THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2007-CP-11-00802
Appellate Case No. 2020-000161

David L. O'Shields, Appellant

v.
Piedmont Glass & Mirror Company, Julie Taylor, David Taylor, and Carolina Storefront Systems, Inc, Respondents.

APPELLANT'S FINAL BRIEF- REPLY

October 5, 2020

s/Chelsea R. Rikard
A BUSINESS LAW FIRM, LLC
Thomas A. Belenchia (SC. Bar No. 2371)
tab@abizlaw.com
Chelsea R. Rikard (SC Bar No. 102355)
crr@abizlaw.com
P.O. Box 3421
Spartanburg, SC 29304
T: (864) 699-9803
Attorneys for Appellant

Other Counsel of Record:
Joseph L.V. Johnson
Saint-Amand, Thompson & Mathis, LLC
210 S. Limestone Street, Suite 1
Gaffney, South Carolina 29340
Attorney for Respondent
(864) 489-6052

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. CASES

ARGUMENT

Respondent's brief includes deficiencies and mischaracterizations that Appellant asks this Court to disregard. Appellants will not reassert any arguments previously raised in its Initial Brief, rather Appellant will address the deficiencies in Respondent's arguments in the order that they appear in Respondent's initial brief.

I. Respondents' argument regarding the application of the Statute of Frauds fails to consider the totality of the evidence, misapplies case law, and mischaracterizes the evidence presented.

First, Appellant asserted that the Statute of Frauds was misapplied by the Trial Court because the verbal agreement between Lynn O'Shields, and his sister, Julie Taylor, called for and was indeed completed within one year from the making thereof. Respondent asserts, however, that there was not sufficient evidence presented at trial to determine the exact date upon which the agreement was made in order to determine the necessary year long timeline. Respondent's arguments are generalized assertions that Appellant's evidence was not sufficient and that was no 'clear' documentation supporting the existence of the verbal agreement. This argument, however, is erroneous because it fails to acknowledge that the terms of the verbal agreement - on their face - could be completed in one year, regardless of the start date. The term was that Lynn would work for one year at a reduced rate; this in and of itself demonstrates that his performance would be completed in the requisite amount of time to remove it from the purview of the Statute of Frauds. However, in support of Respondent's assertion that the trial evidence was generally insufficient to determine the terms or start date of the verbal agreement, they only discussed a limited amount of the evidence presented at trial. They (1) failed to address or present the testimony by Lynn and Julie's brother, who confirmed the exact terms of the partnership agreement, (2) failed to address or to even contend why the testimony of Appellant's expert witness, Professor John Freeman, was

not credible or should be disregarded, and (3) failed to demonstrate why the Appellant's tax returns from the 1990's does not serve as 'clear documentation' of the agreement. Appellant in fact presented three separate witnesses that confirmed the terms of the verbal agreement between Lynn and Julie, presented tax returns that corroborated the testimony of these witnesses and Lynn's performance of his obligations of this agreement, and presented the expert opinion of John Freeman who confirmed that such service is sufficient to form a partnership.

Second, Appellant asserted that the creation of general partnership, by law, does not require the memorialization of written partnership agreement; therefore, the agreement in question is not required to be written. To counter this assertion, Respondents contend that Appellants could not offer clear evidence that a partnership existed. Specifically, Respondent asserts that Appellant did not submit proof that he brought in his tools and other personal assets to the partnership or that he pledged his personal assets to the business. However, Appellant offered his testimony to this affect; such testimony, when unrefuted is proof. Appellant further offered the testimony of expert witness John Freeman, who opined that indeed a general partnership can be formed upon the verbal agreement of the participants, and that a partnership had indeed been formed in this case. Respondents not only failed to identify any fallacies in Professor Freeman's testimony, but they did not raise reason as to why this Court should disregard the same. They did not contend, in any fashion, that Professor Freeman's opinions are wrong.

Third, in support of their arguments regarding the Statute of Frauds, Respondents assert that Appellant was not a stockholder because he did not pay for any stock in the statutory close corporation. Respondents frames the consideration offered by Lynn for his shares, as the alleged verbal contract. This misconstrues the evidence. Lynn earned 50% in the partnership of the unincorporated entity of the partnership. His sweat equity was then offered to the corporation as

consideration for his shares. As cited in Appellant's initial brief, a corporation may authorize shares to be issued in consideration for past services performed. Therefore, Lynn's shares in the corporation were issued in consideration for his past services performed. Further, Respondent's argument on this point briefly and generally states that Appellant never acted as a shareholder and he made no assertive attempts to review the finances of the corporation. Again, this mischaracterizes and ignores the evidence presented at trial; specifically, the myriad of corporate records demonstrating that Lynn partook in shareholder meetings and his own testimony that he requested, but was denied access to the corporation's finances.

