THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-000201

CRAIG CHAPPELL, on behalf of himself and others similarly situated,
Appellant,

vs.

Ladles Soups – James Island LLC; Ladlessoups, LLC; Ladles Soups at Cane Bay LLC; Ladles Soups At Citadel Mall LLP; Ladles Soups Calhoun LLC; Ladles Soups Cane Bay LLC; Ladles Soups Coosaw LLC; Ladles Soups Downtown Charleston, LLC; Ladlessoups Fresh Fields, LLC; Ladles Soups @ Freshfields Village, LLC; Ladlessoups Mainstreet, LLC; Ladles Soups Moncks Corner LLC; Ladlessoups Mount Pleasant, LLC; Ladles Franchise Development, LLC; Ladles Franchising Inc.; Ladles Fort Mill, LLC; Ladles Knightsville LLC; Ladles West Ashley; Teri Owens; Sue Allen, Tracy Allen, Steve Traeger, Erik Dyke, Julie Dyke, Stan Sutton, Carol Sutton, Jason Dalter, Kellie Henderson; Jane Doe 1-25 (Unknown Operating Company and Management Company Owners); John Doe 25-40 (Management Personnel), Defendants,

Of which Ladles Soups Mount Pleasant, LLC, Erik Dyke, and Julie Dyke are the Respondents.

RESPONDENTS INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

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II. WHETHER THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT WHERE PLAINTIFF FAILED TO MOVE TO CONTINUE THE HEARING TO CONDUCT DISCOVERY OR STAY THE HEARING PENDING A HEARING ON THE MOTION TO COMPEL?

III. WHETHER THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT DESPITE APPELLANT'S CLAIMS FOR A PENDING CLASS ACTION AS THERE WAS NO CLASS ESTABLISHED, NO EVIDENCE THAT RESPONDENTS OR THEIR EMPLOYEES WOULD BELONG TO THE CLASS, AND NO MOTION TO CONTINUE THE SUMMARY JUDGMENT HEARING PENDING A HEARING ON THE CLASS ACTION STATUS?

STATEMENT OF THE CASE

Appellant filed suit on February 14, 2018 against Respondents Eric Dyke, Julie Dyke and their LLC, Ladles Soups Mt. Pleasant, LLC for Respondents' alleged failure to pay wages, breach of contract and conversion. See Verified Complaint. Ladles Soups Mt. Pleasant, LLC is owned solely by Respondents Julie Dyke and Erik Dyke. See Id., at p. (e) & (f). Appellant has never worked for Respondents and Respondents have had no contact whatsoever with Appellant. See Id., p. 14.

Respondents accepted service of the Complaint through counsel June 4, 2018, approximately 110 days after Appellant first filed suit. See Acceptance of Service. Respondents filed and served their Answer June 20, 2018. See Answer on Behalf of Ladles Soups of Mount Pleasant, LLC, Erik Dyke and Julie Dyke. Respondent's denied Plaintiff's claims. Id. Almost a year later Respondents took Appellant's deposition May 14, 2019. See Craig H. Chappell Deposition cover page. Appellant did not serve Respondents with any discovery until May 24, 2019, after his deposition, and approximately 338 days after Respondents answered Appellant's Complaint and 464 days after Plaintiff filed suit. See Appellant's Brief p. 12. Respondents moved for Summary Judgment May 28, 2019. See Respondents Motion for Summary Judgment. Respondents timely served their answers to Respondents' discovery June 25, 2019. See Respondents' Answers to Appellant's Discovery attached as Exhibit A & B to Appellant's Memorandum in Opposition to Summary Judgment filed October 23, 2019. Appellant took depositions in September 2019. See Exhibit D & E to Appellant's Memo in Opposition to Summary Judgment, p. 8 and Ex. D & E attached thereto. Appellant did not file a Motion to Compel Respondents' discovery until October 4, 2019, just over three (3) weeks before the scheduled Summary Judgment hearing. See Appellants Amended Motion to Compel.

