THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2017-CP-26-03562

Carolina Cool, Inc. ..... Plaintiff,

v.

Garrard Construction Group, Inc., Dave & Buster's of South Carolina, Inc., Broadway at the Beach, Inc., and Billy's Plumbing Company, LLC..... Defendants,

---

Garrard Construction Group, Inc. .....Third-Party Plaintiff,

v.

RLI Insurance Company ..... Third-Party Defendant

of whom:

Carolina Cool, Inc. is the .....Respondent,
and
Garrard Construction Group, Inc. is the.....Appellant.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. In this case where there was no evidence that Garrard Construction Group, Inc. ("Garrard") violated any previous discovery order, did the circuit court err in dismissing Garrard's counterclaims as a discovery sanction?

STATEMENT OF THE CASE

This appeal arises from an order striking Garrard's counterclaims as a discovery sanction. The underlying action involves a dispute between Garrard, the general contractor, and a terminated subcontractor, Carolina Cool, Inc. ("Carolina Cool"). Carolina Cool was the original plumbing subcontractor for the plumbing for a Dave and Buster's Restaurant to be built at Broadway at the Beach in Myrtle Beach, South Carolina. Billy's Plumbing Company, LLC ("Billy's Plumbing") was ultimately hired to complete the plumbing work for the project.

After its termination, Carolina Cool brought this action on June 8, 2017, naming Garrard, Dave & Buster's of South Carolina, Inc., and Broadway at the Beach, Inc. as defendants (collectively, "Defendants") and alleging claims for breach of contract, breach of contract with fraudulent act, foreclosure of mechanic's lien, and unjust enrichment. (R. at 635-42). On July 6, 2017, Garrard answered asserting various defenses and filed counterclaims against Carolina Cool alleging breach of contract, contractual indemnity, negligence, breach of warranty, breach of contract with fraudulent act, and S.C. Code Ann. § 27-1-15 and a third-party complaint against RLI Insurance Company ("RLI") seeking payment on a construction bond. (R. at 643-58). Carolina Cool replied on September 5, 2017.[1]

The parties participated in written and deposition discovery, including the production of documents. (R. at 766-82).[2] The history with respect to discovery motions leading up to the order on appeal is set forth below:

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[1] Carolina Cool amended its complaint with consent to add Billy's Plumbing as an additional defendant on May 3, 2019. (R. at 702-13). Garrard timely responded reiterating it defenses and asserting the same counterclaims and third-party complaint. (R. at 714-20).

[2] The discovery history between Garrard and Carolina Cool is presented in Garrard's Brief in Opposition to Plaintiff's Motion to Compel/ For Sanctions against [Defendants]. (R. at 766-82).

Date/ Title of Motion[3]	Moving Party	Target Party	Resolution
5/10/18 Defendants' Motion to Compel RLI to Respond to Discovery	Defendants	RLI	Consent order requiring production of responses and documents (10/1/18).
5/24/18 Defendants' Motion to Compel Plaintiff to Fully Respond to Discovery	Defendants	Carolina Cool	Resolved.
7/31/18 Motion to Quash Subpoena Issued to [Billy's Plumbing]	Carolina Cool	Billy's Plumbing	Consent order outlining terms of subpoena response (10/11/18).
11/20/18 Motion for Order of Contempt/ Sanctions as to [Billy's Plumbing]	Carolina Cool	Billy's Plumbing	Granted (4/10/19).
2/13/19 Plaintiff's Motion to Compel Against [Defendants]	Carolina Cool	Defendants	Resolved.
2/15/19 Plaintiff's Motion to Compel Depositions of Defendants' Witnesses and to Impose Sanctions	Carolina Cool	Defendants	Granted (4/1/19). Carolina Cool to take requested depositions but required to pay rule mandated witness fees. Garrard to pay fees and costs associated with motion.
5/24/19 Motion for Order of Contempt/ Sanctions as to [Billy's Plumbing]	Carolina Cool	Billy's Plumbing	Resolved.
5/24/19 Certain Defendants' Motion to Compel Plaintiff to Fully Respond to 3/29/19 Discovery Requests	Defendants	Carolina Cool	Resolved.
9/11/19 Plaintiff's Motion to Compel Against [Billy's Plumbing]	Carolina Cool	Billy's Plumbing	Consent order requiring production of responses and documents (10/16/19).
9/11/19 [Billy's Plumbing's] Motion to Compel Responses to Interrogatories and Requests for Production of Documents Propounded to Plaintiff	Billy's Plumbing	Carolina Cool	Resolved.

