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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Hon. Mikell R. Scarborough, Master-In-Equity Judge
Appellate Case No. 2020-000029
(formerly 2017-CP-10-3705)

HO DONG LEE,

Appellant,

vs.

YONG WOOK PARK AND SUNNY KIM PARK,

Respondents.

APPELLANT'S INITIAL BRIEF

Dated: June 15, 2020

s/Karen M. DeJong
KAREN M. DEJONG, ESQ.
Bar No. 70699
DeJong Law Firm, LLC
222 West Coleman Blvd., Ste. 110
Mt. Pleasant, SC 29464
(843) 216-6161
(843) 300-1080 (Fax)
karen@dejonglawfirm.com
Attorney for Appellant

Other Counsel of Record:
Ellis Reed-Hill Lesemann, Esq.
Lesemann & Associates, LLC
418 King Street, Suite 301
Charleston, SC 29403
(843) 724-5155
erl@lalaws.com
Attorney for Respondents

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STATEMENT OF ISSUES ON APPEAL

- I. **DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENTS GIVEN THAT THERE EXISTED GENUINE ISSUES AS TO MATERIAL FACTS BETWEEN THE PARTIES?**

- II. **DID THE TRIAL COURT ERR IN GRANTING DEFENDANTS' MOTION TO AMEND THE COMPLAINT AFTER THE DATE SET FORTH IN THE SCHEDULING ORDER EXPIRED?**

STATEMENT OF THE CASE

On July 21, 2017, Plaintiff filed a Complaint with the Charleston County Court of Common Pleas, Case No. 2017-CP-10-3705. Alleged in the Complaint were the following facts: that 1) Plaintiff and Defendant Yong Wook Park were joint and equal owners, members and/or shareholders of several restaurants, namely, Yokoso, Inc., Yokoso of Summerville, Inc., Tsunami of Columbia, LLC, Tsunami Harbison, LLC, Tsunami of Mt. Pleasant, LLC, and properties located at 1290 Bower Parkway, Columbia, SC and 6.5 acres, more or less, located in Ladson, Berkeley County, SC, (Complaint, P. 1-2); 2) the Defendant Sunny Kim Park was the wife of Defendant Yong Wook Park and was in charge of the financial affairs of the companies, including bookkeeping, accounting and management of business records; (Complaint, P. 2); 3) on February 27, 2013, Plaintiff and Defendant Yong Wook Park signed an Agreement for Sale and Purchase of the jointly -held assets listed above (Complaint, P. 2); and 4) given Plaintiff's inability to understand the English language, Plaintiff relied upon Defendants during the time the businesses and properties were jointly owned and at the time of the signing of the Agreement. (Complaint, P. 2).

In the Agreement for Sale dated February 27, 2013, Plaintiff was given ownership, with accompanying debt, of Yokoso, Inc. (Complaint, Exhibit A, P. 11). Defendant Yong Wook Park was given ownership, with accompanying debt, of Tsunami of Columbia, LLC, Tsunami of Mt. Pleasant, LLC, Tsunami of Harbison, LLC and Yokoso of Summerville, LLC (Complaint, Exhibit A, P. 12). Defendant Yong Wook Park also received ownership of properties located at 1290 Bower Parkway, Columbia, SC and 6.5 acres, more or less, located in Ladson, Berkeley County, SC (Complaint, Exhibit A, P. 14).

Plaintiff testified at his deposition that he had difficulty understanding English, both

written and verbally, that he trusted Plaintiffs as they were family members to his wife. (Defendants' Memorandum in Support, Exhibit C, Transcript of Lee). Plaintiff also testified that he relied upon Defendants to ensure that he received his fair market value share of these companies and real estate set forth above at the time he signed the February 27, 2013 Agreement. (Defendants' Memorandum in Support, Exhibit C, Transcript of Lee)

Plaintiff's company, Yokoso, Inc., was lost through foreclosure within one year from the date of the Agreement. In 2015, Plaintiff discovered that Defendants had sold the businesses and real estate that Defendant Yong Wook Park received on February 27, 2013 for alleged millions of dollars.

