

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2020-000218

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SC Court of Appeals

PTA-FLA, Inc.,

Appellant-Respondent,

v.

TW Telecom Holdings, Inc., a
Delaware corporation; and
DOES 1-10, inclusive,

Respondent-Appellant.

FINAL REPLY BRIEF OF APPELLANT-RESPONDENT PTA-FLA, INC.

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ARGUMENT

I. REQUEST OF PUNITIVE DAMAGES IS NOT REQUIRED FOR A BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT CAUSE OF ACTION

To recover damages for Breach of Contract Accompanied by Fraudulent Act, the Plaintiff must show:

- (1) **A breach of contract.** Bailey v. North Carolina Mut. Life Ins. Co., 173 S.C. 131, 175 S.E. 73 (1934). In the absence of a breach of contract, the plaintiff's proper cause of action will generally be for fraud in the inducement. See Smyth v. Fleischmann, 214 S.C. 263, 52 S.E.2d 199 (1949).
- (2) **Fraudulent intent relating to the breaching of the contract and not merely to its making.** (Internal citation omitted). Fraudulent intent is normally proved by circumstances surrounding the breach. See Sutton v. Continental Casualty Co., 168 S.C. 372, 167 S.E. 647 (1933).
- (3) **A fraudulent act accompanying the breach.** (Internal citation omitted). The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character. (Internal citations omitted).

Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-04 (Ct. App. 1985) (emphasis added).

In cases involving breach of contract accompanied by a fraudulent act “it is clear that the fraudulent act alleged must be an act done with the intent to deceive.” Save Charleston Foundation v. Murray, 286 S.C. 170, 181, 333 S.E.2d 60, 67 (Ct. App. 1985). This makes breach of contract accompanied by a fraudulent act fall within actual fraud as it requires the intent to deceive. See Maybank v. BB&T Corp., 416 S.C. 541, 577, 787 S.E.2d 498, 517 (2016) (stating that constructive fraud differentiates from actual fraud because “constructive fraud does not require the element of intent to deceive” and therefore limitations on liability could apply to the cause of action for constructive fraud). The Supreme Court has recognized that other jurisdictions have refused to enforce limitations on liability where actual fraud is involved.

Maybank, 416 S.C. at 577 n. 16, 787 S.E.2d at 517 n. 16. “In general, we refuse to enforce contracts based on fraudulent conduct because a party should not retain the benefits of an agreement that he knowingly and *intentionally* entered into through deceptive means.” Maybank, 416 S.C. at 577, 787 S.E.2d at 517 (emphasis in original). “Moreover, beyond the patent unfairness inherent in enforcing a contract induced through intentional fraud, giving legal effect to such a contract violates a fundamental principle of contract law: there must be a meeting of the minds. By its very nature, there can be no union of purpose where one party is intentionally deceiving the other through fraud.” Maybank, 416 S.C. at 577-78, 787 S.E.2d at 517.

In its Response Brief, TWT nonsensically argues that PTA-FLA could only pursue a breach of contract cause of action because “PTA-FLA did not pursue its claim for punitive damages at the damages trial.” (TWT Resp. Br. p. 12). TWT cites to Smith v. Canal Ins. Co., 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980) and Ateyeh v. Volkswagen of Florence, Inc., 288 S.C. 101, 341 S.E.2d 378, 379-80 (1996) in reliance of the idea that breach of contract accompanied by fraudulent act is “simply a breach of contract claim in which punitive damages may be recovered upon proof of a predicate fraudulent act associated with the breach.” (TWT Resp. Br. p. 11-12).

Ostensibly, TWT is trying to argue that without seeking punitive damages you cannot have a cause of action for breach of contract accompanied by a fraudulent act; however, that clearly is not true, nor does either case say anything of the sort. The elements of a cause of action for breach of contract accompanied fraudulent act are outlined in detail above. In Ateyeh, the court stated that Ateyeh could seek punitive damages only if she had a right to maintain a contract action and could make the requisite showing of a fraudulent act. Ateyeh, 288 S.C. at

103, 341 S.E.2d at 379-80. In Smith v. Canal Ins. Co., the South Carolina Supreme Court holds something similar, that the plaintiff must show the breach was accompanied by a fraudulent act “**in order to recover punitive damages.**” Smith v. Canal Ins. Co., 275 S.C. at 260, 269 S.E.2d at 350. TWT’s argument that punitive damages must be claimed in order to have a cause of action for breach of contract accompanied by fraudulent act is without merit.

II. PTA-FLA HAS PROVIDED EVIDENCE THAT IT DID NOT RECEIVE WHAT WAS BARGAINED AND PAID FOR UNDER THE AGREEMENT AND ADDITIONAL DIRECT DAMAGES SHOULD BE AWARDED

TWT has acknowledged that it has not challenged the calculation that PTA-FLA paid \$396,082.42 to TWT. (TWT Resp. Br. p. 13). However, TWT completely misses the point on the purpose of those payments. PTA-FLA was obligated to make payments under a contract that was breached in a manner that was accompanied by a fraudulent act. The amount PTA-FLA paid was the amount required under a contract where the contract was being followed by both parties, which was not the case here. The testimony in court could have established an overpayment of \$9,218.42 if there had been no breach accompanied by fraudulent act, but that is the trial court’s error.