On November 4, 2019 and without consulting Garrard, Carolina Cool filed a motion for sanctions. (R.at 750-52). The motion is three pages long. It seeks sanctions for "(1) intentionally withholding documents from discovery productions and (2) not timely producing documents." (*Id.*). There are no attachments to the motion, nor is there any indication about what Carolina Cool

[3] (R. at 606-20).

contended had not been produced. In fact, the bulk of the motion complained about a "document dump" of 4,201 pages produced on September 25, 2019. (*Id.*).

Garrard repeatedly sought additional information from Carolina Cool about the basis for its motion, and Garrard produced additional documents before the hearing. (R. at 766-82). Counsel for Garrard was finally able to reach counsel for Carolina Cool by telephone on December 5, 2019; however, counsel for Carolina Cool did not clarify what he was seeking or how Garrard could correct any deficiencies. (*Id.*). Garrard filed a memorandum in opposition on December 9, 2019, attaching an affidavit from Garrard's Chief Financial Officer, Rebekah Rudd, as to Garrard's good faith efforts to produce responsive documents for the seventy-two requests for production made by Carolina Cool. (*Id.*).

Carolina Cool did not file a memorandum or any affidavits prior to the hearing on December 18, 2019, nor are there any exhibits attached to the transcript or on file with the Clerk of Court as of that date. At the end of the hearing, the circuit court asked Carolina Cool's counsel to prepare a proposed order granting the motion for sanctions, striking Garrard's counterclaims, and ordering Garrard to pay $9,301 in attorney's fees. (R. at 894:4-17). With the proposed order, Carolina Cool attached thirty-nine exhibits, including all 4,201 pages of Garrard's September 25 production. (R. at 59-605, 606-620). The circuit court entered the proposed order as submitted on January 27, 2020.[4] (R. at 26-55).

Garrard moved to alter or amend on February 6, 2020. (R. at 783-91). In that motion, Garrard incorporated its earlier arguments and raised specific concerns that the order did not correspond to the motion as made and contained factual statements that were either erroneous or unsupported by the record. Garrard further argued that arguments of counsel are not evidence and

[4] The order as filed references the thirty-nine exhibits, but does not attach them.

should not serve as the basis for a sanction as severe as the one imposed here, especially given the absence of affidavits from Carolina Cool. Garrard also argued that the order failed to make specific rulings as to the applicable factors for sanctions, including that the sanction must be "aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198–99, 511 S.E.2d 716, 718–19 (Ct. App. 1999). As relief, Garrard requested that the circuit court "impose no sanction or a lesser sanction (including but not limited to payment of the requested attorney's fees that was also included in the order). Such a ruling would not prejudice any party and would allow this case to proceed to a determination on the merits of all claims and defenses."

The circuit court summarily denied the motion in a Form 4 order without a hearing on February 10, 2020. (R. at 56-58). Garrard filed this appeal on February 14, 2020.

