THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Frank R. Addy, Jr. , Circuit Court Judge

Appellate Case No. 2017-002434

RECEIVED
JUL 18 2018
SC Court of Appeals

Laurens Cycle Sales, Inc. d/b/a Honda of Laurens and Cooper Motor Sales, LLC ..... Respondent,

vs.

Estate of Ruth Tumblin ..... Appellant.

FINAL BRIEF OF APPELLANT

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
S.C. Bar No. 06188
rauchwise@gmail.com
(864) 229-5010

Attorney for Appellant

INDEX

Page:

Table of Authorities ii

Statement of Questions on Appeal 1

Statement of the Case

Procedural History 2

Factual History 3

Argument:

Question I Did the trial court err in finding that Laurens Cycle Sales, Inc. was entitled to recoupment of its alleged losses when the loses did not occur pursuant to the contract being litigated? 9

Question II Did the trial court err in finding Laurens Cycle Sales was entitled to recoupment of any alleged losses when Laurens Cycle Sales, Inc. waived any losses that occurred under the June 23, 2008 contract when it entered into a new contract on July 2, 2010 as modified on August 23, 2017 11

Conclusion 14

Certificate of Counsel 15

Table of Authorities

Cases: **Page:**

C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Commission, 296 S.C. 373, 373 S.E.2d 584 (1988) 11

Edwards v. Rouse, 290 S.C. 449, 351 S.E.2d 174 (Ct. App. 1986) 12

Evans' Executors v. Yongue, 42 S.C.L. (8 Rich.) 113 (1854) 9

Gilliland & Gaffney v. S. Ry. Co., 85 S.C. 26, 67 S.E. 20 (1910) 13

Hyload, Inc. v. Pre-Engineered Prod., Inc., 308 S.C. 277, 417 S.E.2d 622 (Ct. App. 1992) . . 12

Lee v. Schweiker, 739 F.2d 870 (3d Cir. 1984) 10

Mullins Hosp. v. Squires, 233 S.C. 186, , 104 S.E.2d 161 (1958), overruled on other grounds by *McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) 10

Tuloka Affiliates, Inc. v. Moore, 275 S.C. 199, 268 S.E.2d 293 (1980) 10

STATEMENT OF QUESTIONS PRESENTED

Question I: Did the trial court err in finding that Laurens Cycle Sales, Inc. was entitled to recoupment of its alleged losses when the losses did not occur pursuant to the contract being litigated?

Question II: Did the trial court err in finding Laurens Cycle Sales was entitled to recoupment of any alleged losses when Laurens Cycle Sales, Inc. waived any losses that occurred under the June 23, 2008 contract when it entered into a new contract on July 2, 2010 as modified on August 23, 2010?

STATEMENT OF THE CASE

Procedural History

This action originally arose on February 20, 2012, when Kathy L. Freemen, as personal representative of the Estate of Jerry Dale Freeman filed suit against Laurens Cycle Sales, Inc., d/b/a Honda of Laurens, Cooper Motor Sales, LLC and Ruth F. Tumblin for the failure of Ruth Tumblin, as an alleged employee of Honda of Laurens, to obtain insurance on the motorcycle he had purchased. Mr. Freeman was killed in an motorcycle-automobile accident on December 3, 2009.

Laurens Cycle Sales, d/b/a Honda of Laurens and Cooper Motor Sale, LLC on August 10, 2012, in response to the Amended Complaint, filed an Answer to the Amended Complaint and a Cross-Complaint against Ruth Tumblin seeking indemnification for any loss that they might incur, including attorney's fees, for the failure of Ruth Tumblin to properly purchase insurance for Jerry Dale Freeman.

On August 28, 2012, Ruth Tumblin filed her Answer to the Cross-Complaint asserting a Counterclaim against Laurens Cycle Sales, Inc. and Lynn W. Cooper, III for breach of a contract for an agreement entered into on August 23, 2010 by which Laurens Cycle Sales, Inc. and Lynn W. Cooper, III agreed to pay Ruth Tumblin $110,173.50 for Ms. Tumblin ceasing to be an employee of Laurens Cycle Sales and is satisfaction of a prior agreement between the parties by which Laurens Cycle Sales and Cooper had agreed to pay Ms. Tumblin for the business known as Honda of Laurens, LLC.

The suit by the Freeman estate was subsequently settled with Laurens Cycle Sales paying $5,750 to settle the case. In the defense of the case, Laurens Cycle Sales incurred attorney's fees

in the amount of $13,650. Rec. on App. at 20, l 16 to 21, l 15. The reasonableness of these payments is not in dispute in this appeal.

