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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stillwell, Circuit Court Judge

Case No. 2014-CP-23-05031
Appeal No. 2017-002183

Oldcastle APG South, Inc.,
d/b/a Adams Products
Company, and Oldcastle APG
Northeast, Inc., d/b/a Foster-
Southeastern, Respondent,

v.

Daniel B. Albert, Appellant.

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

Daniel B. Albert
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Appellant, *pro se*

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STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE

On September 11, 2014, Respondent brought an action against Appellant alleging breach of contract, unjust enrichment, breach of guarantee and quantum meruit, alleging that appellant owed it \$127,212.13. Appellant filed his Answer and Counterclaim on December 29, 2014.

In the days prior to the trial scheduled for May 23, 2016, the parties entered into settlement discussions. Respondent prepared a 40(j) consent order of dismissal and sent it to Appellant for consideration. Appellant rejected the 40(j) consent order of dismissal because he wanted to bring the litigation to an immediate end in order to enhance the opportunity to resume doing business with Respondent.

Appellant executed a Confession of Judgment on May 16, 2016, but after a sharp disagreement between Appellant and Respondent about the validity of the Confession of Judgment, the parties agreed to execute a settlement agreement and release ("Settlement Agreement") that was prepared by Respondent and was executed in parts, the last of which being executed on June 2, 2016. The Settlement Agreement referenced the Confession of Judgment and introduced other material terms. On May 23, 2016 Respondent informed the court that the parties had settled the case, having executed a Settlement Agreement, and that counsel for Respondent would be submitting a stipulation of dismissal shortly.

In early 2017, Appellant received notification of a status conference in this matter, and made inquiry with Respondent. Respondent sent Appellant a 41(a) stipulation of dismissal with prejudice, which Appellant executed and returned to Respondent on February 4, 2017. Respondent insisted upon Appellant executing a 40(j) consent order striking case from docket, which Appellant refused to do. The parties, being in sharp disagreement about the failure of Respondent to file a stipulation of dismissal, and the materiality of that failure to file a stipulation of dismissal as required by the Settlement Agreement, went before the court for a status conference on March 8, 2017. Respondent filed the Confession of Judgment on May 5, 2017.

Appellant filed Defendant's Motion for Relief of Judgment and for Reinstatement to Trial Roster on May 15, 2017. The court conducted a hearing on Appellant's Motion for Relief of Judgment and for Reinstatement to Trial Roster on June 15, 2017. The court issued an order denying Appellant's motion on July 10, 2017. Appellant filed his Motion to Reconsider Defendant's Motion for Relief of Judgment and for Reinstatement to Trial Roster on July 20, 2017. The court issued an order denying Appellant's Motion to Reconsider on July 27, 2017.

Appellant received the July 27, 2017 order by email on September 18, 2017. Appellant filed his Notice of Appeal on October 18, 2017 and also served notice on the lower court and counsel for Respondent on the same day.

ARGUMENTS

I. WRITTEN COMMUNICATION OF COUNSEL FOR RESPONDENT, AND THE STATEMENTS OF COUNSEL FOR RESPONDENT AT THE JUNE 15, 2017 HEARING INDICATE FRAUD OR MISREPRESENTATION IN NEGOTIATING THE SETTLEMENT AGREEMENT WITH APPELLANT BY COUNSEL FOR RESPONDENT.

Counsel for Respondent misled the court by saying that no attorney would file a stipulation of dismissal before payment was received (R. p. 256, lines 16-21), when in fact, the evidence is clear in the exhibits presented by Appellant with his motion for relief that that is exactly what counsel for Respondent was representing would happen.

In the May 16, 2016 email to which counsel for Respondent attached the Confession of Judgment for Appellant to execute, she stated: "Please sign it as indicated and have it notarized and send it back to me and I will then advise the court of the dismissal of the case" (R. p. 53). Counsel for Respondent made other statements that show that the intent of the parties in entering into the Settlement Agreement was to immediately end the litigation by a timely filing of a stipulation of dismissal.

When Appellant and counsel for Respondent were communicating about their sharp disagreement about the validity of the Confession of Judgment without a clarifying Settlement Agreement that was executed by both parties, counsel for Respondent said "I will be glad to send you a settlement agreement that states that we are relinquishing all claims against you personally and Madawaska Hardscape Products, Inc. due to your signing of that Confession of Judgment" (R. p. 62).

At the time of entering the Settlement Agreement, Appellant did not know the precise mechanics by which Respondent would bring the Litigation to an immediate, full and final end, but the mechanics did not matter to Appellant as long as the Litigation immediately ended.

