THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2019-000623

Hills Machinery Company, LLC,……Respondent,

v.

Jackson Development Group, LLC, and J. Elliott Summey,……Appellants.

Appellants' Amended Final Brief

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STATEMENT OF THE CASE

Respondent filed a complaint in January 2016 alleging a single cause of action for an account stated. It was tried before the Honorable Doyet Early, III on January 7, 2019. Judge Early issued his verdict via Order on February 13, 2019. Appellant filed a motion for reconsideration on February 20, 2019. Judge Early denied the motion for reconsideration on March 28, 2019. This appeal was timely filed and served on April 21, 2019.

STATEMENT OF THE FACTS

Appellant Jackson Development rented heavy equipment from Respondent in 2014. Appellant Summey signed a credit application that required him to guarantee the debt owed by Jackson Development. In March 2015, Respondent sent several itemized statements to Appellant with varying amounts of charges alleged to be due. There was a dispute over the total amount of the charges and Respondent eventually filed suit in 2016. Respondent's Complaint contained a single cause of action for an account stated.

A bench trial was held in January 2019 before Judge Doyet Early. Both sides submitted testimony and cross-examined witnesses. Judge Early ultimately ruled in favor of Respondent and requested that counsel for Respondent draft the final Order, which was filed on February 13, 2019. Appellants made a motion to reconsider on February 20, 2019. Counsel for Respondent filed his Affidavit of Attorney Fees on February 26, 2019 and Counsel for Appellants objected to the amount and requested an evidentiary hearing. The lower court denied the motion to reconsider and granted Respondent all attorney fees and costs submitted without holding a hearing or allowing Appellants to question the affidavit of counsel.

ARGUMENTS

Standard of Review

This matter was an action at law heard without a jury. The appropriate standard of review is established under *Townes Associates, Ltd. vs. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). This Court should only correct errors of law and leave the findings of fact undisturbed unless there was no evidence to reasonably support the lower court's findings.

I. THE LOWER COURT RULED IN FAVOR OF RESPONDENT UNDER THE THEORY OF AN ACCOUNT STATED, NOT A BREACH OF A WRITTEN CONTRACT

In the case below, Respondent's Complaint sought recovery under a single legal theory for an account stated. While the Complaint does allege certain agreements between the parties, including some written agreements, it never set forth the required elements for breach of contract in the State of South Carolina. The sole cause of action articulated by Respondent in its Complaint is for an account stated. *Complaint.*

Respondent filed a motion for summary judgment that was denied by the lower court. There was no claim or argument that Appellant breached a written contract in the motion for summary judgment, and the Order denying summary judgment specifically found that "[t]he basis for [Respondent]'s motion for summary judgment was that It sought to collect on an account stated." *T.36.*

Both the law and the record in this case are clear and unambiguous with regard to the relationship between breaches of contract and accounts stated. They are separate and distinct causes of action. The lower court made this point numerous times in its order. On page 3 of the Order, the lower court stated:

> An action on an account stated is a separate cause of action from the action on the underlying contract or contracts, if any, of the parties.

On page 4, the court again reiterated the point in quoting an opinion from North Carolina:

> An account stated is by nature a new contract to pay the amount due based on the acceptance of or failure to object to an account rendered.

Counsel for Respondent admitted as much in his opening statement to the court at trial:

> An account stated is a separate cause of action from anything that pertains to the underlying contract or contracts. It is a separate cause of action that, once an account has been stated to a party and there's an agreement on the account, that's the cause of action. *T.57*, lines 21-25.

The lower court specifically found that Respondent was entitled to recover under the theory of an account stated. There is no finding in the final order of the lower court that found a breach of contract. The lower court discusses the law of an account stated *ad nauseum* for more than 8 pages in the Order, relying primarily on North Carolina and New York law to justify its findings of law. The lower court went out of its way to establish an account stated and then expound on the history of the antiquated and esoteric cause of action. The only reasonable interpretation of the lower court's order is that Plaintiff recovered under his cause of action for an account stated **only**. Thus, the Record is clear that Respondent only sought relief under the account stated cause of action, and only obtained relief under the account stated cause of action.

II. THE LOWER COURT ERRED IN NOT APPLYING THE STATUTORILY DEFINED INTEREST RATE OF 8.75% AS REQUIRED UNDER S.C. CODE § 34-31-20

The law in South Carolina pertaining to interest on accounts stated is found in S.C. Code § 34-31-20, which states:

> In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to

> law, the legal interest shall be at the rate of eight and three-fourths percent per annum.

The statutory language is clear and unambiguous: **all** accounts stated **shall** draw interest at 8.75%. If the lower court found that Defendants breached the written contracts between the parties, then the argument that the contract controlled the appropriate rate of interest would be viable. But that is not what happened. As an account stated, Plaintiff was only entitled to a calculation of simple interest at the statutorily defined rate of 8.75%, and not the 18% awarded by the lower court.

III. PLAINTIFF WAS NOT ENTITLED TO ANY ATTORNEY FEES UNDER THE CAUSE OF ACTION FOR AN ACCOUNT STATED

As established above, the only finding of the lower court was that Plaintiff established an account stated, not a breach of contract. South Carolina law is clear that an award of attorney fees is not allowed unless authorized by statute or a written contract. *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). There is no statute that allows the award of attorney fees for an account stated. Therefore, as the lower court only found that Plaintiff was successful on its cause of action for an account stated, and not the written contracts, there is no legal basis for the award of attorney fees. The entirety of the award for attorney fees must be stricken from the judgment *in toto*.

