

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2020-000320
Trial Court Case No. 2018-CP-23-05208

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Oct 15 2020

SC Court of Appeals

Associated Receivables Funding, Inc.,Respondent,

v.

Dunlap, Inc.; James Stephen Dunlap, an Individual; Dunlap Industrial Coating Services, Inc.;
Dunlap Industrial Services, Inc; Classic Industrial Services, Inc.; and Mark Beuerle, an
Individual,..... Defendants,

Of Which, Classic Industrial Services, Inc., is..... Appellant.

**RESPONDENT ASSOCIATED RECEIVABLES FUNDING, INC.'S
INITIAL BRIEF**

Townes B. Johnson III (SC Bar# 75412)
TOWNES B. JOHNSON III, LLC
PO BOX 9246
GREENVILLE, SC 29604
PH: (864) 757-4899
tjohnson@sc.legal

Attorney for Respondent

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STATEMENT OF ISSUES ON APPEAL

- I. THE COURT PROPERLY FOUND THAT RESPONDENT COULD ENFORCE APPELLANT'S OBLIGATIONS AND EXERCISE THE RIGHTS OF THE DUNLAP WITH RESPECT TO THE OBLIGATION OF APPELLANT PURSUANT TO SOUTH CAROLINA CODE ANN. 36-9-607.

- II. THE COURT PROPERLY FOUND THAT APPELLANT NEGLIGENTLY MISREPRESENTED TO RESPONDENT THAT COMPLETE PAYMENT SHOULD BE PROCESSED TO IT.

- III. THE COURT PROPERLY FOUND THAT, AS THE DIRECT AND PROXIMATE RESULT OF RESPONDENT'S RELIANCE ON APPELLANT'S UNAMBIGUOUS PROMISE THAT COMPLETE PAYMENT SHOULD BE PROCESSED TO IT, RESPONDENT WAS DAMAGED.

STATEMENT OF THE CASE

On or about July 9, 2016, Plaintiff/Respondent Associated Receivables Funding, Inc. (“Respondent”) brought this action against Defendant/Appellant Classic Industrial Services, Inc. (“Appellant”) as well as Defendants Dunlap, Inc. (“Dunlap”), James Stephen Dunlap, an Individual, Dunlap Industrial Coating Services, Inc., Dunlap Industrial Services, Inc. and Mark Beuerle, an Individual. *See Respondent’s Complaint*. Respondent brought causes of action against Appellant for enforcement of Plaintiff’s security interest pursuant to § 9-607 of the Uniform Commercial Code, Negligent Misrepresentation, and Fraudulent Inducement. *Id.*

On or about March 7, 2017, Appellant filed a motion for Summary Judgment, asserting all of Respondent’s claims against it should be dismissed. *See Appellant’s March 7, 2017 Motion for Summary Judgment*. On April 20, 2017, Judge Robin Stilwell issued an Order dismissing Respondent’s cause of action against Appellant for fraudulent inducement but denied Summary Judgment on the remaining causes of action against it. *See Order dated April 20, 2017*. Respondent, thereafter, filed an Amended Complaint asserting an additional cause of action against Appellant for Promissory Estoppel. *See Respondent’s Amended Complaint*. On or about November 21, 2017, the parties agreed to a dismissal under Rule 40(j), and the case was restored by Order issued October 3, 2018 with the new case number of C.A. 2018-CP-23-5208 by Order issued November 14, 2018. *See Orders dated October 3, 2018 and November 14, 2018*.

On January 2, 2019, Appellant filed a second motion for Summary Judgment. *See Appellant’s January 2, 2019 Motion for Summary Judgment*. A hearing on Appellant’s motion was held on January 22, 2019 before the Honorable Perry H. Gravely. The Judge determined that this renewed motion did not present any newly discovered evidence or major changes in the

direction of the case to be reconsidered and, accordingly, on February 12, 2019, issued an order denying Appellant's motion. *See Order dated February 12, 2019.*

On May 30, 2019, this matter came before the Court for trial before the Honorable Edward W. Miller. The only causes of action at trial were Respondent's causes of action from its Amended Complaint against Appellant. On January 31, 2020, the Court entered judgment in favor of Respondent against Appellant in the amount of Three Hundred Twenty-Three Thousand, Seven Hundred Eighteen and 31/100ths Dollars (\$323,718.31). *See Order dated January 31, 2020.* Appellant did not file any motions pursuant to Rule 59, South Carolina Rules of Civil Procedure. On February 21, 2020, Appellant timely filed its appeal of the January 31, 2020 Order. *See Appellant's Notice of Appeal.*

STATEMENT OF FACTS

On September 24, 2010, Respondent entered into a valid and binding contract with Dunlap, wherein Respondent would provide Dunlap with funding in exchange for receivables. In consideration for entering into the contract, Dunlap gave Respondent a security interest in all its accounts receivables and contract rights, represented by a UCC Financing Statement ("UCC-1") filed with the South Carolina Secretary of State. In April 2014, Respondent began purchasing Dunlap account receivables wherein Appellant was the party who owed the balance on the account; otherwise known as the "account debtor". On all account receivables (hereinafter the "Dunlap Invoices") relevant herein, Appellant was the account debtor on the account.