After further amending the pleadings to reflect the present caption, this matter was heard before the Honorable Frank R. Addy on September 28 and October 3, 2017. Judge Addy awarded judgment in favor of Laurens Cycle Sales, Inc. He ruled under the theory of recoupment that the claims of damages by Laurens Cycle Sales for breach of the August 23, 2008 contract, which would have been barred under the statute of limitations, justified a recoupment against the Estate of Ruth Tumblin[1] that exceeds the amount of her claim against Laurens Cycle Sales.

A timely Motion to Alter or Amend the Judgement was filed. This Motion was denied without formal order on October 27, 2017. The Estate of Ruth Tumblin filed the Notice of Appeal on November 20, 2017

Factual History

The only facts relevant to this appeal involve the contract between Laurens Cycle Sales, Inc. and Ruth Tumblin. The Estate of Ruth Tumblin does not dispute the amount of damages in the Counterclaim for the payment of the settlement of the original law suit and the reasonableness of the attorney's fees.

Ruth Tumblin had operated for a number of years a business in Laurens, SC known as Laurens Cycle Sales, LLC. In early 2008, Lynn W. Cooper, III became aware that Ms. Tumblin needed cash to help her continue the business. While he had know of Ms. Tumblin for a number of years, he did not formally meet her until early 2008. Rec. on App. at 8, l 24 to 9, l 12. He

---

[1] Ruth Tumblin died during the pendency of this action and her Estate was substituted as the proper party.

made an initial loan to Ms. Tumblin on February 29, 2008, in the initial amount of $50,000. This loan was made without examining any of the financial records of Laurens Cycle Sales. He also had not discussed the business at any length with Ms. Tumblin. Rec. on App. at 11, l 24 to 12, l 10.

After the initial loan, Mr. Cooper became aware that the business was out of trust as to the inventory and additional funds would be needed to continue to operate the business. Honda was owed about $179,000 to keep the business in trust with Honda. Rec. on App. at 38, ll 4-6. On June 23, 2008 Mr. Cooper, through HOL, LLC, entered into an agreement with Ms. Tumblin to purchase an interest in the business for $300,000. Mr. Cooper did not request a balance sheet from Ms. Tumblin prior to making this purchase. A partner in HOL, LLC was David Bagwell who did know Ms. Tumblin and had some experience with the company. Aside from discussions with Mr. Bagwell, Mr. Cooper conducted no other due diligence. Rec. on App. at 36, 14-24.

Under this agreement, Mr. Cooper was to pay $300,000 with $179,000 being used to pay Honda to bring the floor plan current. Various other debts would also be paid. A total of $97,000 would be infused into Laurens Cycle Sales. The agreement further provided that Ms. Tumblin would continue to be employed with Laurens Cycle Sales as General Manager for a period of three years at a salary of $66,000. Rec. on App. at 126(Pl. Exhibit 2). This agreement provided that Laurens Cycle Sales would issue an additional 150 shares of stock so that Ruth Tumblin would own 100 shares and HOL, LLC would own 150 shares. Mr. Cooper, through his LLC, thus became a majority stock holder in Laurens Cycle Sales along with his partner, David Bagwell.

On April 24, 2009 David Bagwell agreed to purchase from Ms. Tumblin her 100 shares

of stock in Laurens Cycle Sales in exchange for $346,118.58 owed to Mr. Bagwell by Ms. Tumblin for remodeling of property owned by Ms. Tumblin. Rec. on App. at 135(Exhibit 7). At this point, Ms. Tumblin was no longer a stockholder of Laurens Cycle Sales. Mr. Bagwell subsequently sold his 100 shares of stock to Mr. Cooper for $340,000 in 2010. Rec. on App. at 73, ll 4 to 14. Mr. Cooper admitted purchasing the stock from Mr. Bagwell but only remembered the amount being in excess of $100,000. Rec. on App. at 58, ll 4-11.

In 2008 when Mr. Cooper, through his LLC, purchased a majority interest in the company it was operating at a location outside of Laurens at the intersection of Highway 221 and Interstate 26. Prior to August of 2010, Mr. Cooper relocated the business to Highway 76 between Clinton and Laurens. Rec. on App. at 50, l 22 to 51, l 2. This move was contemplated in the June 23, 2008 agreement as it provided:

> 6. HOL and Tumblin agree to vote their stock in LCS in order to enter into a lease of the current facility located at 109 Honeybee Dr.; Laurens, SC 29360 fo the sum of Six Thousand Five Hundred ($6,500.00) Dollars per month until such time as a new facility is built on US Highway 76 between Laurens and Clinton, SC. Rec. on App. at 127 (Pl. Exh. 2)