Respondents filed their Memorandum in Support of their Motion for Summary Judgment October 25, 2019. See Respondents' Memorandum. Appellant did not file or make any motions to continue or stay the Summary Judgment hearing pending a hearing on his Motion to Compel, his Motion for Class Action Status, or his Motion for a Status Conference and Scheduling Order.

Appellant in his Statement of the Case, makes unsupported allegations that were not raised or established with the trial court. Appellant alleges that he "encountered substantial challenges in getting all of the defendants served." Appellant's Initial Brief, p. 5. This was not presented to the trial court and is not supported by the record. Appellant also included in his Initial Brief deposition excerpts from Respondent Ladles Soups Mt. Pleasant, LLC's 30(b)(6) deposition and from Ladles Soups James Island 30(b)(6) deposition which were not part of the record before the trial court and should not be included in the Record on Appeal. See Appellants Initial Brief p.p. 8 & 9.[1]

STANDARD OF REVIEW

When reviewing summary judgment, the Appellate Court is to apply the same standard as the trial court under Rule 56(c), South Carolina Rules of Civil Procedure. Smith v. Jones (In re Estate of Smith), 419 S.C. 111, 116, 796 S.E.2d 158, 160 (Ct.App. 2017) citing Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438–39 (2003).

> [S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Smith v. Jones, 419 S.C. at 116, 796 S.E.2d at 160 (emphasis original), quoting Grimsley v. S.C. Law Enforcement Div., 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015).

[1] Appellant presented Ladles James Island 30(b)(6) depo. p. 25., l. 20-25 to the trial court, but has now included p.25, l.10-19 as well. Respondents 30(b)(6) deposition was not presented at all.

"Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" Grimsley, 415 S.C. at 40, 780 S.E.2d at 900 (2015) (quoting Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). Respondents, as the "part[ies] seeking summary judgment[,] ha[ve] the burden of clearly establishing the absence of a genuine issue of material fact." Bennett v. Investors Title Ins. Co., 370 S.C. 578, 588–89, 635 S.E.2d 649, 654 (Ct. App. 2006). However, once "the moving party is successful, the nonmoving party must then come forward with specific facts showing there is a genuine issue for trial." Smith v. Jones, 419 S.C. at 117, 796 S.E.2d at 161, citing Bennett, supra.

ARGUMENTS

I. THE TRIAL COURT WAS CORRECT IN GRANTING RESPONDENTS' SUMMARY JUDGMENT MOTION WHEN RESPONDENT SHOWED THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AND APPELLANT FAILED TO COME FORWARD WITH ANY FACTS SHOWING A GENUINE ISSUE FOR TRIAL.

Appellant testified that he knew of no reason to include Respondents in the lawsuit. Appellant testified as follows to the tips:

> Q. As far as you know, Ladles Mount Pleasant was doing it right, as far as you know?
> A. As far as I was told.
> Q. Right. As far as you know?
> A. Correct.
> Q. And so any employees that worked for Ladles Mount Pleasant, as far as you know based on what you were told would have -- would not have any claims because they would have gotten their tips?
> A. Absolutely.

See Appellant's deposition p. 61, l. 22 – P. 62, l. 6.

Appellant further conceded that he "didn't want to include [Respondent] period." See Appellant's deposition, p. 60, l. 23. The only reasonable evidence in this case regarding how Respondents' handled the tips is that they were "doing it right." Therefore, Summary Judgment was and is appropriate.

In response to Respondents Motion for Summary Judgment, Appellant filed no affidavit that Appellant's testimony was incorrect or that there was any reasonable evidence that Respondents were not "doing it right". Appellant's Affidavit of September 9, 2019, attached to his Motion for Class Certification and made part of Appellant's Memorandum in Opposition to Summary Judgment, does not rebut his previous testimony. In Paragraph 6 of his Affidavit he asserts that based on his communications with employees of other Ladles' stores, he believes credit card tips were withheld at other locations. See Appellant's Affidavit, Para. 6. He does not say at all Ladles locations. See Appellant's Affidavit. Further, his testimony to include other stores is based on alleged conversations, which Appellant admits is the same basis for not including Respondents.