STANDARD OF REVIEW

The circuit court's order dismissing Garrard's counterclaims for purported discovery infractions is subject to an abuse of discretion standard.[5]

> "The imposition of sanctions is generally entrusted to the sound discretion of the [c]ircuit [c]ourt." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997) (quoting *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987)). "A [circuit] court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the [c]ourt of [a]ppeals only if an abuse of discretion has occurred." *Id.* "The burden is upon the party appealing from the order to demonstrate the [circuit] court abused its discretion." *Id.* "An abuse of discretion may be found whe[n] the appellant shows that the conclusion reached by the [circuit] court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Id.*

Skywaves I Corp. v. Branch Banking & Tr. Co., 423 S.C. 432, 456–57, 814 S.E.2d 643, 656 (Ct. App. 2018).

With respect to the sanction of the dismissal of Garrard's counterclaims, "[a] dismissal under Rule 37(b)(2)(C) is not mandatory; rather, the trial court is allowed to make such orders as it deems just under the circumstances, and the selection of a sanction is within the court's discretion." *Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). "When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). "A sanction that results in a default or dismissal is a severe punishment that should be imposed only if there is some showing of *bad faith, willful disobedience, or gross indifference* to the rights of the adverse party." *Rickerson v. Karl*, 412 S.C. 215, 221, 770 S.E.2d 767, 770–71

[5] Given this standard of review, Garrard does not appeal the portion of the order awarding Carolina Cool its fees and costs incurred in bringing the motion with respect to the September 25 production. The appeal is directed solely to the dismissal of Garrard's counterclaims.

(Ct. App. 2015) (emphasis in original). "[T]he sanction imposed should be reasonable, and the Court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990).

ARGUMENT

The circuit court imposed the "nuclear option" sanction of dismissal in the absence of evidence of willful disobedience or gross indifference to the rights of the adverse party and in the absence of any violation of prior discovery orders. This was error.

The factors to be considered in imposing the sanction of dismissal are as follow:

> If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment. Rule 37(b)(2)(C), SCRCP. When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly. *See Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996).
>
> Therefore, the sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case. *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990). Where the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

Griffin Grading & Clearing, Inc., 334 S.C. at 198–99, 511 S.E.2d at 718–19.

I. Dismissal was not warranted because there was no evidence that Garrard was in violation of any previous discovery order in this matter.

As an initial matter, Carolina Cool's motion did not argue and the circuit court did not find that Garrard was in violation of any previous discovery order. As shown above, although there were many discovery motions filed by the various parties, there were only two motions filed by Carolina Cool as to Garrard (and those motions were filed within two days of each other in February 2019). (R. at 681-88, 689-691). One of those motions was resolved by the parties. The

other motion related to the scheduling and costs for the depositions of certain witnesses residing out of state. (R. at 689-91). The parties disagreed about the venue for the depositions and the costs of producing the witnesses. (R. at 692-701). Ultimately, the circuit court issued an order that addressed both sides' concerns and ordered Garrard to pay Carolina Cool's attorney's fees surrounding the motion. (R. at 10-12). The depositions proceeded as directed in the order. All of the other discovery motions involved different parties.

This alone indicates that the sanction of dismissal was not appropriate in this case. *Skywaves I Corp.*, 423 S.C. at 456–59, 814 S.E.2d at 656-58 (discussing cases in which the sanction of dismissal was considered and noting that there is a factual and legal distinction between cases where the offender violated prior discovery orders and ones in which there was no such violation). Given this precedent and the general rule that the sanction should be tailored to fit the specific conduct at issue, it is not appropriate to consider the sanction of dismissal for any alleged unrelated conduct, other orders, or the conduct of other parties. *See Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 306, 529 S.E.2d 45, 56 (Ct. App. 2000) ("It would not be proper for a court to deny a continuance as a sanction for unrelated discovery abuse. *Griffin Grading and Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., Inc.,* 334 S.C. 193, 511 S.E.2d 716 (Ct.App.1999) (sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case)."). Given this background, the punishment does not fit the alleged crime, and the sanction of dismissal of the counterclaims should be reversed.

II. The circuit court impermissibly reached beyond the scope of the motion and the evidence in dismissing Garrard's counterclaims.

