THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No.: 2018-CP-21—02958
Appellate Case No.: 2019-001370

Walt Parker, ... Appellant,

v.

John C. Curl, ... Respondent.

v.

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This action was commenced by a Summons and Complaint with an application for a temporary restraining order and a temporary injunction on November 8, 2018. The Temporary Restraining Order was granted on November 9 and, following a hearing, the preliminary injunction was entered on November 19, 2018.

The issues were joined between Messrs. Parker and Curl with an Answer and the Third-Party Summons filed December 13, 2018, and an Answer and Counterclaim from the Plaintiff Parker on January 18, 2019. The Defendant Curl filed a Motion for Summary Judgment on February 1, 2019, denied by Order of February 22, 2019.

On March 21 and 22, 2019 a trial was held before the Honorable Michael Nettles for the non-jury purposes created by the pleadings:

I. A declaratory judgment as to the rights of the parties arising under their contractual arrangements;

II. To determine and declare the ownership of Florence Carpet & Tile, Inc.; and

III. To determine whether the Defendant should be ordered to transfer shares of stock in Florence Carpet & Tile, Inc. to the Plaintiff Parker.

Following the court's oral rulings of March 22, 2019, it entered Findings of Facts and Conclusions of Law dated April 25, 2019, to which the Plaintiff Parker requested reconsideration. The reconsideration was substantially denied on August 6, 2019 and the court Amended its Findings and of Fact and Conclusions of Law.

STANDARD OF REVIEW

In an action in equity, tried by the judge alone, without a reference, on appeal the Appellate Court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Crowder v. Crowder,* 246 S.C. 299, 143 S.E. (2d) 580 (1965); *Townes Assocs., Ltd. v. Greenville*, 266 S.C. 81, 86, 221 S.E. 2d 773, 775 (1976).

FACTS

On April 30, 2007, John Curl ("Curl") and Walt Parker ("Parker") purchased 100% of the outstanding stock in Florence Carpet & Tile, Inc. ("FCT") from Charles Carnell ("Carnell") for a purchase price of $1,080,000. (R. pp. 423–435). This purchase occurred four months into the Corporation's fiscal/tax reporting year (the calendar year 2007). At that time, Curl and Parker agreed that Curl owned 53% of FCT and Parker owned 47%. This ownership split was memorialized in the minutes of a shareholders meeting for FCT on April 30, 2007. (R. p. 436).

Based upon the financial strength of Curl, Charles Carnell owner-financed $540,000 of the Purchase Price and Branch Bank and Trust ("BB&T) lent FCT the remaining $540,000. The

purchase was bankrolled based upon the strength of Curl's financial statements and the new owners planned for Parker to run the Corporation's daily operations. Both Curl and Parker personally guaranteed the loans. (R. p. 204, lines 6-24).

To help incentivize Parker's management of the Corporation, Curl communicated with Porter Stewart, Esquire, before the closing with Carnell and requested that he prepare corporate minutes of the first meeting of the Shareholders of FCT which would contain an incentive proposal (the "Agreement"). In those minutes, Curl set forth a performance incentive proposal to transfer 3% of his shares to Parker if certain conditions were met:

> At this meeting, in consideration of their mutual promises and the sums of Five ($5.00) Dollars in hand paid as acknowledged, the shareholders agreed that John C. Curl as fifty three (53%) per cent shareholder and Walter A. Parker as forty seven (47%) per cent shareholder, would agree for a transfer of share ownership from Curl to Parker within the period of the first five years of one per cent of share ownership from Curl to Parker for each complete fiscal year of operation of said corporation at a profit as determined by the accountant for the corporation, up to a total of 3 percentage points, the effect of which would be to allow for an ownership of fifty (50%) per cent to Curl and fifty (50%) per cent to Parker if the corporation operated at such profit for a minimum of three of the first five years.
>
> (R. p. 436)

Because Curl unilaterally provided the Agreement terms to attorney Porter Stewart and because Stewart acted solely as a scrivener of the Minutes, Curl was the drafter of the Agreement. (Finding of Fact 8). (R. p. 27).

The terms of the Agreement were found ambiguous in two respects: whether the financial results for FCT for the partial fiscal year 2007 are to be included in the incentive formula and whether Parker was entitled to receive a one percent interest ownership transfer from Curl for each single profitable year regardless of the total number of profitable years or was

the transfer of shares by Curl contingent on a minimum total of three years profitability for FCT. (Finding of Fact 10). (R. pp. 27-28). The FCT tax returns and Profit/Loss Statements show an operational profit for the years 2007, 2010, and 2011. (R. pp. 406-422).

Both Parker and Curl were directors of FCT; both Parker and Curl were officers of FCT; Parker served as President while Curl served as Secretary. As the daily operations manager, Parker oversaw the finances of FCT and directed the preparation of the Company's tax returns. Parker and Curl each signed FCT's tax returns for those years when they were prepared by FCT's accountant. FCT's 2016 and following tax returns have not yet been prepared. In May of 2015 Curl informed Parker and his attorney that no additional shares were owed to Parker, alleging FCT was not profitable during the first five years of operation. (Finding of Fact 15). (R. p. 28).