"Where a plaintiff relies solely upon the pleadings, files no counteraffidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law." Dawkins v. Fields, 354 S.C. 58, 69-70, 580 S.E.2d 433 (2003) quoting Humana Hospital – Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991). "A court 'cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.'" Dawkins, 354 S.C. at 70, 580 S.E. 2d at ___, quoting Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (citation omitted).

Curiously, Appellant's counter argument to Respondents' motion based on Appellant's own testimony is that Appellant's knowledge of this alleged conspiracy to deprive employees of tips came only from a conversation with a co-worker and is therefore unreliable. See Appellant's brief, pp. 10, 28. If Appellant argues that his own testimony is not relevant or reliable because it was based on what someone else told him, then that applies to all of his arguments as to the alleged conspiracy. And even if Appellant's testimony is not reliable there still has to be some evidence that Respondents' acted improperly.

There is nothing in the record to tie the Dykes individually or Ladles Soups Mt. Pleasant to this suit in the allegations set forth. Appellant's argument is solely that because the separate Ladles Soup business where Appellant worked allegedly failed to properly pay tips to Appellant, Appellant is entitled to sue Respondents Julie and Eric Dyke individually and their independent LLC for allegedly withholding tips. There is no evidence or reasonable inference that Respondents did anything wrong. Appellant acknowledged, and the only evidence available or offered, was that Respondents' location was the exception to the allegations. See Appellant's depo. p. 21, l. 20 – p. 22, l. 2; p. 60, l. 23; p. 61, l. 22 -p. 62, l. 6.

In arguing against a Motion of Summary Judgment, a party cannot merely rely on the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, ___ (Ct. App. 2003). Neither Appellant's Memorandum in Opposition to Respondents' Motion, nor arguments at the hearing referred to any evidence or any of Respondents' testimony or for that matter any testimony by others implicating Respondents. Appellant does include testimony as to other Defendants' liability, but there is no link between them and Respondents other than counsel's pure, unsupported speculation that because Respondent Julie Dyke at some time in the past

worked for one of the other Defendants, there must be or is likely to be or could be a scheme to defraud employees of their tips.

Appellant fails to cite any reasonable evidence or inferences arising therefrom to rebut Appellant's own testimony that he knows of no reason to include Respondents or that Respondents did not engage in the conduct alleged of the other defendants. Accordingly, Summary Judgment was proper.

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT WHERE PLAINTIFF FAILED TO MOVE TO CONTINUE THE HEARING TO CONDUCT DISCOVERY OR STAY THE HEARING PENDING A HEARING ON THE MOTION TO COMPEL.

Appellant did not move the Court to continue or stay the Motion for Summary Judgment in order to complete further discovery. While Appellant's counsel discusses the status of the discovery and alleged at the Summary Judgment hearing and in his Memorandum in Opposition to Summary Judgment that he believes Respondents' responses to discovery were insufficient, and therefore Summary Judgment should not be granted, at no time did counsel move to continue the Summary Judgment hearing or object to the Summary Judgment hearing going forward. This omission is fatal to Appellant's assertion that Summary Judgment should not have been granted because he needed more time to conduct discovery. See Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495 (1992). Appellant's argument that he did not have sufficient time to conduct discovery is not persevered on appeal.

In Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495 (1992), the Court found Appellants "took no steps to protect their interests ..." where they "did not move for a continuance or ask the [court] to hold his decision in abeyance pending the outcome of their motion to compel discovery." Id., 309 S.C. at 118, 420 S.E.2d at 497. The Degenhart Court

went on to hold that the failure to move for a continuance or stay before the trial court meant the issue of the need to obtain more discovery was not properly before the appellate court. Id.

