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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
COURT OF COMMON PLEAS

JOE M. CROSBY, MASTER-IN-EQUITY

APPELLATE CASE NO.: 2020-000597

CRM OF THE CAROLINAS, LLC,

APPELLANT,

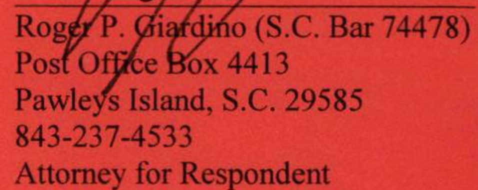
v.

TREVOR W. STEEL,

RESPONDENT.

RESPONDENT'S FINAL BRIEF

August 13, 2020



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STATEMENTS OF ISSUES ON APEAL

I. Did the trial court err in finding CRM of the Carolinas, LLC was not entitled to be reimbursed a $50,000 payment to Steel per the clear and unambiguous terms of their agreement when he did not remain employed for three (3) years?

II. Did the trial court err in denying CRM of the Carolinas, LLC's request for attorney's fees?

STATEMENT OF THE CASE

CRM of the Carolinas, LLC (hereinafter "CRM") filed this action on October 11, 2017, via Verified Complaint, asserting causes of action against Trevor W. Steel (hereinafter "Steel") for Breach of Contract, Anticipatory Breach of Contract, Slander *Per* Se and Intentional Interference with Prospective Contractual Relations. CRM also filed a Motion for Temporary Restraining Order and a Motion for Temporary Injunction on the same date. The Honorable Eugene C. Griffith, Jr. granted the Temporary Restraining Order on October 24, 2017 and the Honorable Larry B. Hyman, Jr. granted the Motion for Temporary Injunction on November 17, 2017.

Steel filed an Answer and Counterclaim on December 1, 2017 denying the allegations of the Verified Complaint and asserting a counterclaim for breach of contract and wrongful restraint of trade. CRM filed a Reply to Counterclaim on October 11, 2019, the same day Steel filed an Affidavit of Default.

This action was referred to the Master-in-Equity by consent and tried non-jury on October 14, 2019. At the call of the case, the parties and court agreed that the Temporary Injunction issued by the Honorable Larry B. Hyman, Jr. expired on its terms and was moot. Steel abandoned his counterclaims and the case proceeded on CRM's

claims. At the end of its case in chief, CRM agreed to waive any other damages but the claim for $50,000.00 and attorney fees. The court issued an Order, dated October 18, 2019, that all Court Orders restraining Defendant from any and all types of business activities are hereby rescinded and/or terminated. Then court issued its Order finding in favor of Steel on March 12, 2020.

Appellant filed its Notice of Appeal on April 3, 2020. Appellant then served Respondent an envelope sent via US Mail, postmarked April 16, 2020 with prepaid US Postage stamped on April 15, 2020; containing a copy of the Appellant's Letter to the Honorable Jenny Abbott Kitchings dated April 3, 2020, Notice of Appeal, a copy of the March 12, 2020 Order and a Certificate or Service dated April 3, 2020. Respondent received said mailing on, or about April 20, 2020.

FACTS

CRM is a general contractor, mechanical contractor and electrical contractor performing construction and maintenance services in fourteen (14) states, primarily at large resorts and buildings. (R. p 089 lines 24-25, R. p 090 lines 1-3). CRM is based in Pawleys Island, South Carolina and is run by Keith Errico. (R. p. 089 lines 20-22). Steel owned a pressure washing and painting business in Pawleys Island, called Clean Image, LLC. (R. p. 90 lines 9-15). CRM had a pressure washing and painting division but "could never really get it moving forward" and was looking for someone "to partner up with." (R. p. 90 lines 20-24). Errico approached Steel about joining CRM and began negotiating an agreement. CRM drafted an employment contract. (R. p. 105 lines 23-25). Then presented Steel a contract for his signature dated November 10, 2016 to confirm the parties understanding of their arrangement. (R. p. 139).

The Employment Contract provided, *inter alia,* that Steel would be paid an annual salary of $90,000 and would be employed at will, as well as a non-compete and non-solicitation provisions. (R. p. 139). CRM delivered to Steel a check in the amount of $50,000.00 designated as "Goodwill". (R. p. 155). On the same day, November 10, 2016, the parties executed an Employment Contract Addendum. (R. p. 145). The Appellant drafted this addendum as well. (R. p. 106, lines 3-8). It provided that CRM would pay Steel an initial payment of $50,000 which would "be duly earned after 3 years from the date of execution of the Employment Contract." (R. p. 145). The Addendum further provided that "should Employee leave the employment of CRM of the Carolinas, LLC before the expiration of said 3-year period, Employer would be entitled to be reimbursed for the Fifty Thousand ($50,000.00)." (R.p.145). CRM had never, in the history of the company, paid anyone that much compensation to join the company. (R. p. 109, lines 3-8.