For each Dunlap Invoice Respondent purchased, the Dunlap Invoice would be provided to Appellant containing the following language:

"For value received, this invoice has been assigned to, owned by and payable to Associated Receivables Funding, Inc. PO Box 16253, Greenville, SC 29606. Any offsets, claims, etc. must be reported to Associated Receivables Funding, Inc. immediately upon receipt of this invoice."

Each Dunlap Invoice also had a stamp executed by Dunlap which read:

“For value received, we hereby assign and transfer this invoice and its proceeds to Associated Receivables Funding, Inc. who is the owner of this invoice unencumbered by any other security or claims, and pursuant to the master agreement. The undersigned does herewith assign all lien rights, chooses in action, chattel paper or contract rights. We further certify that the goods have been shipped and/or services have been rendered in agreement with all terms and conditions.”

After receiving each Dunlap Invoice, Appellant would email its executed assent of a “Work Completion Form” directly to Respondent wherein Appellant would make the following two certifications to Respondent:

“This is to certify that the below work as described has been satisfactorily completed and to acknowledge that payment for this invoice is not contingent upon any other work being completed.”; and

“I certify that the above work has been completed in full, all invoicing for material used has been provided to project designee. The work performed has been inspected and complete payment should be processed to PO Box 16253, Greenville, SC 29606.”

Relying on Appellant’s executed assent of the “Work Completion Form” and the certifications therein, Respondent would, thereafter, purchase each Dunlap Invoice from Dunlap. At trial, Respondent’s Kevin Gilbert testified that but for Appellant’s representations in the “Work Completion Form” it would not have purchased any of the Dunlap Invoices.

From April 2014 until February 2016, Appellant remitted payment to Respondent on Dunlap Invoices without any problem. Beginning with two (2) March 28, 2016 Dunlap Invoices, however, Appellant failed to remit payment on fifteen (15) invoices which it had certified to Respondent, totaling Two Hundred Two Thousand, Three Hundred Ninety and 92/100ths Dollars (\$202,390.92). Those invoices and related Appellant certifications to each are as follows:

Dunlap Invoice No.	Invoice Date	Amount	Date Appellant signed “Work Completion Form”	Date Appellant emailed “Work Completion Form” to Respondent
6933	3/28/2016	\$12,600.00	3/31/2016	3/31/2016
6934	3/28/2016	\$15,223.68	3/31/2016	3/31/2016

6944	4/4/2016	\$5,998.08	4/4/2016	4/14/2016
6945	4/4/2016	\$5,453.60	4/4/2016	4/4/2016
6946	4/4/2016	\$29,387.64	4/4/2016	4/4/2016
6948	4/12/2016	\$18,117.35	4/12/2016	4/13/2016
6949	4/20/2016	\$18,000.00	4/22/2016	4/22/2016
6951	4/20/2016	\$4,422.03	4/22/2016	4/22/2016
6952	4/25/2016	\$18,000.00	4/26/2016	4/26/2016
6953	4/27/2016	\$40,662.14	5/2/2016	5/2/2016
6954	4/27/2016	\$5,998.08	4/28/2016	5/2/2016
6955	4/27/2016	\$5,998.07	4/28/2016	5/2/2016
6956	4/27/2016	\$5,453.59	4/28/2016	5/2/2016
6957	5/2/2016	\$9,000.00	5/2/2016	5/2/2016
6959	5/4/2016	\$8,076.66	5/5/2016	5/9/2016

Total: \$202,390.92

No later than April 2016, according to the trial testimony of Appellant's Jessica Kirk DeLaune, Appellant learned Dunlap had failed to pay at least two (2) of its suppliers, Hertz and Carboline, and back-charged Dunlap in excess of the Two Hundred Two Thousand, Three Hundred Ninety and 92/100ths Dollars (\$202,390.92) open invoice balance. Despite learning that Dunlap had failed to pay at least two (2) of its suppliers, Appellant continued to represent to Respondent that complete payment should be processed on the Dunlap Invoices until May 9, 2016. It was not until July 2016 that Appellant informed Respondent regarding the unpaid Dunlap suppliers and the back- charges.