Prior to the expiration of the employment contract with Ms. Tumblin, Mr. Cooper on July 2, 2010 negotiated what could be described as a severance agreement with Ms. Tumblin. The agreement was for $136,000.00, roughly two years salary. Rec. on App. at 46, ll 16-21. At that point Mr. Cooper had been a majority stockholder in the corporation for over two years. He had complete access to the financial books and was fully aware of the day to day operations. Rec. on App. at 45, l 23 to 46, l 15. Eric Rogers, the manager he had hired, reported that the inventory for the year 2009 had some problems, and he reported them to Mr. Cooper. He testified the inventory for the year 2010 was within normal error rates. Rec. on App. at 112, l 5-

24.

The terms of the July 2nd 2010 agreement between HOL, LLC and Ms. Tumblin provided:

> 4. Each party represents to the other that he or she hereby releases, acquits, and forever discharges the other from any and all claims, actions, causes of action, demands, rights, damages, costs, expenses and compensation whatsoever, in law or equity, which I now have or which may hereafter accrue to me on account of, in relation to, or in any way growing out of any act or omission by the other party to the date hereof, specifically including but not limited to the contract between the parties dated effectively June 23, 2008 and the sale of any personal property or fixtures from Tumblin to HOL. Rec. on App. at 141 (Def. Exh. 1)

At the time of the signing of the July 2, 2010 agreement, Mr. Cooper was fully aware of inventory problems for 2009, missing property and having to relocate the business to Highway 76. In fact, the July 2, 2010 agreement acknowledged that there had been problems with the other agreement and the new agreement was to replace any prior agreements.

Subsequently, the parties modified the July 2, 2010 agreement and reduced the amount Ms. Tumblin received to $110,000. This agreement was on August 23, 2010. While the copy of this agreement is missing, both parties agreed it did exist and the terms were interest at the same rate as previously given and a payment of $1,800 per month. This amount was paid on a regular basis through January of 2012. He subsequently made a $2,500 payment to Ruth Tumblin in August of 2012. Rec. on App. at 47, l 8 to 48, l 3; 49, l 14 to 50, l 19.

At the trial of this case, Mr. Cooper relied upon the law of recoupment to attempt to offset any alleged losses he had from the businesses he had purchased from Ms. Tumblin. The contract upon which Ms. Tumblin was suing was not the sale of the business to HOL, LLC, but the agreement of July 2, 2010 as modified in August of 2010, terminating her services as an employee Laurens Cycle Sales, Inc. If Mr. Cooper has a claim for recoupment, it must arise from

any equitable offsets in this contract and not the agreement to sell the business on June 23, 2008. In August of 2010, Ms. Tumblin had sold her remaining interest in the business to Mr. Bagwell the previous year.

Mr. Cooper was not able to specify any loss that occurred after the August 23, 2010 agreement.. He was specifically asked if he had a list of missing parts to which he responded:

> Q. (By Mr. Wise) What documents have you got to show that you found missing parts after you agreed to pay her $110,000.00 dollars on July, on August 23, 2010?
> A. (By Mr. Cooper) We have notebooks full of things that show that.
> Q. You have what sir?
> A. We have notebooks, like a documentation that we did.
> Q. Do you have them with you here today in the courtroom?
> A. No. Rec. on App. at 52, ll 1 - 9.

Mr. Cooper further admitted that other than the expenses involved in the Freeman case, he had no other documentation of any loss that occurred after August 23, 2010. Rec. on App. at 61, l 2 to 62, l 1.

The testimony as to parts being missing in 2010 is completely contrary to the testimony of Eric Rogers, his general manager. Mr. Rogers testified that the 2010 audit was within "acceptable errors." Rec. on App. at 112, ll 3 - 24.

Mr. Cooper further acknowledged that when he signed the July 2, 2010 agreement with Ms. Tumblin, he knew of the inventory problems and bad debts. Rec. on App. at 60, ll 6 - 17. This fact is also reflected in the written agreement of July 2, 2010. The agreement provided:

> WHEREAS a number of circumstances underlying the original agreement have changed and the parties desire to enter into a new agreement settling all rights, responsibilities and differences between them, including but not limited to items purchased by HOL from Tumblin and removed from the original store location at 109 Honeybee Dr.; Laurens, SC 29360. Rec. on App. at 141. (Def. Exh. 1)

The July 2, 2010 agreement and the subsequent August 23, 2010 agreement modified the prior agreement and acknowledged there were problems with the old agreement. Mr. Cooper acknowledged that when he signed the new agreement he was aware of the problems with the old agreement. The July 2, 2010 agreement did in fact release both parties from any causes of action under the June 23, 2008 agreement.