In addition, the order reaches far beyond the scope of the motion and the evidence. As noted in the order, "[t]he current motion before the Court was filed by Carolina Cool after receiving what it describes as a 'document dump' from Garrard on September [25], 2019." (R. at 28). Rather than focusing on the propriety of that production, the order spends the bulk of its twenty-nine pages outlining a variety of what it contends were inappropriate discovery responses by Garrard as well as Billy's Plumbing. Only pages 23 and 24 relate to the September 25 production, and the order does not delve into the organization of the production, the orderliness of the documents, or the supposed relevant documents to be compelled.

The Conclusions of Law found in the order are similarly brief and are found at pages 27-29. The Conclusions of Law again do not relate to the September 25 production, but instead attempt to connect the consent scheduling orders entered in this case to a willful failure to produce responsive documents while ignoring the only evidence in the record, the Rudd Affidavit, which provides evidence that there was no intent to withhold any documents. (R. at 52-54, 781-82).

In its order, the circuit court impermissibly permitted Carolina Cool to expand the basis for its request for sanctions well beyond those grounds expressed in its motion in violation of Rule 7, SCRCP. Rule 7(b)(1), SCRCP requires that motions "shall state with particularity the grounds therefor, and shall set forth the relief or order sought." As set forth in *Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010), "[t]he particularity requirement is to be read flexibly in recognition of the peculiar circumstances of the case. By requiring notice to the court and the opposing party of the basis for the motion, [R]ule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly." (Citations and quotations omitted). Here, a very general three page motion

that did not specify which discovery rules were violated or which documents or types of documents had been withheld and which was not supported by any exhibits or affidavits within the timeframe established in Rule 6(d), SCRCP, somehow resulted in a twenty-nine page order referencing thirty-nine exhibits. In addition, the motion makes no reference to any violation of the scheduling orders in this matter, and yet, that was the basis for a finding of willfulness in the order.[6] Garrard raised this lack of notice both before the hearing in its memorandum and after the order in it motion to alter or amend. The prejudice of the failure to consider Rule 7 is obvious—Garrard was left unable to defend against the dismissal of its counterclaims.

In addition, the order fails to consider the only evidence relating to willfulness and/or bad faith timely presented under Rule 6, the Rudd Affidavit, and instead indulged the unsworn supposition of counsel at the hearing. Arguments of counsel are not evidence and should not serve as the basis for a sanction as severe as the one imposed here. *See S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence."). Therefore, the order lacks an evidentiary basis for the harsh sanction imposed.

As argued by Garrard in its motion to alter or amend, the order is based on the faulty premise that Garrard withheld certain documents. The order repeatedly glosses over and omits significant productions by Garrard, leaving the impression than an earlier question was not addressed in good faith through consultation. For example, the order states (on page 5) that Garrard "failed to produce daily reports for the time period before and only a few after Carolina Cool was terminated," while failing to mention that Defendant produced the requested six months of daily reports in January 2018. (R. at 30, 785). In addition, the order insinuates that during the

[6] This argument was not raised at the hearing either. The only reference to a scheduling order is as follows: "We're on our third scheduling order in this case." (R. at 893:21).

early stages of the case Garrard intentionally withheld critical documents disclosing the relationship between Garrard and Billy's Plumbing when in fact, in its earliest productions, Garrard produced numerous documents detailing that relationship. (*Id.*).

With respect to the September 25 production, the order finds that this production was a jumbled and duplicative "document dump," when, in fact, the documents were produced in PDF format, organized with like things together as they were kept, and largely consisted of materials not previously produced (with certain items included for completeness). (R. at 785). The table below shows the sequentially numbered index of documents in the production:

BATES # RANGE	**DESCRIPTION**
1-31	Change Order Requests a/k/a Work Orders
32-42	Calendars
43-2946	Shawn Gill emails
2947-3295	Progress Reports – Interior
3296-3327	Two Week Look Ahead Reports
3328-3754	Progress Reports – Shell Daily Reports
3755-3806	Schedules – Interior
3807-3844	Schedules – Shell
3845	Schematic of Incomplete Work
3846-3874	Pat's Notebook
3875-4201	Will Bromley emails

(*Id.*). Given this lack of an evidentiary predicate under the Rules of Civil Procedure, the twenty-three pages of Findings of Facts in the order are not supported by the record. Garrard highlighted many of the more egregious findings in its motion to alter or amend.