Additional statements made by counsel for Respondent at the June 15, 2017 hearing are contradictory to the prior position she took to persuade Appellant to enter into the Settlement Agreement (R. p. 256, lines 16-21- p. 257, lines 7-20 - p. 259, lines 1-7). All the

court had to do to test the veracity of the conflicting statements by counsel for Respondent is to look at the exhibits presented with the motion for relief.

II. THE COMMUNICATIONS BETWEEN APPELLANT AND RESPONDENT LEADING UP TO THE EXECUTION OF THE SETTLEMENT AGREEMENT JUSTIFY THE POSITION OF APPELLANT THAT IT WAS UNAMBIGUOUS THAT RESPONDENT WOULD TIMELY FILE A STIPULATION OF DISMISSAL THAT WOULD IMMEDIATELY AND COMPLETELY END THE LITIGATION.

The court pointed out that the Settlement Agreement did not clearly state that it was the responsibility of Respondent to file the Stipulation of Dismissal, but the agreement also did not state that it was *not* the responsibility of Respondent to do so. There is ambiguity as to who had the responsibility to file the stipulation, but by looking outside the four corners of the agreement it is clear that counsel for Respondent took the responsibility for filing the Stipulation of Dismissal. The court improperly held that it was not clear that Respondent had responsibility for filing the Stipulation of Dismissal in spite of the fact that there was ambiguity. The evidence outside the four corners clearly demonstrates that Respondent was responsible, that Respondent was the drafter of the agreement and that Appellant is a *pro se* litigant (R. p. 53 – pp. 112-113).

Respondent was not only responsible for filing a stipulation of dismissal, Respondent actually sent draft stipulations of dismissal to Appellant, one of which Appellant actually executed and returned to Respondent for filing with the court (R. p. 252, lines 3-5 - p. 287 - p. 264, lines 17-18 - p. 268, lines 15-23).

III. IF THERE IS AMBIGUITY IN THE TERM OF THE SETTLEMENT AGREEMENT REQUIRING THE PARTIES TO FILE A STIPULATION OF DISMISSAL, THE AMBIGUITY SHOULD BE CONSTRUED AGAINST RESPONDENT AS DRAFTER OF THE AGREEMENT, AND EVIDENCE OUTSIDE THE FOUR CORNERS OF THE AGREEMENT SHOULD BE EXAMINED TO DETERMINE THE INTENT OF THE PARTIES.

Paragraph 5 of the Settlement Agreement, entitled “**Stipulation of Dismissal**” states that “The parties agree to enter into a stipulation of dismissal which will release all claims and counterclaims in this Litigation.” As the court observed, this language did not say that

the stipulation of dismissal would be entered into immediately. The language also did not say that it was *not* immediate, for it was silent on the timeframe (R. p. 265, lines 10-16). Appellant understood the timeframe to be immediate, and counsel for Respondent testified that “no attorney would file the stipulation of dismissal before receiving payment.” The language was therefore clearly ambiguous if both parties had completely different understandings of the intended timeframe.

Appellant testified that ambiguity in the agreement must be construed against the drafter of the agreement, which in this case was Respondent (R. p. 265, lines 7-9). Appellant also testified that there were at least three instances when counsel for Respondent stated that she would enter a stipulation of dismissal (R. p. 264, lines 12-24). Each of these statements by counsel for Respondent were contained in the exhibits to the Motion for Relief, as pointed out by Appellant. The court improperly failed to look outside the four corners of the agreement to see the clear evidence that there indeed was an agreement for the immediate cessation of the Litigation, and that Appellant entered into the Settlement Agreement upon reliance upon the statements and representations of counsel for Respondent. All of this is plain as day if the court would simply look outside the four corners of the agreement to see what the true intent was of the parties (R. p. 264, lines 12-24).

IV. THE ONLY REASON APPELLANT HAD FOR ENTERING INTO A SETTLEMENT AGREEMENT AND SIGNING A CONFESSION OF JUDGMENT WAS TO BRING THE LITIGATION TO AN IMMEDIATE END IN ORDER TO ENHANCE THE OPPORTUNITY FOR APPELLANT TO RESUME DOING BUSINESS WITH RESPONDENT.

Respondent, through counsel, sent to Appellant a proposed consent order to dismiss this case without prejudice pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure (R. p. 236, line 6 - pp. 275-278 - p. 251, lines 20-24 - p. 51). Upon review of the proposed dismissal without prejudice, Appellant rejected the proposed 40(j) dismissal because it did not bring the litigation to an immediate end. Appellant proposed entering into a confession of judgment in order to bring the litigation to an immediate end.

