

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

SC Court of Appeals

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.

REPLY BRIEF

HAYNSWORTH SINKLER BOYD, P.A.

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ARGUMENT IN REPLY

Garrard Construction Group, Inc. (“Garrard”) has not argued that the circuit court abused its discretion in entering *any* sanction in this case. It did not appeal the circuit court’s award of \$9,301 in attorney’s fees relating to its September 25, 2019 document production. Instead, Garrard has appealed the portion of the circuit court’s order striking its counterclaims as a discovery sanction in this case where there was no violation of any prior discovery order.

Carolina Cool, Inc. (“Carolina Cool”), rather than responding to Garrard’s specific arguments relating to the order dismissing its counterclaims, has retooled its proposed order as entered by the Circuit Court laying out its grievances against all defendants over the entire course of the case, including matters long since resolved and matters relating to unrelated defendants. Then, after a twenty-seven page factual recitation, Carolina Cool focuses on the law applicable to discovery sanctions in general rather than the more limited law relating to the striking of pleadings as a sanction.

“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 (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).

Here, Carolina Cool filed a generic, three-page motion for sanctions relating to the response to a letter dated August 22, 2019 and complaining that the response in the form of a September 25, 2019 document production was both incomplete and, at the same time, too voluminous. (R. at 750-52). In seeking sanctions, the motion states “[t]he Plaintiff is also entitled to an Order awarding sanctions against the Defendants for their intentional and numerous violations of the South Carolina Rules of Civil Procedure and will argue the striking of [Garrard’s] counterclaim is appropriate.” No further basis for this relief was provided in the motion, no affidavits were attached, and Carolina Cool’s counsel declined to consult before filing or to respond to Garrard’s counsel’s request for additional information between filing and the hearing. Garrard was blindsided at the hearing and was not even provided copies of what was being submitted to the circuit court. This lack of notice is further illustrated by the Rudd Affidavit, which reflects Garrard’s inability to parse what Carolina Cool was seeking by way of its motion for sanctions. (R. at 781-82). For this reason, the motion failed to comply with the requirement in Rule 7, SCRCF that motions “shall state with particularity the grounds therefor” and should have been denied.

With respect to the sanction of dismissal, Carolina Cool cannot point to a discovery order that Garrard failed to follow, nor did it attempt to do so in its motion or at the hearing. This is not a case where there were repeated discovery motions relating to Garrard’s conduct as shown in Garrard’s Appellant’s brief. Garrard complied with the only discovery order issued with respect to its conduct, the April 1, 2019 order relating to the conduct of certain depositions.

Instead of showing a pattern of motions to compel and noncompliance, Carolina Cool points to the consent scheduling orders entered in this action. These scheduling orders were not “discovery orders” or “rulings on discovery” and were not issued as a result of the parties’ conduct during discovery. Rather, they are a routine series of consent orders submitted by the parties.

Given this history, dismissal was too harsh a sanction and amounted to an abuse of discretion. *See Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 456–57, 814 S.E.2d 643, 656 (Ct. App. 2018).

In addition, the only evidence in the record with respect to Garrard’s document collection efforts is the Rudd Affidavit. This affidavit was the only evidence submitted prior to the hearing in accordance with Rule 6, SCRPC. Ms. Rudd is Garrard’s Chief Financial Officer. Although it is true she was not listed as a witness in this case as to the facts giving rise to the parties’ claims, that does not mean she lacks knowledge or is somehow disqualified from offering an affidavit as to Garrard’s document production. Knowledge of the underlying claims is separate and distinct from the subject matter of the affidavit. The circuit court erred in failing to consider this evidence of good faith on Garrard’s part in its sanctions order.

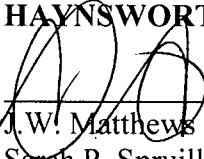
Contrary to Carolina Cool’s arguments in section IV of its brief, reversal of the dismissal would not result in an over lenient sanction. The circuit court awarded \$9,301 in attorney’s fees, which is a significant amount especially given the amount in controversy in this case. This sanction award was not trivial and made Carolina Cool whole for its costs in pursuing the motion (and was tailored to the production at issue in the motion). Such an award in no way results in Carolina Cool’s rights being “deemed irrelevant.” The circuit court’s order rather than imposing a narrowly tailored sanction rewards Carolina Cool’s failure to consult and “gotcha” strategy at the hearing by awarding a windfall in the form of the dismissal of Garrard’s counterclaim.

CONCLUSION

For these reasons and those previously presented in its Appellant’s brief, this Court should reverse the portion of the trial court’s order dismissing its counterclaims and remand this matter for a full and fair resolution on the merits.

Respectfully Submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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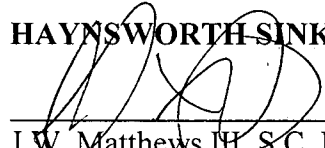
Garrard Construction Group, Inc. is the Appellant.

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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