In September 2011, Parker caused two companies to be created: Florence Custom Countertops, Inc. and Floor Covering Specialties, Inc. (the "Granite Business" and the "Installation Business", respectively). Although Curl was not ready for FCT to get into the granite countertop business, Parker thought it was important *to FCT* that it not be subject to competitive pressures from a current employee who announced his plans to leave the company to start his own granite works, that it was a meaningful way to offer incentives for another valuable employee to maintain her affiliation with FCT, and to respond to market demand. The result of those considerations *for the benefit of FCT* was that Parker assisted in the creation of the Granite Business:

> One of the drawing cards for Florence Carpet and Tile is ... from a service standpoint we can provide just about any service from a -- remodel type situation. So, if somebody wants a kitchen floor, they don't just come to us for that and then

have to go to somebody else and get a countertop and then go to somebody else to get something else. You know, they can go to one place ... has a good reputation in the community, they can go there and feel confident that they can just deal with one person. And so it often happens that somebody comes in looking for just a countertop, then we wind doing a backsplash or they'll say ... I want to put carpet in the bedroom so go ahead and measure for that or any number of things. So it is kind of a snowballing thing that takes place. ... And so this was a manner that was definitely going to improve quality of what we were doing at Florence Carpet and Tile and it was going to improve profitability. So we always hoped that the countertop business would be of some benefit, but that was not the overall driving force. My commitment has and – initially was and has been and still is to – loyalty is with Florence Carpet and Tile.

(R. p. 174, line 7-p. 175, line 18).

The short-lived Installation Business came about because of business that FCT had been turning away – installation work.

... (I)f you don't purchase the materials at Florence Carpet and Tile, we won't install it for you because you get into liability issues. You get into all kind of potential problems. If there is a problem, whose fault is it, is it the material or is it the installation. And so for anybody to have work done at Florence Carpet and Tile, they have to purchase the material there. And so, there was a lot of that was taking place. And so, there was an opportunity to – that I saw ... There was a lot of request to install materials that we did not sell or to do work that we did not do. ...we formed an installation company and then I would take on work that Florence Carpet and Tile would typically not engage in. ...we figured out how to do that work and there was a demand for that work Florence Carpet and Tile took over that work. So, Palmetto Floor Covering quit doing that kind of work and Florence Carpet and Tile started doing that kind of work. ...It was not competing with nor undermining the business. As a matter of fact, it was one of the things that I think that help keep us where we are today... .

(R. p. 176, line 3-p. 178, line 17).

FCT received the profits resulting from the Granite Business and the Installation Business. (R. p. 230, line 5-p. 236, line 7; p. 275, line 23-p. 276, line 24; p. 279, lines 2-24).

The defense offered by Curl neither disputed nor offered any evidence contradicting the expressed motivations of Parker or the testimony of Barker and Parker that all the Granite Business and Installation Business profits went to Florence Carpet & Tile, Inc. The only evidentiary mention of either business came in an off-hand, non-responsive answer to cross-examination when Curl stated: "Those business were a huge concern of mine that they were conflict of interest being operated out of Florence Carpet and Tile and not to the benefit of Florence Carpet and Tile." (R. p. 323, lines 11-14). In spite of the undisputed testimony that the sub-tenant businesses were created to be a benefit to FCT and operated so that their profits went to FCT, the court below found that their existence and operation must have been a breach of Walt Parker's fiduciary duty. (R. p. 19).

Parker alleges that Curl Properties, LLC is controlled and managed by John Curl. As FCT's Landlord, it has failed and refused to keep the roof in decent repair, breaching his fiduciary duty to Parker. Curl has alleged that Parker mismanaged FCT, breaching his fiduciary duty to Curl. These disputes were not to be resolved at the non-jury trial. (SR. pp. 682-688; R. p. 138).

ARGUMENTS

I. WALT PARKER OWNS HALF OF FLORENCE CARPET & TILE, INC.

The Agreement defines the events triggering Walt Parker's ownership of half the company: three profitable years "for each complete fiscal year of operation of [FCT] at a profit as determined by the accountant." The last full fiscal year prior to the Parker/Curl ownership

ended December 31, 2006. The first five (5) fiscal years were also calendar years ending on December 31, 2007 – 11. The language is clear and unambiguous; it is not disputed that 2007, 2010, and 2011 were profitable years.

Curl argued below that 2007 is not to be counted among the first calendar years, rather that 2008 is the first. The Agreement does not explicitly state that, so any such determination must arise from ambiguity. The court below properly held, based on undisputed facts, that since Curl unilaterally provided the agreement terms to Attorney Porter Stewart, solely a scrivener, Curl was the drafter of the Agreement. As a result any ambiguity should properly have been resolved against Curl and equal ownership declared by the court. *Ecclesiastes Prod. Ministries v. Outparcel Assoc., LLC*, 374, S.C. 483, 499-500, 649 S.E.2d 494, 502 (Ct. App. 2007) (*quoting Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981).