Additionally, Respondent cites the 1950 case of *Baker v. Mutual Lan & Inv. Co,.* 218 S.C. 47, 61 S.E.2d 387 (1950) and relies upon the following language from that case: "A tentative subscription to stock which is not final, but which contemplates an act to be done in the future by the subscriber to make the subscription binding, is, of course, unenforceable as a contract." *Id,* 218 S.C. at 53, 61 S.E.2d at 389 (citations omitted). The reliance on this case and this specific language is notable because it specifically addressed a stock subscription agreement which contemplates an act to *be done in the future*. The Plaintiff in *Baker* sought to enforce a handwritten note in pencil that appeared on the back of a stock subscription card. The note was written much like a promissory note that anticipated payments in the future for stock that would be issued upon payment. The Court noted that contract law is applicable to the formation of a stock subscription, and the question of intent becomes of essential importance. Respondents relied on this case to assert that Lynn does not own any shares because he did not offer any compensation for the shares *after* signing the stock subscription agreement. This argument is contradictory because there is no doubt that the Taylors' consideration for their stock was also offered or paid well before the stock subscription was signed. All three shareholders including Lynn and the Taylors provided their consideration

for their shares in PGM *prior* to the same incorporating. Lynn retained rights and assets in the unincorporated partnership that he rolled into the corporation, Julie did the same, and David gave a loan to the partnership years prior to incorporation. It is oxymoronic and even inequitable for the Taylors to be able to assert that they are entitled to offer past performance as consideration for shares, yet Lynn is not. Additionally, when we look at the intent of the parties, as dictated by the *Baker* Court, we must review the parties testimony, including Julie's testimony calling Lynn a partner, as well as the corporate records and the years of tax returns showing Lynn as a shareholder (which were prepared by David as a Certified Public Accountant). All of which demonstrate that the parties clearly understood and held Lynn out to be a shareholder.

For the foregoing reasons, Appellant requests this Court to find Respondent's arguments regarding the Statute of Frauds unpersuasive.

II. Respondents arguments regarding equitable estoppel and partial performance also fails to consider the litany of documents presented at trial and fails to address the case law presented by Appellant.

Appellant asserted that strictures of the Statute of Frauds may be set aside pursuant to the doctrines of equitable estoppel and partial performance.

In response, Respondents first assert that the doctrines of equitable estoppel and partial performance cannot be applied in this case because Lynn did not submit competent proof of the existence of the oral contract. In support of this assertion, Respondent attacks the evidence that was submitted by attempting to mischaracterize or attack its credibility. It cannot be disregarded that Lynn submitted not only his own testimony, but also that of his wife, his brother, and an expert witness. He also submitted copies of tax returns corroborating the terms of the oral agreement. The testimony provided by Lynn's wife and brother included a high degree of specificity such that their testimony in this regard should be afforded a high degree of credibility. Again, Respondents did

not even attempt to demonstrate to this Court why the testimony of Professor Freeman is not credible or should be disregarded.

Notably, Appellants' brief detailed two illustrative and noteworthy cases that involve a fact scenario strikingly similar to that here. These cases, each hailing from New York, ultimately found that the doctrine of equitable estoppel prevented two entities from disregarded the status of the named individuals as shareholders, because the corporate records and tax returns- as here - demonstrated that the entities indeed revered the individuals as being shareholders and held them out to public as such. Respondents did not address these cases, nor present any reason why this Court should disregard them. As such, Appellant urges this Court to give these cases due consideration in the present matter.

III. Respondents arguments regarding the Statute of Limitations contorts Appellant's trial testimony.

The third argument raised by Appellant regarded the statute of limitations. Respondent urges this court to find that the statute of limitations began to toll when a discrepancy about the *amount* of Appellant's ownership arose upon incorporation. However, this is incorrect because the central issue in this trial is not whether Appellant was the holder of 400 vs 500 shares, rather it was whether he was a holder of *any shares at all.* It was not until 2007 that Respondents Taylor took the position that Lynn was never a shareholder in PGM; ever. The corporate records and tax returns clearly demonstrate that they believed he was a shareholder until 2007. In that year, following Appellant's devastating accident, Lynn was excluded from participation in the management of the corporation, the corporate meeting minutes do not show Lynn as a signee, the corporate tax returns do not list him as a shareholder, and the was no longer notified of meetings or entitled to vote in the same. Upon incorporation, the Respondents Taylor represented to him that he was not only a holder of