PTA-FLA paid TWT a total of \$396,082.42 over this relationship for the services. (R. p. 110, lines 7-8, p. 120, lines 5-9). However, because of TWT’s breach of contract accompanied by fraudulent act, PTA-FLA never received any real value for the service. This is because the service PTA-FLA received was not the service it had bargained for, which kept PTA-FLA from implementing its business plan of selling unlimited data plans to its customers. (R. pp. 47-50, 56-57, ¶¶ 8-12, 23-25, 73-78, R. p. 140, lines 11-15).

There is ample evidence in the record, that PTA-FLA did not receive the services it paid

for and the value of the service it received was much less than what was paid for it, if in fact, the services had any value at all. Such evidence includes:

- PTA-FLA and TWT agreed to certain payment schedules for an initial period of 28 months in exchange for “unlimited internet service up to certain bandwidth limits as measured by the amount of internet traffic used at the ‘drain’ located at 1401 Main Street.” [R. p. 47-48, ¶¶ 8-9].
- Initial invoices did not correspond with payments upon terms of the agreement and Payment Schedule where the first invoice was for \$3,450.09 instead of \$,588.00 as agreed. [R. pp. 49-50, ¶ 21].
- PTA-FLA was concerned because PTA-FLA received reports from TWT’s employees that TWT did not intend to honor the agreement and desired to implement another type of arrangement that involved different structure and only a small amount of internet bandwidth. [R. pp. 49-50, ¶ 23].
- The uncertainty introduced by TWT hampered PTA-FLA’s efforts to launch its data service because it could not effectively market the service without knowing what its costs were going to be. The fixed cost element of the Payment Schedule was material and would allow PTA-FLA to sell unlimited data service to its customers. [R. p. 50, ¶ 25].
- TWT’s agent Mr. Knierim told PTA-FLA that the discrepancy was meant to save money but Mr. Knierim assured PTA-FLA that “under no circumstances would it be charged a higher amount than what was set forth in the Payment Schedule” and that PTA-FLA was “assured that in no event would it not be provided with unlimited use on the point to point circuits and internet access at 1401 Main location. [R. pp. 46-50, ¶¶ 2-28].

- TWT never provided the agreed to service that was agreed to in term to make the payments per the Payment Schedule. [See R. pp. 51-53, ¶¶ 30-46].
- Mr. Steinmann testified at the first damages hearing that the “agreement was that we would pay a certain amount every month and that amount would escalate if our business presumably would grow.” [R. p. 128, lines 10-13].
- Mr. Steinmann also testified that under the agreement, PTA-FLA would be overpaying for the actual use, but the fixed payments would be beneficial to PTA-FLA. [R. p. 128, lines 15-19].
- Mr. Steinmann further testified that “[w]e agreed that the amount of capacity on those pipes would be limited only by this amount that was designated in the agreement for the internet access. So if there was 140 megabits at the internet access point, that would be allocated amongst these fiberoptic pipes, and instead of that, they only gave us like 10 megahertz – or 10 megabits pipes and 10 megabits of capacity at the drain that’s what caused blocking of our sessions and that was the failure when we were in the testing period that they said that needed to be worked out by putting in duplicate sessions.” [R. p. 151, line 4-20].
- TWT’s failure to provide the agreed upon service in the manner that was agreed to prevented PTA-FLA being “two or three years ahead of anybody else talking about unlimited data plans and wireless. We were installing and designing for unlimited data plan two or three years ahead of everybody else, but we couldn’t execute that business plan at that point.” [R. p. 151, line 22-p. 152, line 1].
- At the second damages hearing Mr. Steinmann testified he was seeking direct damages

for “the amount that we paid TW Telecom for these circuits that were not what we purchased, which was about \$396,000” [ROA _____, Dec. 3, 2019 Hr’g Tr. 21:24-22:1].

- Mr. Steinmann also testified that TWT “never provided us with the unlimited circuits we asked and then went back and – went back on their agreements and caused us to, you know, scamper around and make – try to get people to replace these circuits after they said they would extend the contract.” [R. p. 188, lines 10-15].
- On recross-examination, TWT’s counsel asked Mr. Steinmann if PTA-FLA had overpaid \$9,218.42 to which Mr. Steinmann replied, “No. I don’t believe that’s correct. We overpaid pretty much the whole thing. If you agreed to pay, you know, \$50,000 for a car and - - a new car, and you got something entirely different, then I think it’s fair to say you overpaid the entire \$50,000.” [R. p. 189, lines 7-13].

There is more than ample evidence in the record that PTA-FLA’s direct damages far exceed the \$9,218.42 overpayment that the Trial Court eventually awarded. (R. p. 37). This overpayment calculation inaccurately assumes the value of the service TWT provided to PTA-FLA where all the evidence points to the fact that PTA-FLA agreed to a flat rate of payment at higher than normal amounts for a set service that would allow PTA-FLA to offer unlimited data plans to its customers. The flat rates for unlimited bandwidth use on TWT’s network limited only by at the drain would allow PTA-FLA to succeed with its business plan. Unfortunately, TWT did not provide that service and instead provided lesser service that should have been billed at a much lower rate and practically was useless to PTA-FLA as it made it impossible for PTA-FLA to pursue its business plan.

CONCLUSION

For the reasons stated above and in PTA-FLA's Initial Brief, this Court should reverse the judgment of the circuit court and award additional damages.

Respectfully submitted,

October 20, 2020

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

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