At the time of trial, the contact balance due and owing Respondent from Dunlap was Three Hundred Twenty-Three Thousand, Seven Hundred Eighteen and 31/100ths Dollars (\$323,718.31).

ARGUMENT

I. APPELLANT HAS FAILED TO PRESEVE ISSUES UNDER THIS APPEAL

"A party must file [a Rule 59(e), SCRCPP] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, at 24, 602 S.E.2d 772, at 780 (2004). In this matter, Appellant did not file any motions pursuant to Rule 59, South Carolina Rules of Civil Procedure and accordingly, matters

not raised and ruled upon are not preserved for appellate review. *Id.* This includes, but is not limited to, the following arguments of Appellant:

1. Whether there existed a legally cognizable offer to form an agreement between Appellant and Respondent as to Appellant's agreement not to assert defenses or claims;
2. Whether the offer to form an agreement between Appellant and Respondent was ambiguous;
3. Whether there existed legally cognizable consideration to form an agreement between Appellant and Respondent as to Appellant's agreement not to assert defenses or claims;
4. Whether Appellant was already under an obligation to forward all Dunlap payments to Respondent by virtue of the work completion forms;
5. Whether Appellant's promise to process complete payment to Respondent was an obligation it was already legally bound to do;
6. Whether there is any evidence in the record to support the Circuit Court's implicit conclusion that consideration was given;
7. Whether the Circuit Court misapplied South Carolina Code §§ 36-9-404 or 607;
8. Whether the Appellant waived payment defenses in favor of Respondent;
9. Whether the word "should" as stated on the work completion forms is ambiguous;
10. Whether Appellant should be responsible for all work completion forms issued, even those issued in March 2016;
11. Whether the Respondent failed to meet its burden to prove each statement regarding "complete payment" was false when made;
12. Whether the Circuit Court could determine, with any certitude, which of the work completion forms contained false representations of fact at the time of their issuance;

13. Whether “complete payment” means payment in full or giving due regard to any of Appellant’s claims and defenses;
14. Whether Appellant occupied the position of a fiduciary with respect to Respondent;
15. Whether Appellant had a general duty to disclose information to Respondent;
16. Whether there is evidence in the record that suggests Appellant acted in derogation of any standard of care;
17. Whether Respondent failed to act reasonably in protection of its own interests;
18. Whether Respondent’s cause of action for negligent misrepresentation failed if Respondent failed to act reasonably in protection of its own interests;
19. Whether the Order, as written, is inconsistent in finding in favor of Respondent on both its causes of action for enforcement of its security interest and promissory estoppel;
20. Whether there were sufficient payment details to support a promissory estoppel cause of action;
21. Whether the interests of equity are served by fashioning an equitable remedy in favor of Respondent against Appellant;
22. Whether Appellant could be responsible for Respondent’s lost interest;
23. Whether the award of \$202,390.92 under Respondent’s promissory estoppel cause of action was appropriate; and
24. Whether Appellant’s set off rights, if any, applied to all three of Respondent’s causes of action.

II. THE COURT PROPERLY FOUND THAT RESPONDENT COULD ENFORCE APPELLANT’S OBLIGATIONS AND EXERCISE THE RIGHTS OF THE DUNLAP WITH RESPECT TO THE OBLIGATION OF APPELLANT PURSUANT TO SOUTH CAROLINA CODE ANN. 36-9-607.

Respondent incorporates the arguments from Paragraph 1 of the Circuit Court's January 31, 2020 Order and the arguments from Section I, above, as if restated herein verbatim.

A. APPELLANT AGREED TO PROCESS COMPLETE PAYMENT TO RESPONDENT AND, THEREBY, AGREED NOT TO ASSERT ANY DEFENSES OR CLAIMS WHICH WOULD REDUCE COMPLETE PAYMENT

In the matter at hand, Respondent offered to fund Dunlap's receivables and keep Dunlap available for work on Appellant's project if Appellant would change its position and waive any defenses it had to processing complete payment to Respondent on Dunlap's receivables. (Tr. 31:2-6 and See, e.g., Respondent's Tr. Ex. 1.) Appellant accepted Respondent's offer on each of the Dunlap Invoices. (Id.) By and through this exchange, Appellant received the benefit of Dunlap remaining on the project and Respondent received the benefit of Appellant agreeing to pay the Dunlap Invoices in full – a benefit Respondent did not enjoy until Appellant agreed to it. (Tr. 31:2-6 and See, e.g., Respondent's Tr. Ex. 1.) Accordingly, there was an offer, an acceptance and an exchange of consideration in order to support the agreement to process complete payment of the Dunlap Invoices.