Parker brought the action below to have his rights declared and to the extent the court failed to explicitly declare him the 50% owner, it was in error. (Complaint ¶9). (R. p. 54).

II. THE TRIAL COURT USED A BACK DOOR TO IGNORE THE PLEADING REQUIREMENTS OF SOUTH CAROLINA LAW.

The Trial Court issued Findings of Fact and Conclusions of Law April 26, 2019. The Findings of Fact were entirely supportive of the Plaintiff's claim that he was entitled to 50% ownership, that there was no adequate remedy of law, but denied to grant the equitable relief of specific performance solely because it found Parker to have "unclean hands."

Appellant filed a motion for reconsideration not only taking issue with certain findings of fact made by the Trial Court but also arguing that the Doctrine of Unclean Hands had never been pled by the Respondent and that the events giving rise to the court's *sua sponte* finding of

unclean hands were unrelated to the ambiguities in the contract, the plain language of the contract, or the facts necessary to resolving the differing interpretations of the contract. (R. pp. 126-131).

Apparently recognizing the validity of the pleading and association arguments made by Appellant, the court reworked its order to deemphasize the unclean hands and to assert that its ruling was based upon general ideas of fairness. The court's view of the relative attractiveness of the conduct of the parties is not a valid legal reason to deprive a litigant of legal rights acquired by contract. No one can be deprived of his property, except by his own consent, or by proceeding in accordance with the law. *See*, *Koester v. Citizens' Pub Co.*, 154 S.C. 54, 151 S.E. 452 (1930). "What the state cannot do, and what the federal government cannot do, a Court of Chancery ought to hesitate to do." 151 S.E. at 468. Walt Parker's contractual rights to own one-half of FCT should not be deprived him based on conduct occurring afterward.

III. THIS COURT SHOULD FIND THAT WALT PARKER'S CONDUCT WAS NOT INEQUITABLE AND/OR THAT IT DID NOT DEPRIVE HIM OF HIS CONTRACTED OWNERSHIP.

The Trial Court decided that Parker's hands were unclean or that he breached his fiduciary duty and duty of loyalty to FCT, *sic*, and Curl in three respects: the creation and operation of a floor-covering business and a granite business (Conclusion of Law ¶12, (a)-(e) (R. p. 32), not filing 2015 and beyond tax returns and providing documentation of the filing to Synovus Bank (*ibid.* (f)-(g)) (R. pp. 32-33), and paying employees' salaries while being late in the payment of rent and other vendors (*ibid.* (h). (R. p. 33). The Granite Business and the Installation Business were not competitive to FCT because they were each a business that Curl,

one of its two owners, expressly stated he did not want to engage in. Walt Parker, who had exclusive operational control over the business did not believe that the granite or installation work was competitive to FCT but complementary to its business. The profits from the companies went to FCT and Respondent offered no evidence to the contrary.

As to the tax returns, no evidence was offered that any taxes were due or owing for the years 2015 and beyond, not that there was any requirement of a return to be filed, nor any damage to the company arising from Mike Barker's, the general manager, lassitude with respect to the tax returns. Neither is there any evidence that Synovus Bank made a written request for copies of the non-existent tax returns. It is beyond dispute that all tax returns were properly prepared and filed during the first five years of these parties' ownership of FCT, and beyond.

Mike Barker explained the priority in which invoices were paid: vendors first, employees second, rent third, and owners beyond. There is literally no evidence that the rent, the vendors, the employees, or the owners were not being paid in full throughout the first five full fiscal years following the FCT ownership by these parties. Any contention that it is disloyal for Parker to serve not only as a vendor to FCT while an owner of half of FCT must be viewed in the light of Curl's expectation of and proclivity to loyalty: Curl is the landlord to and customer of FCT while also an owner in it. (R. p. 371, lines 1-5).

This court should find the facts in accordance with its view of the preponderance of the evidence to determine that Walt Parker's hands were not unclean, that his conduct did not breach any duties of loyalty, and that any conduct frowned upon below did not even occur until after the facts were in place with the Appellant entitled to 50% ownership in Florence Carpet & Tile, Inc.

IV. DEFENDANT CURL SHOULD BE ORDERED TO CONVEY 3% OF FLORENCE CARPET & TILE, INC.'S SHARES TO PLAINTIFF PARKER.

The conditions precedent to Walt Parker's ownership of half of Florence Carpet & Tile, Inc. have occurred. The company was profitable in 2007, 2010, and 2011, three of the first full calendar/fiscal years following these parties' ownership of it. No unclean hands or disloyalty have divested him of his ownership.

The court below declined to issue an order requiring Curl to convey 3% of the stock in FCT to Parker only because of its view of the evidence with respect to the cleanliness of hands and his loyalty. Since this Court should take a different view, the only adequate remedy to Parker would be for it to issue an order compelling Curl to memorialize the transfer of the shares and to undo any actions he has taken inconsistent with equal ownership of the company.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Circuit Court.

May 21, 2020

Respectfully submitted,

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BY: _____

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CERTIFICATE OF COUNSEL

I do also certify that the Appellant's Final Brief and complies with Rule 211(b) SCACR.

May 21, 2020

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