The Complaint alleges the following Causes of Action:

- A. For a First Cause of Action- Breach of Contract/Breach of Contract by Fraudulent Act (Complaint, P. 2)
- B. For a Second Cause of Action – Unjust Enrichment (Complaint, P. 3)
- C. For a Third Cause of Action- Negligent Misrepresentation (Complaint, P. 4)
- D. For a Fourth Cause of Action- Breach of Covenant of Good Faith and Fair Dealing (Complaint, P. 5)

Plaintiff requested the following relief- actual, compensatory, consequential, incidental, plus statutory interest (Complaint, P. 6)

On September 13, 2017, Defendants filed an Answer denying Plaintiff's Causes of Action. As Defenses (Answer, P. 1- 4). Defendants asserted the following defenses:

- A. For a Third Defense- Failure to State a Claim (there are no first or second defenses listed in their Answer) (Answer, P. 5)
- B. For a Fourth Defense- Unclean Hands/*In Pari Delicto* (Answer, P. 5)

- C. For a Fifth Defense – Waiver (Answer, P. 5)
- D. For a Sixth Defense- Estoppel (Answer, P. 5)
- E. For a Seventh Defense- Laches (Answer, P. 5)
- F. For an Eighth Defense- Statute of Frauds (Answer, P. 5)
- G. For a Ninth Defense- Failure to Mitigate Damages (Answer, P. 5)
- H. For a Tenth Defense- Prior Breach (Answer, P. 5)
- I. For an Eleventh Defense- Reservation of Additional Defenses (Answer, P. 6)

On February 4, 2019, the Court signed a Scheduling Order setting forth the deadline dates in preparation for trial. (Scheduling Order)

On April 12, 2019, Defendants filed a Motion for Summary Judgment wherein Defendants argued that 1) Plaintiff's claims were barred by the Statute of Limitations, 2) Plaintiff's cause of action for breach of contract failed because Plaintiff failed to create a material question of fact that a breach had occurred or that Plaintiff had been damaged as a proximate result of any alleged breach; 3) Plaintiff's cause of action for breach of contract accompanied by a fraudulent act also failed due to absence of question of fact regarding a breach of the underlying contract; 4) Plaintiff's cause of action for unjust enrichment fails due to the existence of an express written contract; 5) Plaintiff's cause of action for negligent misrepresentation failed because Plaintiff had failed to create a question of fact that either Defendant made a false representation to the Plaintiff, owed a duty of care to Plaintiff or breached a duty by failing to exercise due care; and 6) Plaintiff's cause of action for breach of implied covenant of good faith and fair dealing failed because this is not a stand-alone cause of action and that Plaintiff failed to create a question of fact that the implied covenant of good faith and fair dealing had been breached. (Defendants' Motion for Summary Judgment)

Defendants also requested summary judgment as to Defendant Sunny Kim Park as it was alleged that she was not a party to the February 27, 2013 Agreement. (Defendants' Motion for Summary Judgment).

On April 22, 2019, Defendants filed a Memorandum in Support of Defendants' Motion for Summary Judgment. (Defendants' Memo in Support)

On April 22, 2019, Plaintiff filed Opposition to Defendants' Motion for Summary Judgment on the following grounds: 1) that Defendants had not complied with SCRCP Rule 61(d) and Rule 6(a) thereby giving Plaintiff insufficient time to prepare for the Summary Judgment Hearing scheduled for April 23, 2019; 2) that Defendants had not complied with all terms of the Scheduling Order, more specifically Plaintiff was not aware that the hearing for Defendants' Motion for Summary Judgment was proceeding on April 23, 2019 because Defendants had not completed discovery by March 15, 2019; 3) Defendants had deposed Plaintiff on April 10, 2019 and the transcript had not yet been received by Plaintiff's counsel; 4) the parties did not schedule mediation by April 5, 2019; and 5) that the parties were in the process of scheduling mediation. (Plaintiff's Opposition)

It was not until Friday, April 19, 2019, that Plaintiff received notice from Defendants' attorney that he was proceeding with the Motion for Summary Judgment on April 23, 2019. (Plaintiff's Opposition)

Also argued in Plaintiff's Opposition to Defendants' Motion of Summary Judgment was the fact that Plaintiff could not file an Opposing Affidavit setting forth his deposition testimony to counter Defendants' alleged facts because the deposition transcript was not yet available by the court reporter and that under the Discovery Rule, Plaintiff was permitted to file a lawsuit against the Defendants, notwithstanding the Statute of Limitations. (Plaintiff Opposition)

On April 23, 2019, Defendants' Motion for Summary Judgment was heard before Hon. Mikell R. Scarborough, Charleston County Master-In- Equity. At the hearing, Defendants' counsel argued in part, that the parties had signed the Agreement dated February 27, 2013, that the Statute of Limitations barred this pending lawsuit, and that there were no allegations of damages. Defendants' counsel argued that discovery had been completed. (Transcript of Hearing)

Plaintiff's counsel responded by stating that under the Discovery Rule, Plaintiff was not aware that he had not received his fair value of the companies/properties until one and one/half years later (2015), when he heard that Defendants were making millions from the sale of the restaurants that Defendant Yong Wook Park had received on February 27, 2013. With regard to damages, Plaintiff's counsel told the Court that she had not received any financial documents or appraisals from Defendants' counsel, despite discovery requests. Nevertheless, there was at least \$132,000.00 that was not paid to Plaintiff by Defendants, possibly in 2017. (Transcript of Hearing)