Laurens Cycle Sales, Inc. asserted at trial a defense of recoupment. He contended that his losses from the contract he entered into with Ms. Tumblin exceeded the amount he owed her. Under this defense, the relevant contract would be the July 2, 2010 contract as modified on August 23, 2010. Laurens Cycle Sales, Inc. failed to establish any loss under the July 2, 2010 contract as modified on August 23, 2010.

ARGUMENT

Question I

Did the trial court err in finding that Laurens Cycle Sales, Inc. was entitled to recoupment of its alleged losses when the loses did not occur pursuant to the contract being litigated?

Since 1854 the courts of our state have recognized that a defense of recoupment is a proper defense in a breach of contract action. As this Court said in *Evans' Executors v. Yongue*, 42 S.C.L. (8 Rich.) 113, 115 (1854):

> The better opinion, therefore, is that a failure of consideration is not a matter of defence within the provisions of the discount law; but analogous to it in character, and is embraced within that species of defence called *recoupment*, (Barb. on Law of Set-off, 26,) the purpose of which is to reduce the plaintiff's damages for the reason, that he himself has not complied with the cross obligations arising under the same contract. It is an equitable defence, superseding the necessity of a cross-action by the defendant, whose plea is, that to the extent of the diminution in value, by reason of the breach of warranty, the contract was void *ab initio*, and by a parity of reason, where there is a total failure of consideration, it may be shown in bar of the action. Such a defence grows out of the contract itself, which is the cause of action, and is not barred by the statute of limitations. It would be manifestly unjust to permit the vendor to enforce a subsisting contract, and deny to the purchaser, from lapse of time, a defence involving the validity of it at its inception.

The defense of recoupment is grounded in equity in an attempt to seek justice between the parties. As noted above the damages which justify the recoupment must arise out of the contract that is the subject of the litigation and not a prior contract between the parties. In this case the alleged damages did not arise out of the contract that is the subject of the litigation and does not do equity to the parties.

As this Court has said "Recoupment, unlike counterclaim, may result only in the

reduction of the plaintiff's claim, and not in affirmative money judgment for any excess over that claim. Unlike set-off, it must grow out of the identical transaction that gave rise to the plaintiff's cause of action." *Mullins Hosp. v. Squires*, 233 S.C. 186, 197, 104 S.E.2d 161, 166 (1958), overruled on other grounds by *McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). This principle is also recognized in *Tuloka Affiliates, Inc. v. Moore*, 275 S.C. 199, 202, 268 S.E.2d 293, 295 (1980) when this Court said "The duties imposed on the lender arise out of the loan transaction itself and effectively become a part of the contract." The third circuit has said, "The fact that the same two parties are involved, and that a similar subject matter gave rise to both claims, however, does not mean that the two arose from the 'same transaction.'" *Lee v. Schweiker*, 739 F.2d 870, 875 (3d Cir. 1984).

As the parties modified the June 23, 2008 agreement, the only claim for recoupment would be from any alleged failure of consideration of the July 2, 2010 contract as modified on August 23, 2010. The July 2, 2010 contract released both parties from any claims under the June 23, 2008 contract. In addition, with full knowledge of the alleged breach of the June 23, 2008 contract by Ms. Tumblin, Laurens Cycle Sales paid Ms. Tumblin pursuant to the August 23, 2010 modified contract through January of 2012. The reason for stopping the payments then was due to the issue involving the insurance dispute. The record is devoid of any complaint about the July 2, 2010 contract as modified on August 23, 2010 Ms. Tumblin filed suit to collect the monies due to her.

The trial court erred as a matter of law in finding that Laurens Cycle Sales was entitled to use the alleged losses before July 2, 2010 as a recoupment against Ms. Tumblin. When this fact was brought to the attention of the trial court, the trial court did not address the issue but simply

denied the motion. The order issued by the trial court also does not discuss or explain how the alleged recoupment arose out of the July 2, 2010 contract as modified on August 23, 2010. Mr. Cooper, the owner of Laurens Cycle Sales, was unable to identify the specific loss other than the monies involved in the insurance dispute. Rec. on App. at 52, ll 1 - 9.

To permit Laurens Cycle Sales to apply a recoupment to the suit by Ms. Tumblin does not promote equity, but instead awards deception. As noted earlier, Laurens Cycle Sales agreed to pay Ms. Tumblin $110,000 to have her terminate her employment. This would be paid over a number of years. In the July 2, 2010 contract both parties released each other from the obligations under the June 23, 2008 contract. But now Laurens Cycle Sales wants to argue that the release was not valid because it has the right of recoupment against Ms. Tumblin for obligations under the old contract. Laurens Cycle Sales appears to have had its corporate fingers crossed when it signed the July 2, 2010 agreement.