In the present case, although Appellant filed a Motion to Compel discovery on October 4, 2019, Appellant did not make or ask the Summary Judgment Court for a continuance or stay of the summary judgment hearing pending the outcome of the motion to compel. Because Appellant "did not ask the court to continue the case so that discovery could be completed ... the issue is not preserved for ... review." Pryor v. Northwest Apartments, LTD., 321 S.C. 524, 529, 469 S.E.2d 630, 633 (Ct. App. 1996) (holding that the appellant's failure to request a continuance of a summary judgment hearing while discovery was pending did not preserve the issue of outstanding discovery on appeal); See also Mixson, Inc. v. American Loyalty Ins. Co., 349 S.C. 394, 401, 562 S.E.2d 659, ___ (Ct. App. 2001) (holding no preservation of outstanding discovery issue where appellant failed to object to court's consideration of summary judgment motion).

Even if the issue of not enough time for discovery was made to the Court, the trial court was correct in granting Summary Judgement as Appellant had more than enough time to begin and conduct discovery and failed to advance a good reason why the time was insufficient to obtain discovery from Respondents under the facts of the case.

> A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact.

Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, ___, 677 S.E.2d 32, 36 (Ct. App. 2009) (emphasis added). Additionally, "[T]he nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is

'not merely engaged in a "fishing expedition"'." Id., citing Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003).

So even if Appellant's argument is preserved, Appellant was required to enunciate to the trial court a good reason why the time to obtain discovery from Respondents was insufficient. Appellant failed to do so. Nothing in the record establishes a good reason for Appellant's delay or that the time Appellant had for discovery was insufficient. Here, Appellant served Respondents' with the Summons and Complaint on June 4, 2018 and had Respondents' Answer on June 20, 2018. See Acceptance of Service and Respondents' Answer. Appellant knew Respondents denied his allegations against them and could easily have immediately or shortly thereafter begun discovery to establish his claims against them.

As it was, Appellant did not initiate any discovery on Respondents until May 24, 2019, more than eleven months after Respondents' answered the Complaint and only after Respondents deposed Appellant on May 14, 2019. See Appellant's Deposition cover page; Appellant's Initial Brief. Respondents timely answered or otherwise objected to Appellant's discovery requests on June 25, 2019. See Respondents' Answers and discovery answers as exhibits to Appellant's Memorandum in Opposition to Summary Judgment. Appellant did not take any depositions until September 2019 and only filed a Motion to Compel discovery against Respondents on October 4, 2019. See Deposition cover page for 30(b)(6) Ladles Soups of Mt. Pleasant, LLC; Amended Motion to Compel. Appellant provides no good reason why this time was insufficient and so it was not appropriate to delay a Summary Judgment hearing let alone deny Summary Judgment. See Middleborough Horiz. Property Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 479-80, 465 S.E.2d 765, 771 (Ct.App.1995) (affirming summary judgment where

appellants "advance[d] no good reason why four months was insufficient time under the facts of this case to develop documentation in opposition to the motion for summary judgment").

Appellant argues that there was a supposed lengthy process in obtaining service on all the Defendants. Appellant did not substantiate that before the trial court with any evidence or justification or support for that argument. But even if Appellant did have issues with serving other Defendants, the fact is Appellant delayed in initiating discovery on Respondents for nearly a year after Respondents' filed their Answer and waited for more than three (3) months and just before the hearing on the Motion for Summary Judgment before Appellant filed his Motion to Compel.

Appellant argues that his counsel "inadvertently left Respondents" out of a Motion to Compel that he filed on other Defendants in August 2019. Once again, Appellant cites to no evidence to support his claim that his counsel was negligent in failing to include Respondents in that August 2019 Motion. A review of that August 2019 Motion shows that Appellant specifically only addressed other Defendants' failure to answer any discovery. See Appellant's Motion to Compel. Respondents had already completely and timely answered discovery. To argue now that because there were so many Defendants, counsel accidently omitted Respondents from the August 2019 Motion to Compel initial responses is spurious, suspect and not argued before the trial court.

Appellant did not advance a good reason to the trial court why the time he had to conduct discovery on these Respondents was insufficient. See Guinan, 383 S.C. at ___, 667 S.E.2d at 36. Further the trial court did not rule, nor was it asked to rule on whether the time was sufficient for Appellant. The Summary Judgment hearing was held October 29, 2019. See Order. Appellant had well over a year to pursue discovery from Respondents.