The Court reserved its' ruling and gave Plaintiff's counsel until May 10, 2019 to obtain a copy of the Plaintiff's deposition transcript and provide a written response to Defendants' Motion for Summary Judgment. The Court then gave Defendants until May 24, 2019 with which to respond to Plaintiff's latest filing. (Transcript of Hearing)

On May 13, 2019, Plaintiff filed its Memorandum in Opposition to Defendants' Motion for Summary Judgment. Plaintiff argued that Defendants were barred from raising the Statute of Limitation defense as this defense was not raised in Defendants' Answer. Also, according to the Scheduling Order, the time to amend the Answer to include the Statute of Limitation defense had expired. Therefore, the Statute of Limitation defense had been waived. (Plaintiff's Memo in

Opposition)

Plaintiff also argued that Plaintiff's Causes of Action did not fail as a matter of law and that all evidence and reasonable inferences drawn from it must be in the light most favorable to Plaintiff, the non-moving party. Sauner v. Pub. Serv. Auth. Of S.C., 354 S.C. 397, 404, 581 S.E.2d. 161, 165 (2003). (Plaintiff's Memo in Opposition)

Plaintiff set forth the following facts:

A. Shortly after February 27, 2013, Defendants had renegotiated a \$1.4 million dollar loan to \$700,000.00 thereby realizing a \$350,000.00 profit. This dealing and profit was not disclosed to Plaintiff at the time the Agreement was signed. Plaintiff also testified at his deposition that he trusted Defendants at the time he signed the Agreement. Plaintiff only began to realize that he did not receive his fair share of the companies and properties when rumors started to circulate in 2015 that the Agreement was not fair or just (Plaintiff's Memo in Opposition);

B. Plaintiff also discovered during the course of this litigation that Defendants had listed Plaintiff on two other companies' tax returns without his knowledge or consent: Tsunami of Greenville, LLC and Tsunami of West Ashley, LLC. However, Plaintiff did not receive any income or distribution from these companies from Defendants (Plaintiff's Memo in Opposition);

C. At deposition of Robert Christopher Ulmer, tax accountant for all the companies and the parties' personal tax returns, Mr. Ulmer testified that Defendants were running the businesses for many, many years, that the Agreement was signed on in February 2013, yet in its' 2013 income tax return for Yokoso Inc., the K-1 showed a distribution to Plaintiff of \$132,424.00 which Plaintiff did not receive (Plaintiff's Memo in Opposition) ;

D. Mr. Ullmer also testified at his deposition that in 2017, Tsunami of Columbia, LLC

gave Defendant Yong Wook Park the sum of \$84,420.00 in tax distribution as 100% owner of Tsunami Columbia, LLC and that Defendant Yong Wook Park was listed as 100% owner of Tsunami Harbison as well as sole owner of real property that the restaurant was built upon- 1290 Bowers Parkway, Columbia, SC. Mr. Ulmer could not explain why Plaintiff did not receive any distributions from these companies in 2017 as Plaintiff was a 50% owner of Tsunami of Columbia, LLC, Tsunami of Columbia, LLC and the real estate from January 1, 2013 to February 27, 2013 during that fiscal year (Plaintiff's Memo in Opposition);

E. Mr. Ulmer also testified at his deposition that he assumed or thought that the Defendants would explain the tax returns to Plaintiff, that Mr. Ulmer does not recall any business valuations being discussed and that thereafter the signing of the Agreement, Defendants sold their companies for profit (Plaintiff's Memo in Opposition); and

F. Lastly, in Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, Plaintiff included as evidence a portion of Defendant Yong Wook Park's deposition testimony wherein, amongst other sworn testimony, Defendant Park stated that he signed the Articles of Organization for each company, and that his wife, Defendant Sunny Kim Park, was in charge of billing. (Plaintiff's Memo in Opposition)

On May 28, 2019, Defendants filed their Reply in Support of Defendants' Motion for Summary Judgment. (Defendants' Reply in Support)

On May 28, 2019, Defendants filed a Motion to Amend to include the Statute of Limitations defense. Plaintiff's counsel had previously presented her Opposition to Defendants' Motion to Amend Answer in Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment. (Defendants' Motion to Amend)

On September 18, 2019, a Form 4 Judgment in a Civil Matter was filed that granted

Defendants' Motion to Amend Answer. (Form 4)

On December 20, 2019, an Order was filed Granting Defendants' Motion for Summary Judgment. (Order Granting SJ)

STANDARD OF REVIEW

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRPC. Trousdell v. Cannon, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002). Pursuant to Rule 56(c), SCRPC, summary judgment may be affirmed if no genuine issue as to material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party. Cantrell v. Green, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct.App.1990).