B. AS APPELLANT AGREED NOT TO ASSERT ANY DEFENSES OR CLAIMS WHICH WOULD REDUCE COMPLETE PAYMENT, RESPONDENT WAS ENTITLED TO COMPLETE PAYMENT FROM APPELLANT

As Appellant agreed to process complete payment to Respondent and, thus, waive any defenses or claims which would reduce complete payment in accordance with S.C. Code § 36-9-404(a)(1), Respondent was entitled to enforce Appellant's full obligations on the Dunlap Invoices in spite of the language of the subcontract between Appellant and Dunlap or any other defenses Appellant may have had. See e.g. South Carolina Code § 36-9-607.

C. THIS MATTER IS DISTINGUISHABLE FROM THE FACTOR KING CASE

As a starting point, the decision reached in the *Factor King* case by the federal trial court in Louisiana on a summary judgment motion is clearly not binding upon this Court; especially when the parties resolved the matter out of court before the appellate court could provide review. *See e.g. Factor King, L.L.C. v. Block Builders, L.L.C., et al, United States Court of Appeals for the Fifth Circuit, Court of Appeals Docket #: 16-30848, Document 00513724526 dated October 16, 2016.* Furthermore, the facts of the *Factor King* case are wholly distinguishable from the matter at hand. In *Factor King*, the secured party brought a breach of contract action against the account debtor based on subrogating into the debtor's shoes wherein the contract stipulated that the debtor's contract balances would be held in trust for the benefit of the debtor's subcontractors and were further subject to separate joint check agreements with debtor's subcontractors. *See e.g. Factor King, LLC v. Block Builders, LLC, 193 F. Supp 3D 651 (M.D. La. 2016).* Accordingly, *Factor King* should not be considered as persuasive authority with respect to Respondent's cause of action under *South Carolina Code* § 36-9-607. Instead, the Respondent asks that the Court look at the simple statutory construction of *South Carolina Code* § 36-9-404 which states that Respondent is subject to Dunlap's contract with Appellant unless Appellant agrees otherwise – which is precisely the circumstance of this matter wherein Appellant agreed to process complete payment of the Dunlap Invoices. *See e.g. South Carolina Code* § 36-9-404(a)(1).

D. CONCLUSION

For the foregoing reasons, the Circuit Court properly found that Respondent could enforce Appellant's obligations under the Dunlap Invoices and properly awarded judgment to Respondent in the amount of Two Hundred Two Thousand, Three Hundred Ninety and 92/100ths Dollars (\$202,390.92).

III. THE COURT PROPERLY FOUND THAT APPELLANT NEGLIGENTLY MISREPRESENTED TO RESPONDENT THAT COMPLETE PAYMENT SHOULD BE PROCESSED TO IT.

Respondent incorporates the arguments from Paragraph 2 of the Circuit Court’s January 31, 2020 Order and the arguments from Sections I and II, above, as if restated herein verbatim.

A. APPELLANT DID HAVE SPECIALIZED KNOWLEDGE AND THE HARM TO RESPONDENT WAS PATENTLY OBVIOUS

For the foregoing reasons As stated in the Order, in a cause of action for negligent misrepresentation, the duty of care is not requiring the defendant to take every possible care, much less to be right – it is simply the duty to exercise the care of a reasonable person under the circumstances. *See AMA Management Corp. v. Strasburger*, 309 S.C.213, 420 S.E.2d 868, 874 (Ct. App. 1992). In the matter at hand, Appellant, despite being made aware and knowing that Dunlap had failed to pay its subcontractors, routinely and in complete disregard for the foreseeable harm that could befall Respondent, represented to Respondent over and over that “complete payment should be processed” on the Dunlap Invoices in order to induce Respondent to fund Dunlap. The fact that Appellant had been made aware of Dunlap’s breach is indeed specialized knowledge that, if disclosed to Appellant through the exercise of reasonable care, would have allowed Respondent to avoid this foreseeable harm.

B. RESPONDENT ACTED PRUDENTLY BASED ON APPELLANT’S PROMISE TO PROCESS COMPLETE PAYMENT

As discussed herein, Appellant agreed that complete payment should be processed to Respondent. Accordingly, based on those representations, there was no real interest to protect by Respondent performing further due diligence into Dunlap’s contractual relationships.