While the Addendum stated the $50,000 was for initial compensation, the actual check stub delivered to Steel dated November 10, 2016 indicates the payment was for "Goodwill". (R. p. 155, R. p. 115, lines 4-9, R. p. 119). CRM is partially owned by an Employee Stock Ownership Program ("ESOP"). (R. p. 95, line 11). As a result, the company's finances and accounting are subject to regular audits. (R. p. 95, lines 12-15). After one of the required audits, Errico claims he was instructed CRM needed to reclassify the $50,000 payment to Steel. Specifically, CRM attempted to reclassify the payment to Steel from "initial compensation" to purchase of the goodwill and the client list of Clean Image, LLC. (R. p. 95, lines 19-25). At trial, Errico failed to identity any other instance such a payment was reclassified for any other employee. (R. p. 108, lines 13-25, R. p.109, lines 1-

6). Apparently, whoever performed the audit was unaware the check and check stub presented to Steel on November 10, 2016 did, in fact, indicate the payment was for "Goodwill." (R. p. 119, lines 17-24). Thus, on March 3, 2017, the parties executed a new Employment Agreement Addendum, also drafted by CRM (R. p. 105, lines 23-25, R. p. 106, lines 1-5). This Addendum provided that the original Addendum "incorrectly identified" the $50,000 payment as initial compensation but was now being classified and identified as payment "for the good will and client list of Employee's former company, Clean Image, LLC." (R. p. 147). The Addendum further provided that if the Employee left his employment with CRM he would "be entitled to keep his former company name and client list, excluding any new clients developed during Employee's work for CRM." (R. p. 147). Converse to the Addendum executed on November 10, 2016; the Addendum **drafted and presented** by CRM and executed by Errico and Steel on March 3, 2017, remained completely silent as to the CRM being entitled to the reimbursement of the $50,000.00 payment.

The CRM manger to whom Steel reported made the decision in May of 2017 to terminate him. (R. p. 9, lines 14-19, R. p. 107 lines 18-25, R. p. 108, lines 1-12). When he was terminated Errico specifically asked Steel to repay the $50,000. (R. p. 96, lines 20-23). Less than a week later, Steel approached Errico and assured Errico he could and would do better and promised improvements. (R.p.97, lines 9-13, R.p.114, lines 2-8). At the time this division of the business was "bleeding money" and Errico told Steel the company could not afford to continue a $90,000 salary. Errico offered, and Steel accepted, a 50% salary reduction to $45,000, although Steel continued to be eligible for performance incentives bases on the performance of his division. (R. p. 97, lines 14-19, R. p. 98, lines 1-6). Although CRM rehired Steel, Appellant **did not** present a third Addendum for

Steel to execute prior to recommencing work at CRM. (R. p. 108, lines 7-12)

Steel voluntarily resigned from CRM on October 2, 2017. (R. p. 118, lines 14-20).

STANDARD OF REVIEW

"On appeal from an action at law tried without a jury, the appellate court's standard of review extends only to the corrections of errors of law." *Frampton v.* S.C. *Dep't of Transp.,* 406 S.C. 377, 752 S.E.2d 269, 273-74 (Ct. App. 2014); *Townes Assocs., Ltd. v. City of Greenville,* 266 S.C. 81, 85-86, 221 S.E.2d 773, 775 (1976). The factual findings of the trial judge will not be disturbed "unless a review of the record discloses there is no evidence which reasonably supports [its] findings." *Id.* The rule is the same whether the judge's findings are made with or without, a reference. The judge's findings are equivalent to a jury's findings in a law action. *Townes Assocs., Ltd. v. City of Greenville,* 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) citing *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 211 S.E.2d 876 (1974).

ARGUMENT

I. THE APPELLANT'S APPEAL IS NOT TIMELY AND SHOULD BE DISMISSED.

In appeals from the Court of Common Pleas, a notice of appeal must be served on all respondents within 30 days after receipt of written notice of entry of the order or judgment. Rule 203(b)(1), SCACR; *Culbertson v. Clemens,* 322 S.C. 20, 471 S.E.2d 163 (1996). The identical procedure must be adhered to for services of notices of appeal in appeals under S.C. Code Ann. § 14-11-85 (Supp. 2001), from an order or judgment issued by a master or special referee, Rule 203(b)(4), SCACR. Within 10 days of service, Appellant must file notice of appeal with the lower court. Rule 203(d).