IV. EVEN IF RESPONDENT WAS ENTITLED TO AN AWARD OF ATTORNEY FEES, APPELLANT WAS DENIED DUE PROCESS IN THE DETERMINATION OF THOSE FEES

After the bench trial, the lower court requested Respondent to submit an affidavit of attorney fees. Counsel for Appellant objected to the affidavit and requested an evidentiary hearing to resolve the matter. The lower court ignored this request and ruled without allowing Appellant to appear and examine witnesses on the issue of the appropriateness of attorney fees. Rather, the lower court issued a cursory Form 4 Order denying the motion to reconsider and

stating that Appellant's objections to the fee award was "not sustained." It is impossible to sustain an objection without the opportunity to cross examine the only witness at an evidentiary hearing.

In *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), the Supreme Court articulated three identifiable factors for assessing the constitutional requirements of due process. These are:

> First, the private interest that will be affected by the official action;
>
> Second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
>
> Finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

With regards to the determination of attorney fees by a trial court, the private interest is the loss of substantial sums of money (in this case $32,548.55). The risk of erroneous deprivation may be less due to the ethical obligations of attorneys as opposed to lay persons, it still exists and require the implementation of safeguards. After all, the nature of the proceeding requires sworn testimony from the person who will be receiving the substantial sum of money at issue. There must be a safeguard in the form of a right to cross-examination in an evidentiary hearing. Finally, a single post-trial evidentiary hearing does not impose such a burden to justify the elimination of a fundamental constitutional right, i.e. the right to confront witnesses.

There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained. *Blumberg v. Nealco*, 310 S.C.

492, 427 S.E.2d 659 (1993). The only evidence submitted on these factors was the affidavit of Respondent's counsel, Barron Stanton. Mr. Stanton was not subject to a deposition or any other form of cross-examination. While Respondent will inevitably argue that he was truthful and honest in his affidavit, the focus is not on Mr. Stanton's character, but rather on Appellant's constitutional right to examine witnesses who provide testimony against their interests. An evidentiary hearing was requested, but that request was ignored. No reason or justification for the lack of a hearing was ever provided.

If the only thing required to sustain an award of $32,548.55 to an opposing attorney is an affidavit from that same attorney, then the requirement for "specific findings of fact" espoused by this Court and the South Carolina Supreme Court are little more than lip service. If procedural due process does not require some ability to confront and examine the only source of the evidence being provided to the court, it is hard to understand how due process protects the fundamental rights of anyone. This is not a situation where this Court is being asked to determine the sufficiency of due process afforded in an administrative proceeding. Appellant concedes there is precedent from this Court that holds the right to confront certain witnesses in an administrative proceeding is not absolute under minimum standards of procedural due process. *Anonymous v. State Bd. of Med. Exam'rs*, 323 S.C. 260, 264, 473 S.E.2d 870, 873 (Ct. App. 1997) ("Resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected.") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)), *rev'd on other grounds,* 329 S.C. 371, 496 S.E.2d 17 (1998); *South Carolina Dep't of Soc. Servs. v. Holden*, 319 S.C. 72, 459 S.E.2d 846 (1995); *First Federal Sav. and Loan Ass'n v. Board of Bank Control*, 263 S.C. 59, 65, 207 S.E.2d 801, 804 (1974) ("It is recognized that due

process 'does not require a trial-type hearing in every conceivable case of government impairment of private interest;' and 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.'") (*quoting Cafeteria and Restaurant Workers Union Local 473 v. McElroy*, 367 U.S. 886, 894-95, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961)). But these cases are easily distinguishable in this situation. First, nearly every administrative proceeding is subject to judicial review by our courts. More importantly, the situation in this case is one in which the party submitting the affidavit is always a biased party. The attorney is required to submit the fee affidavit, and it is the attorney who will reap the rewards of an Order granting attorney fees. Even if the attorney was already paid by the client, the attorney is benefitting by obtaining an additional recovery of funds for his client. Thus, the need for cross-examination is inherent in this process and an evidentiary hearing was required by the lower court.

Appellant first seeks this Court to find that Respondent was not entitled to attorney fees under the account stated cause of action. If this Court disagrees, then, at the very least, this matter should be remanded for an evidentiary hearing on the issue of the amount of attorney fees.

CONCLUSION

Respondent obtained a verdict for an account stated only. It was the only cause of action plead and argued at trial. The interest rate for accounts stated is controlled by statute and there is no provision under South Carolina law that allows the recovery of attorney fees in cases of accounts stated. Therefore, the lower court must be reversed and this Court should strike the award of attorney fees and recalculate the interest based on the statute.

February 27, 2019

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CERTIFICATION OF COUNSEL

I hereby certify that Appellant's Final Brief conforms with Rule 211(b), SCACR.

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Certificate of Compliance

I hereby certify that Appellants' Amended Final Brief conforms with Rule 211(b), SCACR. The only changed made was to the cover page, which now lists all counsel of record for Appellants.

Respectfully submitted,

October 5, 2020

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