Appellant attempts to argue that the need for additional discovery from other Defendants is relevant to this argument, but it is not. Appellant argues that Respondent is "disingenuous" for claiming that there is no evidence of a common policy of depriving employees of credit card tips when other Defendants failed to answer discovery. Under Appellant's logic, if another Defendant failed to answer discovery, Summary Judgment would never be timely for Respondents since Appellant would never have the "opportunity" to obtain discovery from that other Defendant. Appellant sued alleging Respondents' improper acts. Other Defendants' business practices are irrelevant to how Respondents paid their employees or turned over credit card tips and Appellant offers no evidence as to why that is not the case.

Assuming Appellant did preserve the issue of alleged insufficient time for discovery, under Guinan, Appellant also would have to demonstrate to the trial court why the discovery sought would uncover additional relevant evidence and create a genuine issue of material fact. Appellant did not show this. Appellant's only claim is that they did not get the names of Respondents' employees or payroll records. Appellant provided no argument to the trial court below as to how having the names of Respondents' employees or payroll records would establish a policy of inappropriate wages. At best the names of the employees would allow Appellant's counsel to contact those individuals to ask questions and the payroll records would show how much each of the employees received in wages. This information would not necessarily address tips paid to employees or a policy. This is exactly the type of fishing expedition that the Guinan Court sought to avoid, especially in light of Appellant's previous testimony that he knew of no incidences where Respondents paid employees improperly. Guinan, 383 S.C. at ___, 667 S.E.2d at 36.

Appellant sued Respondents without any evidence of wrongdoing on Respondents' behalf. He neither had nor has any evidence of Respondents' wrongdoing and Summary Judgment was appropriate.

III. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT DESPITE APPELLANT'S CLAIMS FOR A PENDING CLASS ACTION AS THERE WAS NO CLASS ESTABLISHED, NO EVIDENCE THAT RESPONDENTS OR THEIR EMPLOYEES WOULD BELONG TO THE CLASS, AND NO MOTION TO CONTINUE THE SUMMARY JUDGMENT HEARING PENDING A HEARING ON THE CLASS ACTION STATUS.

Appellant cites no statutory or common law prohibiting the trial court from considering Respondents' Motion for Summary Judgment while the class action status was pending. Further this is not an appeal of whether Appellant's claims warranted a class action. Appellant points out that the alleged class included employees of Ladles' locations who "were paid an hourly wage without credit card tips ...." See Appellant Memo in Opposition to Summary Judgment, p. 6. There is nothing in the record to show that Respondents' employees fell within the alleged class. Nor is there evidence Respondents followed the same policies or procedures as the other businesses or were in any way controlled by the Franchisor or its policies and procedures. The only evidence is that Respondents were an exception and Appellant has no evidence to include Respondents. See Appellant deposition supra. Arguing other, non-related businesses' employees might be in the class is not grounds to delay Summary Judgment to the Respondents.

Further, Appellant did not move the trial court to continue or stay the Summary Judgment hearing pending a hearing on the class action status. As with the failure to move to stay the hearing pending the need for further discovery, Appellant's failure to so move in this regard fails to preserve this issue for appeal.

CONCLUSION

Because Respondents established that there was no genuine issue of fact and because Appellant failed to rebut that evidence with any evidence related to Respondents, and because Appellant did not preserve his argument of an insufficient time for discovery or a pending class certification, and because Appellant had sufficient time to conduct discovery on Respondents, the Order granting Summary Judgment to Respondents should be affirmed.

RESPECTFULLY SUBMITTED,

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October 12, 2020

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Of which Ladles Soups Mount Pleasant, LLC, Erik Dyke, and Julie Dyke are the Respondents.

PROOF OF SERVICE FOR RESPONDENT'S INITIAL BRIEF

I certify that I have served a copy of Respondent's Initial Brief by e-mail on Appellant, Craig Chappell's counsel Ben Le Clercq, Esq. at ben@leclercqlaw.com and David D. Ashley, Esq. at david@leclercqlaw.com on October 12, 2020.

This 12th day of October 2020

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