Appellant testified at the hearing on the motion for relief that the sole purpose for Appellant entering into the Settlement Agreement with Respondent was to bring an

immediate, complete and final end to the litigation between the parties (R. p. 236, lines 6-9 – p. 242, line 23 - p. 243, line 4 – p. 250, lines 12-13 - p. 260, lines 13-20 - p. 260, lines 24-25). Appellant entered into the Settlement Agreement based upon the representations of Respondent that, upon entering into the Settlement Agreement, the litigation would be brought to an immediate, complete and final end. Appellant wanted to bring the litigation to an immediate end in order to enhance the opportunity to resume doing business with Respondent (R. p. 234, line 25 - p. 235, line 1 – p. 267, lines 3-13). Communication between the parties submitted by Appellant as exhibits to the motion support this narrative.

Appellant testified that he was surprised to learn that the litigation was still pending when, in January 2017, he received a notice of a status conference in this litigation that was scheduled for March 8, 2017 (R. p. 251, line 25 - p. 252, line 2).

There is no rational reason why Appellant would reject a 40(j) stipulation of dismissal and then agree to a Settlement Agreement and Confession of Judgment that granted Respondent a judgment of \$100,000, but did not bring an immediate end to the case.

V. RESPONDENT, THROUGH COUNSEL, TOOK THE RESPONSIBILITY FOR IMMEDIATELY FILING A STIPULATION OF DISMISSAL IN ORDER TO BRING THE LITIGATION TO AN END, AND COMMUNICATED THAT INTENT WITH THE COURT AND WITH APPELLANT.

In an email to Lindall Coker on May 23, 2016, counsel for Respondent informed the court that the parties had settled the case by entering into a Settlement Agreement, and that counsel for Respondent would be submitting a stipulation of dismissal shortly (R. pp. 112-113).

Since counsel for Respondent informed the court that the case was settled, and that she would be submitting a stipulation of dismissal shortly, and since counsel for Respondent sent at least three different draft versions of a stipulation of dismissal to Appellant and did all of the drafting of the Settlement Agreement and attached Confession of Judgment, and since upon learning that the case was still on the active roster, counsel for Respondent immediately responded by emailing Appellant a draft stipulation of dismissal, it would strain credulity for reasonable person to conclude anything other than that counsel for Respondent did indeed

take responsibility for immediately filing the stipulation of dismissal required by the Settlement Agreement.

VI. RESPONDENT BREACHED A MATERIAL TERM OF THE SETTLEMENT AGREEMENT BY NOT FILING A STIPULATION OF DISMISSAL, DENYING APPELLANT OF THE BENEFIT OF HIS BARGAIN.

The preponderance of the evidence clearly proves that Respondent breached a material term of the Settlement Agreement, and that Respondent engaged in negligence, fraud, misrepresentation or other misconduct that should relieve Appellant from his obligations under the Settlement Agreement and Confession of Judgment.

Counsel for Respondent did not file a stipulation of dismissal bringing the litigation to an immediate end as agreed throughout the discussions of the initial execution of the Confession of Judgment and the execution of the Settlement Agreement. From May 23, 2016 through the time that he received the case scheduling notice sent by the court dated January 18, 2017, Appellant had the understanding that the litigation in this matter was completely and finally over. Since learning that the case was not ended as agreed, Appellant has contested the validity of the Confession of Judgment.

Appellant rejected the offer by counsel for Respondent of a stipulation of dismissal without prejudice because it would not bring a complete and final end to the litigation in this case. The immediate, final and complete end of the litigation in this case was a key element of all of the settlement negotiations between Appellant and Respondent, and was a necessary and material provision of the Settlement Agreement and Release as well as the Confession of Judgment. Whether through negligence, breach of contract, fraud, misrepresentation or other misconduct of Respondent, Appellant has been denied the benefit of his bargain (R. p. 250, lines 9-11 - p. 260, lines 13-20 – p. 260, lines 24-25 – p. 266, lines 9-13 - p. 267, lines 3-13).

CONCLUSION

If this Court reverses the judgment of the Circuit Court, the result will be that the litigation would proceed, and Respondent would then be able to prove its case upon the merits. Respondent would not lose a valid judgment that they earned by proving the merits of their case, they would simply lose a confession of judgment that was secured by counsel for Respondent through negligence, fraud or misrepresentation. For the reasons stated, justice in this case requires that this Court reverse the judgment of the Circuit Court and allow the parties to prove their claims, defenses and counterclaims.

Respectfully submitted,

August 31, 2018

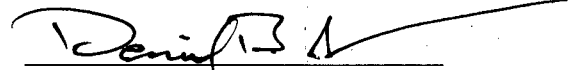


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Certificate of Counsel

The undersigned hereby certifies that this **Final Brief of Appellant** conforms with the requirements of Rule 211(b).

August 31, 2018



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