The question here is not whether the agreement of July 2, 2010 as modified on August 23, 2010 is a good agreement or a bad agreement for Laurens Cycle Sales. The lower Court should have applied the contract as written. As this Court has said "Our duty is limited to the interpretation of the contract made by the parties themselves '... regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.'" *C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Commission*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988).

Question II

Did the trial court err in finding Laurens Cycle Sales was entitled to recoupment of any alleged loses when Laurens Cycle Sales, Inc. waived any losses that occurred under the

June 23, 2008 contract when it entered into a new contract on July 2, 2010 as modified on August 23, 2010?

The attorney for the Estate of Ruth Tumblin argued at the end of the trial that Laurens Cycle Sales waived any argument they might have had to claim any recoupment for any loss or claim that occurred before July 2, 2010. Rec. on App. at 117, ll 3-20. In his post trial motion, he pointed out to the trial court that the order did not consider his argument that Laurens Cycle Sales has waived any claim prior to July 2, 2010 when he signed a new contract with Ms. Tumblin. The lower court simply denied the motion without any discussion as to this issue.

This Court has said "Waiver is an intentional relinquishment of a known right." *Edwards v. Rouse*, 290 S.C. 449, 451, 351 S.E.2d 174, 176 (Ct. App. 1986). Everything Laurens Cycle Sales needed to know about any problems with the June 23, 2008 contract it knew on July 2, 2010. By signing the new contract which expressly modified the old contract, Laurens Cycle Sales waived any claim for damages that occurred before July 2, 2010.

In addition, from the date Laurens Cycle Sales signed the July 2, 2010 contract as modified on August 23, 2010, they paid Ms. Tumblin the required monthly payment without objecting to any of the payments nor asserting a claim for any damages. "[T] he general rule [is] that acts inconsistent with the continued assertion of a right may constitute waiver." *Hyload, Inc. v. Pre-Engineered Prod., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992). The payment of its obligations without complaint for 17 months without objection or complaint. Such acts are totally inconsistent with the assertion of a claim for recoupment and is as a matter of law a waiver of any such claims. The lower court erred in failing to find such a waiver by both the signing of a new contract and by its conduct in continuing to make payments to Mr.

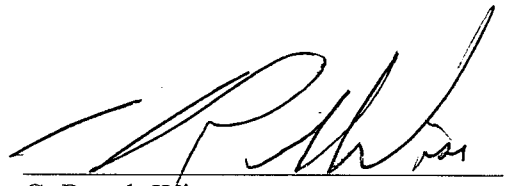
Tumblin. *See also Gilliland & Gaffney v. S. Ry. Co.*, 85 S.C. 26, 67 S.E. 20, 23 (1910)("[T] he party to be charged waives the forfeiture if with knowledge of the facts he requires the claimant to do some act, or incur some trouble or expense, inconsistent with the position that the contract had become inoperative in consequence of the breach of its conditions.")

This matter was tried non-jury. The evidence established the claim of the Estate of Ruth Tumblin to be $108,944.44, less the claim of Laurens Cycle Sales for expenses and costs in the amount of $19,400.00. Ms. Tumblin has not disputed the amount of this claim. Therefore, this matter should be reversed with instructions to enter judgment in favor of the Estate of Ruth Tumblin in the amount of $89,544.44.

CONCLUSION

As Laurens Cycle Sales failed to establish any loss from the contract of July 2, 2010 as modified on August 23, 2010, this Court should reverse the decision of the lower court finding that Laurens Cycle Sales was entitled to recoupment. Furthermore, the lower court erred in failing to find that Laurens Cycle Sales waived any claim to recoupment when it signed the contract of July 2, 2010 as modified on August 23, 2010. This Court should enter judgment for the Estate of Ruth Tumblin in the amount of $89,544.44.

July 16, 2018



C. Rauch Wise
305 Main St.
Greenwood, SC 29649
(864) 229-5010

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LAURENS COUNTY
Court of Common Pleas
Frank R. Addy, Jr. , Circuit Court Judge

Appellate Case No. 2017-002434

Laurens Cycle Sales, Inc. D/b/a Honda of Laurens and Cooper Motor Sales, LLC . . Respondent,

vs.

Estate of Ruth Tumblin . . . . . Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

July 16th, 2018

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Attorney for Appellant