some shares, but actually a holder of 500 shares. Lynn was entitled to rely upon this representation and he testified that he conducted himself in reliance upon that statement, which including Lynn pledging his personal assets and wealth so the corporation could obtain a loan. The Taylor's position that Lynn was never a shareholder did not arise until 2007; that is when the cause of action accrued. Further, the causes of action that assert malfeasance and misconduct on behalf of Respondents Taylor are based on their conduct in misappropriating corporate funds and mismanaging the Corporation including permitting tax liens to accrue against the Corporation. Lynn testified that he was not aware of the misuse of corporate funds until this matter was filed, and it was not until then that he realized that the misappropriation went as far as the 1990's. Respondents' brief attempts to mischaracterize this testimony to suggest that he knew of the misuse in the 1990's and failed to take an action. He also testified that he was contacted by the IRS and he brought it to David's attention, who assured him that he would resolve it. Lynn was not aware that these liens were indeed not resolved until much later. The testimony presented at trial and cited in Appellant's brief demonstrates that this action was timely filed shortly following Lynn's discovery of Respondents Taylor's malfeasance and their position that he was never a shareholder in the Corporation.

IV. Respondent's arguments regarding shareholder oppression similarly fails to consider evidence presented by Appellant and uses an incorrect analysis.

Lastly[1], Respondent addresses Appellant's arguments regarding minority shareholder

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1 Respondents' last argument relates to successor liability and CSS being a successor entity to PGM. Rather than address this section in a separate argument section, Appellant will simply state that Respondent asserted that they were simply protecting PGM by getting a loan and opening CSS. However, this is directly contradicted by David Taylor's testimony stating they were avoiding more tax liens that they knew were coming and by the fact that they allowed PGM to be forfeited, due to failure to pay liens.

oppression generally stating that (1) Appellant cannot demonstrate how things would have turned out differently, had he permitted to manage the corporate finances, and (2) Appellant did not provide evidence that Respondent's in fact misappropriated the corporation's finances. First, Respondents appropriately identified that the cases of *Kiriakides v. Atlas Food Systems & Services, Inc.,* 343 S.C. 587, 541 S.E.2d 257 (2001) and *Ballard v. Roberson* 399 S.C. 588, 733 S.E.2d 107 (S.C. 2012) set forth the appropriate standard to determine when minority oppression has occurred. Yet, Respondents still asserted that Appellant "did not produce any evidence to support that his management of the corporation" would not have resulted in a litany of tax liens; as if to suggest that this is appropriate evidentiary burden that Appellant must overcome. However, in order to be successful on a claim for minority shareholder oppression, the oppressed shareholder does not have to demonstrate to the court that the corporation's finances would have been managed more efficiently had they been entitled to so manage them. Appellant's case at trial, as it regarded the tax liens and shareholder oppression, was as follows: Respondents Taylor, as the holders of the majority of the shares in the corporation, misused and misapplied the corporation's funds for personal transactions and personal gains, instead of paying taxes and permitting liens to accrue for years and years, some of which accrued due to David Taylor's admission of his own negligence. Appellant presented ample evidence at trial demonstrating this misappropriation including two MBNA accounts that David Taylor admitted had personal transactions, check stubs showing payments to these accounts during the time period that these cards were used for personal transactions, a check showing that the Taylors gave a personal loan of $10,000.00 in the month before they received yet another lien, and check stubs showing payments towards a Bank of America loan that David admitted on the stand was not a loan for the business. David admitted in deposition testimony, which he was presented with in impeachment at trial, that some of the liens

accrued because he forgot to timely file them even though, he admitted it was his responsibility to do so. Respondent's argument that Appellant failed to demonstrate that Respondents Taylor used the corporation's finances for personal gain is an attempt to turn a blind eye to this evidence.

Therefore, Appellant respectfully requests this court to find Respondent's arguments as it relates to the issues of shareholder oppression unpersuasive.

CONCLUSION

For the foregoing reason, Appellant respectfully requests this Court reverse the circuit court's order dismissing Appellant's claims.

October 5, 2020

s/Chelsea R. Rikard
A BUSINESS LAW FIRM, LLC
Thomas A. Belenchia (SC. Bar No. 2371)
tab@abizlaw.com
Chelsea R. Rikard (SC Bar No. 102355)
crr@abizlaw.com
P.O. Box 3421
Spartanburg, SC 29304
T: (864) 699-9803
Attorneys for Appellant