C. CONCLUSION

For the foregoing reasons, the Circuit Court properly found that Appellant negligently misrepresented to Respondent that complete payment should be processed to it and properly awarded judgment to Respondent in the amount of Three Hundred Twenty-Three Thousand, Seven Hundred Eighteen and 31/100ths Dollars (\$323,718.31).

IV. THE COURT PROPERLY FOUND THAT, AS THE DIRECT AND PROXIMATE RESULT OF RESPONDENT'S RELIANCE ON APPELLANT'S UNAMBIGUOUS PROMISE THAT COMPLETE PAYMENT SHOULD BE PROCESSED TO IT, RESPONDENT WAS DAMAGED.

Respondent incorporates the arguments from Paragraph 3 of the Circuit Court's January 31, 2020 Order and the arguments from Section I, above, as if restated herein verbatim.

A. APPELLANT MADE AN UNAMBIGUOUS PROMISE

Despite Appellant's contentions otherwise, all the details regarding who will pay what amount and when are included in the Dunlap Invoices and the accompanying Work Completion Form. Specifically, Appellant promised to pay the complete amount on net 30 terms. (See e.g., Respondent's Tr. Ex. 1.).

B. NO INEQUITY INFLICTED UPON APPELLANT

There is no dispute that the true bad-actor in the totality of this equation was Dunlap. That said, Appellant's position that the Circuit Court did not undertake any balancing of equities as between Appellant and Respondent is in complete disregard for the Court's findings that Appellant, itself, was a bad actor by falsely representing "to Plaintiff that 'complete payment should be processed' to Plaintiff on the Dunlap Invoices despite having knowledge since April 2016 that Dunlap had not paid its subcontractors or suppliers." As Appellant was in the best position to prevent the harm that arose by and through its knowledge of Dunlap's default, there is no inequity inflicted upon Appellant in this matter.

C. CONCLUSION

For the foregoing reasons, the Circuit Court properly found that, as the direct and proximate result of Respondent relying on Appellant's promise that "complete payment should be processed", Respondent was damaged and properly awarded judgment to Respondent in the amount of Two Hundred Two Thousand, Three Hundred Ninety and 92/100ths Dollars (\$202,390.92).

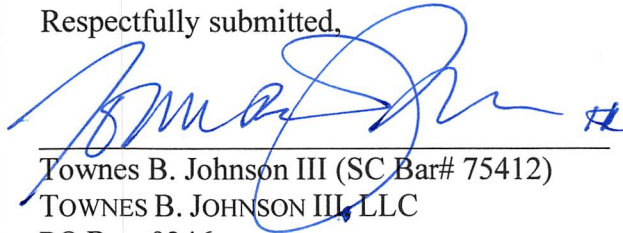
V. AFFIRMANCE ON ANY GROUND APPEARING IN RECORD.

Respondent expressly asks that the Court affirm the Circuit Court's January 31, 2020 Order upon any grounds appearing in the Record on Appeal pursuant to Rule 220(c), SCACR.

CONCLUSION

For the foregoing reasons, Respondent Associated Receivables Funding, Inc. respectfully asks this Court to affirm the Circuit Court's judgment against Appellant Classic Industrial Services, Inc.

Respectfully submitted,



Townes B. Johnson III (SC Bar# 75412)

TOWNES B. JOHNSON III, LLC

PO BOX 9246

GREENVILLE, SC 29604

PH: (864) 757-4899

Attorneys for Respondent

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Of Which, Classic Industrial Services, Inc., is..... Appellant.

PROOF OF SERVICE

The undersigned counsel for Respondent hereby certifies, subject to penalty of perjury,
that the following document(s) was/were served upon the following counsel of record by the
following means as of the date identified below:

Document(s):

- (1) Respondent’s Initial Brief; and,
- (2) Respondent’s Initial Designation of Matter to be included in the Record on Appeal

Counsel Served:

For Appellant:
Steven Edward Buckingham
The Law Office of Steven Edward Buckingham
16 Wellington Avenue
Greenville, South Carolina 29609
seb@buckingham.legal

Means of Delivery: *via E-Mail*

Courts Served:

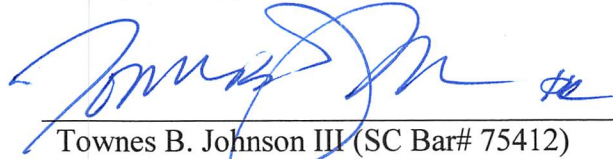
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Date:

October 15, 2020

Respectfully,



Townes B. Johnson III (SC Bar# 75412)
TOWNES B. JOHNSON III, LLC
PO BOX 9246
GREENVILLE, SC 29604
PH: (864) 757-4899
tjohnson@sc.legal

Attorney for Respondent