ARGUMENT

1. TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENTS GIVEN THAT THERE EXISTED GENUINE ISSUES AS TO MATERIAL FACTS.

With regard to Plaintiff's causes of action, there is evidence given by Mr. Ulmer, Plaintiff and Defendant Yong Wook Park that Plaintiff relied upon Defendants' understanding of English, both verbal and in writing, to cause him to believe that the Agreement which he signed was fair between the parties; that he trusted Defendants, as family members, to run the businesses and handle the companies' financial affairs. Plaintiff had no reason to believe that the Agreement was grossly unfair until he began to receive communication in 2015 that Defendants were selling their companies and making millions in profit. (Plaintiff's Memo in

Opposition, Exhibits C, D and E)

This evidence contradicts Defendants' "facts" that Plaintiff knew what he was signing on February 27, 2013. As pointed out to the Court at the hearing on April 23, 2019, even Plaintiff's attorney had difficulty understanding the terms of the Agreement. (Transcript of Hearing) An inspection by this Court will likely result in the same conclusion. If experienced attorneys have difficulty interpreting the Agreement, then it is completely within the realm of reason that Plaintiff did also.

Defendant Sunny Kim Park had not yet been deposed at the time that Defendants had filed their Motion for Summary Judgment. However, testimony given by Mr. Ulmer, Mr. Park and Plaintiff make it very clear that she was in charge of the billing and financial matters of the aforementioned companies and this contradicts Defendants' assertions that she was not involved in the distribution of these companies (Plaintiff's Memo in Opposition, Exhibit C, D and E).

Given the foregoing, there clearly exists genuine issues as to material facts in this case that can only be determined at trial. Based upon inferences and facts most favorable to the Plaintiff, as non-moving party, there is more than a scintilla of evidence to find that Defendants' Motion for Summary Judgment should have been denied.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO AMEND THE COMPLAINT TO INCLUDE STATUTE OF LIMITATION DEFENSE BECAUSE THE DATE SET FORTH IN THE SCHEDULING ORDER HAD EXPIRED.

The Court entered into a Scheduling Order on February 4, 2019 in anticipation of trial. The latest date that Defendants could have filed their Motion to Amend Answer was on or before April 12, 2019. (Scheduling Order) Defendants did not do so. They did not seek to

Amend their Answer to include the Statute of Limitation Defense until May 28,2019.

(Defendant's Motion to Amend). Therefore, the Court's Form 4 granting Defendants' Motion to Amend Answer was in error.

CONCLUSION

Based upon the evidence submitted, Plaintiff respectfully requests that the Order Granting Summary Judgment to Defendants and Order Granting Defendants' Motion to Amend Answer be overturned/reversed.

Dated: June 15, 2020

s/Karen M. DeJong
Karen M. DeJong
DeJong Law Firm, LLC
222 West Coleman Blvd., Ste. 110
Mt. Pleasant, SC 29464
(843) 216-6161
(843) 300-1080 (Fax)
Attorney for Appellant

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity Judge

Appellate Case No. 2020-000029
(Formally Case No. 2017-CP-10-3705)

HO DONG LEE,

Appellant,

v.

YONG WOOK PARK and
SUNNY KIM PARK,

Respondents.

PROOF OF SERVICE

I certify that I have served a copy of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal on Yong Wook Park and Sunny Kim Park by emailing said documents, addressed to their attorney of record, Ellis R. Lesemann, Esq., Lesemann & Associates, LLC, at his AIS email address: erl@lalawsc.com.

June 15, 2020, 2020

s/Karen M. DeJong

Karen M. DeJong, Esq.

Bar No. 70699

DeJong Law Firm, LLC

222 West Coleman Blvd., Ste. 110

Mt. Pleasant, SC 29464

Tel. No. 843-216-6161

karen@dejonglawfirm.com

Attorney for Appellant

DEJONG LAW FIRM, LLC
222 West Coleman Blvd., Ste. 110
Mt. Pleasant, SC 29464
Tel. No. 843-216-6161
karen@dejonglawfirm.com

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SENT VIA FAX (803) 734-1839

S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Lee v. Park, et al.
Appellate Case No. 2020-000029

Dear Sir/Madam:

Pursuant to S.C. Supreme Court, Amended Order dated May 29, 2020, enclosed please find the following documents for filing:

1. Appellant's Initial Brief
2. Designation of Matter to be Included in the Record on Appeal
3. Proof of Service

If you have any further questions, please do not hesitate to contact me.

Very truly yours,

s/Karen M. DeJong

Karen M. DeJong

KMD:abc

Encs.

cc: Ellis Lesemann, Esq.