Service of the notice of appeal confers jurisdiction. This Court in *Elam v. S.C. Dep't of Transp.,* 361 S.C. 9, 602 S.E.2d 772 (2004) held, "the requirement [for a timely] notice of appeal is jurisdictional, *i.e.,* if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. Dep't of Transp.,* 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004); *accord Camp v. Camp,* 386 S.C. 571, 574, 689 S.E.2d 634, 636 (2010) (stating courts have "no authority to extend or expand the time" for serving a notice of appeal).

In this action, the Appellant failed to adhere to the procedure as set forth in the SCACR and applicable case law. The trial court filed its order on March 12, 2020 (R. p. 0017). Appellant filed notice of appeal on April 3, 2020 (R. p. 077). However, Appellant did not serve Respondent until April 16, 2020 (R. p. 163) as clearly evidenced by the envelope sent by Appellant to Respondent via US Mail, postmarked April 16, 2020 with prepaid US Postage stamped on April 15, 2020 (R.p.163); containing a copy of the Appellant's Letter to the Honorable Jenny Abbott Kitchings dated April 3, 2020, Notice of Appeal, a copy of the March 12, 2020 Order and a Certificate or Service dated April 3, 2020. (R. p. 163) Therefore, Appellant did not effectuate acceptable service until thirty-four days after the notice of entry of the court order. In *Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, LLC,* 422 S.C. 211, 810 S.E.2d 856 (2017), the Supreme Court of South Carolina held a notice of appeal served on the thirty-first day as untimely.

II. IF APPELLANT OVERCOMES THE TIMELY ISSUE, APPELLANT FAILED TO PROPERLY PRESERVE THE ISSUES NOW ON APPEAL

Appellant must preserve an issue for appellate review by actually raising it to the lower court. *Wilder Corp. v. Wilke,* 330 S.C. 71, 497 S.E.2d 731 (1998). The record should contain evidence that an issue has been properly raised to the court. *York v. Conway Ford, Inc.,* 325 S.C. 170, 480 S.E.2d. 726 (1997). The trial transcript of any objections raised by Appellant's counsel at trial germane to Appellant's case on appeal (R. p.p. 079-137). All of the exhibits from either party were entered into evidence without objection, but for Plaintiff's Exhibits #5 & #6, with the objection raised by Respondent's counsel being to the amounts stated on face. (R. p. 104, lines 5-11). Hence, Appellant did not properly preserve any issues for appeal.

Furthermore, an appealing party is limited to arguments, motions, and objections raised to and ruled upon by the trial court, and the record must establish how the issue was raised and contemporaneously treated at trial. Rule 210(h), SCACR, *Reid v. Kelly,* 274 S.C. 171, 262 S.E.2d 24 (1980), *State v. Hudgins,* 319 S.C. 233, 460 S.E.2d 388 (1995). Within 10 days of the notice of order, Appellant failed to raise any post-trial motions, specifically, but not limited to a motion pursuant to Rule 59(e) and or Rule 52, SCRCP. Therefore, Appellant's actions at trial and post-trial failed to preserve any issue for appellate review.

An appellate court may not, of course, *reverse* for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. *I'ON, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716 (S.C. 2000). This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. *I'ON, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716 (S.C. 2000); *Smith v. Phillips,* 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally

will not address an issue unless the issue was raised to and ruled upon by the trial court); *State v. Williams,* 303 S.C. 410, 401 S.E.2d 168 (1991) (same); *Sumter Building & Loan Ass'n v. Winn,* 45 S.C. 381, 23 S.E. 29 (1895) (same).

If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. *Id, 422*, *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton,* 311 S.C. 56, 427 S.E.2d 673 (1993); *Hoffman v. Powell,* 298 S.C. 338, 380 S.E.2d 821 (1989); *see also* Rules 52(b) and 59(e), SCRCP.

Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. *See Roche v. South Carolina Alcoholic Beverage Control Comm'n,* 263 S.C. 451, 211 S.E.2d 243 (1975) (purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal).