Lastly, the order makes findings that "false" representations or interrogatory answers were given, when in fact they were not false and were not raised in the motion. For example, interrogatory responses are quoted on page 6 of the order and said to be "false" but their falsity is not demonstrable on the record, nor is there any indication of what documents were not produced.

For all of these reasons, the circuit court erred in awarding sweeping sanctions based on the motion as filed and the evidentiary record.

III. Given the above, the order erred in awarding sanctions against Garrard, or at the very least, erred in dismissing Garrard's counterclaims in their entirety.

Carolina Cool's motion made no arguments as to the required findings for sanctions. Nor was there any discussion of these elements at the hearing. A review of the transcript and the motion shows there was no mention of "*bad faith, willful disobedience, or gross indifference* to the rights of the adverse party." *Rickerson*, 412 S.C. at 221, 770 S.E.2d at 770–71 (emphasis in original). Nor was there any discussion of how the sanction was "aimed at the specific misconduct of the party sanctioned" and did "not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Balloon Plantation, Inc.*, 303 S.C. at 154, 399 S.E.2d at 440.

Here, the only evidence in the record presented in compliance with the Rules of Civil Procedure shows there was not bad faith, willful disobedience, or gross indifference as to Garrard's document production. (R. at 781-82). Nor is there any showing that a lesser sanction would not have prompted the desired conduct. In fact, Garrard's counsel argued at length that the earlier sanction relating to the depositions of out of state witnesses had prompted him to take additional steps to make sure that documents were being produced in accordance with the rules. (R. at 889:24-90:16). Garrard remained willing to discuss these issues with Carolina Cool; however, Carolina Cool filed the motion without consultation and refused to respond to Garrard's repeated attempts to determine what Carolina Cool was seeking. (*Id.*; R. at 766-82).

For these reasons, there is no indication that the sanction of dismissal of the counterclaims was appropriate or that a lesser sanction would not have addressed the necessities of the situation. Accordingly, this Court should reverse the circuit court and reinstate Garrard's counterclaims.

CONCLUSION

South Carolina courts have a strong preference for resolving cases on their merits. Here, Carolina Cool filed a general motion that did not detail any violation of prior court orders or any specific conduct at issue (other than its allegations relating to the September 25 production). Garrard did its best to respond to that motion by attempting to discuss it with counsel and in its memorandum in opposition with the attached Rudd Affidavit. At the hearing, Carolina Cool made an argument relating to all of the discovery conduct in the case (including the conduct of other parties). This argument somehow gave rise to a twenty-nine page order referencing thousands of pages of exhibits that went well beyond the scope of the motion and the arguments.

Even given its length, the order fails to make the requisite findings to support the "nuclear option" sanction of dismissal. There is no finding that Garrard violated any previous discovery orders; there is no evidence submitted in accordance with the Rules of Civil Procedure showing any bad faith, willful disobedience, or gross indifference; and there is no finding that a lesser sanction would not have been effective. For all of these reasons, Garrard has shown that "the conclusion reached by the [circuit] court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 456–57, 814 S.E.2d 643, 656 (Ct. App. 2018). Therefore, the portion of the order dismissing Garrard's counterclaims must be reversed.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

I certify that the final appellant's brief and reply brief in this matter comply with Rule 211(b), SCACR and the April 15, 2014 Order of the South Carolina Supreme Court relating to personal data identifiers.

Respectfully Submitted,

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