he knows nothing about any policy promulgated by Sue Allen or Tracy Allen (Chappell deposition, page 78, lines 5-23) and that anything he knew about the ownership of other locations was purely speculation (Chappell deposition, page 86, lines 9-21).

Sue Allen unequivocally states that Ladles Franchising, Inc. has no policy concerning the handling of tips by individual franchisees (Sue Allen Affidavit of August 16, 2019, page 2, Sue Allen deposition, page 85, lines 8-25).

Corey Paul (Paul deposition, page 98, lines 1-15), Terri Owens (Owens deposition, page 70, lines 6 - page 71, line 7) and Julie Dyke (Dyke deposition, page 51, lines 7-19) have all verified that there is no such policy imposed by the franchisor.

Further, I have previously granted summary judgment in favor of Ladles Franchising Mt. Pleasant, in part because it has a practice of paying out credit cards tips to the hourly employees on a monthly basis (Dyke deposition, page 24, line 23 – page 25, line 13). This fact alone negates the Plaintiff's claim of a group wide policy of retaining credit card tips.

Other legal principles guiding the Court's grant of summary judgment in this case are found in *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E. 2nd 319, 321 – "...summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law" and "in determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party" *Id.*

As to the Plaintiff's contention that summary judgment is premature because of discovery issues, I note that, the Plaintiff did not serve discovery until May 24, 2019, over fifteen (15) months after the filing of suit. At the motion hearing, Plaintiff stated that the only deficiency he

was claiming as to the moving Defendants was their objection to his interrogatory number 11 requesting the amounts paid by the franchisees to the franchisor over a certain period of time. Although I ordered that this interrogatory be answered, the issue could have no bearing upon this motion. In Guinan v. Tenet Health Systems of Hilton Head, Inc., 383 S.C. 48, 54-55, 677 S.E. 2nd 32 (Ct. App. 2009), the Court of Appeals stated:

“In Dawkins v. Fields, 354 S.C. 58, 71, 580 S.E. 2nd 433, 439-40 (2003) our Supreme Court rejected Dawkins ‘argument’ that summary judgment was premature because they did not have a full and fair opportunity for discovery.”
 “A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact.” Id. at 354 S.C. 71, 580 S.E. 2nd 439-40.

The Plaintiff has advanced no argument that further discovery could possibly lead to additional evidence relevant to this motion, as the critical facts are un-contradicted.

Based upon the failure of the Plaintiff to cite any facts in the record creating a genuine issue for trial and after a careful review of the Motion for Summary Judgment and supporting documentation as well as Plaintiff’s Opposition and supporting documentation, and viewing the record in the light most favorable to the non-moving party, the motion for summary judgment of Ladles Franchising, Inc., Ladlessoups, LLC, Sue Allen and Tracy Allen, is hereby **GRANTED**.

AND IT IS SO ORDERED!

Honorable Bentley D. Price
 Court of Common Pleas
 Ninth Judicial Circuit

Charleston, South Carolina
 _____, 2020.



Charleston Common Pleas

Case Caption: Craig Chappell VS Ladles Soups James Island LLC , defendant, et al
Case Number: 2018CP1000785
Type: Order/Summary Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766