III. THE TRIAL COURT CORRECTLY RULED ON THIS MATTER WHEN PRESENTED WITH AMBIGUOUS TERMS OF THE PARTIES' AGREEMENTS

In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. The rule is the same whether the judge's findings are made with or without, a reference. The judge's findings are equivalent to a jury's findings in a law action. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 211 S.E.2d 876 (1974). Appellant contends that the employment contract, November 10, 2016 Addendum and March 3, 2017 Addendum (R. p.p. 139, 146, 147)

are unambiguous. The mere fact that the three documents attempt to alter the classification of the $50,0000.00 payment three times in a four-month window illustrates otherwise. Appellant relies on *Wallace v. Day,* 390 S.C. 69, 700 S.E.2d 446 (S.C. App. 2010). The crux of CRM's legal argument hangs on, "when the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court." *Wallace,* 700 S.E.2d at 449 (citing *Hawkins v. Greenwood Dev. Corp.,* 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct.App. 1997). Appellant relies on such when asserting the contention, "the trial court committed an error of law in finding that Steel did not intend to pay the money back if he was not employed with CRM for three years, or in finding the change in classification of the payment, even if it did change, somehow alleviated his contractual promise." (Appellant Brief, page 8). Unfortunately, CRM failed to fully cite *Wallace* for this Court's complete analysis:

> When interpreting a contract, a court must ascertain and give effect to the intention of the parties. *Chan v. Thompson,* 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct.App.1990). To determine the intention of the parties, the court "must first look at the language of the contract...." *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n,* 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court. *Hawkins v. Greenwood Dev. Corp.,* 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct.App.1997). Whether an ambiguity exists in the language of a contract is also a question of law. *S.C. Dep't of Natural Res. v. Town of McClellanville,* 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001).
>
> "A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." *McClellanville,* 345 S.C. at 623, 550 S.E.2d at 302. "The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe." *Pee Dee,* 381 S.C. at 242, 672 S.E.2d at 803. "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties." *McClellanville,* 345 S.C. at 623, 550 S.E.2d at 303. "The determination of the parties' intent is then a *question of fact.*" *Id.* (emphasis added).

The fact that the parties executed three different documents, all containing different terms drafted wholly by the Appellant, in a relatively short period of time is ample evidence to establish the agreement between the parties was ambiguous. Appellant argument that the

agreement between the parties is unambiguous is disingenuous when CRM fails to offer any semblance of an explanation as to why the language drafted by CRM differs between the two addenda and why the March 3, 2017 Addendum fails to include the identical "repayment language" contained in the November 10, 2016. Therefore, the trial court correctly determined the issues presented and properly ruled in favor of Respondent.

With respect to Appellant's assertion that the March 12, 2020 Order fails to comply with S.C.R.C.P 52(a), Respondent contends that such is not ripe for appellate review. If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. *I'ON, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422.; *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton,* 311 S.C. 56, 427 S.E.2d 673 (1993); *Hoffman v. Powell,* 298 S.C. 338, 380 S.E.2d 821 (1989); *see also* Rules 52(b) and 59(e), SCRCP. Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. *Roche v. South Carolina Alcoholic Beverage Control Comm'n,* 263 S.C. 451, 211 S.E.2d 243 (1975) (purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal). CRM's lack of engagement as to any post-trial motions failed to preserve any contention that the Order failed to comply with S.C.R.C.P. 52(a).

IV. TRIAL COURT CORRECTLY DENIED CRM'S REQUEST FOR ATTORNEY FEES

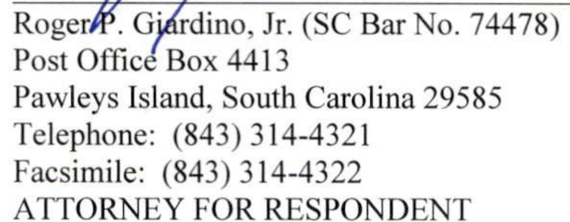
Trial Court correctly did not grant Appellant's request for attorney's fees. The court contemplated the parties' request for attorney's fees, addressing such specifically to the parties in

open court. (R. p. 121, lines 9-22). Again, CRM failed to address such ruling with the appropriate post trial motion practice. Therefore, this issue is not ripe for appellate review. In addition, Appellant fails to cite in support of its argument any analogous precedent. Instead, CRM relies on case law not totally eliminating the possibility of recovering attorney's fees.

CONCLUSION

Based on the forgoing, Respondent respectively request the trial court's Order finding for Steel affirmed in totality. That the trial court weighed all the evidence presented and properly ruled in the Respondent. Additionally, Respondent prays that the judgment be affirmed for any other reason appearing in the record of the case.

GIARDINO LAW FIRM, LLC



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CRM OF THE CAROLINAS, LLC,

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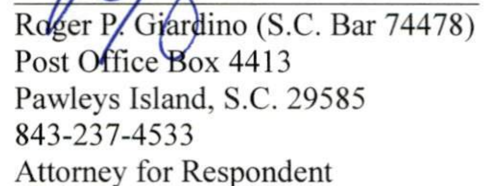
CERTIFICATE OF COUNSEL

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



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