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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Steven C. Kirven, Master in Equity

Case No. 2016-CP-04-00443
Appellate Case No. 2020-000890

Vicki Littlefield ……. Respondent

v.

Paul W. Cromer, Jr., individually and d/b/a Paul Cromer, Inc. ….....Appellant.

FINAL REPLY BRIEF

PRUITT & PRUITT

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STANDARD OF REVIEW

"An action for an accounting is an action in equity. Accordingly, '[the] court may review the record and make findings in accordance with … [its] own view of the preponderance of the evidence.'" *Consignment Sales Llc v. Tucker Oil Co.*, 391 S.C. 266, 705 S.E.2d 73, 76-77 (Ct.App. 2011) (*citing Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009)). Furthermore, an action for accounting seeks "'an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due.' *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009) (*citing* Am.Jur.2d Accounts and Accounting § 52 (2005)).

The parties agree that the primary remedy sought by Ms. Littlefield concerned payment of money. However, in this case the central dispute involved detailed examination of accounts between the parties to determine what matters constituted payments, how any applicable entries were reconciled, and ultimately whether any balance was left owing. The characterization of the account pursuant to the request for accounting permeated the issues before the Court. The request before the Trial Court was not merely the "examination of a long account" but rather the more central inquiry into the nature of entries into the account itself. *See Newell Contracting Co. v. J.F. & J.. Blankenship*, 130 S.C. 131, 125 S.E. 420, 423 (1924). Equitable review is appropriate.

However, in the alternative, even if this Court applies the legal standard of review, Cromer's position remains that the Trial Court erred in applying the law to this

case.[1] Cromer is, at a minimum, asking this Court to correct application of the law to the Master's finding.

ARGUMENT IN REPLY

The central issue this appeal concerns characterization of losses under the unusual provisions of a promissory note. However else the parties, the Trial Court, or this Court may characterize losses referred to as the "Massey losses" they were unquestionably bad debts. Accordingly, Cromer should be afforded credit for such losses pursuant to the plain language of the Promissory Note. Furthermore, Cromer properly plead his claim to receive credit for all payments and bad debts in the Court's calculation of amounts due. That request, denominated as a Counterclaim, should have been viewed as an alternative request for recoupment or set-off.[2] Cromer's claim to reduce or defeat discovery was timely, as it was Littlefield herself raised the issue of transactions related to Mr. Massey and thereby waived assertion of the statute of limitations. This Court should REVERSE the judgment below and direct entry of judgment that the Note has been fully satisfied. In the alternative, to the extent proper calculation is not possible based on the existing record, this Court should REVERSE the judgment below and REMAND for a calculation of the amount due, if any, upon proper consideration of credit for losses attributable to bad debts.

1 More specifically, Cromer still contends that the Trial Court applied tort principles to allow contract recovery. While Cromer seeks to have this Court review that characterization under an equitable standard of review, he is still entitled to ask the Court to, in the alternative, address the Trial Court's reasoning as to the basis for recovery which presents a legal question.

2 That alternative relief was specifically requested at Trial. See R. p. 47 (Defendant's Post-Trial Brief).

1. The Losses at Issue Were Bad Debts within the Meaning of the Promissory Note

The Promissory Note at issue, unquestionably a contract between the original parties, provided for calculating payments pursuant to that agreement.[3] The parties provided for interest calculations based on an equal (50%) division "of the profits on car loans during each calendar year, minus fifty (50%) of the bad debts on car loans."[4] However else one might characterize losses from loans to Darrell Massey (the "Massey Losses") they are unquestionably bad debts.[5] The parties could have further defined bad debts in their agreement, just as they could have provided for a method of calculating interest that excluded bad debts entirely. However, the Court should enforce the agreement between the parties as written.[6] Cromer is entitled to credit for bad debts, the Massey losses are bad debts, and excluding bad debts from calculation under the Promissory Note was error. Upon calculating payments due under the Note, including bad debts attributable to the Massey losses, the Note is satisfied and Littlefield is not entitle to any further payments.[7]

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3 R. p. 272 (Plaintiff's Exhibit #1, Promissory Note).

4 *Id*.

5 Indeed, following trial the Trial Court appeared to make this very point in characterizing the evidence at the time of trial. R. p. 204 (Tr. 204: 3-6). However, the Court went on to discuss concerns about including these bad debts in the calculation of amounts that may still be owing. R. pp. 204-205.

6 "The primary concern of the court interpreting a contract is to give effect to the intent of the parties. The best evidence of the parties' intent is the contract's plain language." *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237 (S.C. 2015) (*citing Lee v. Univ. of S.C.*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014))

7 Both experts seem to agree on this point. Cromer's expert testified, based on inclusion of the Massey losses, that the Note had been satisfied. R. p. 187. Littlefield's expert, in response to a hypothetical on cross-examination, admitted that if the Massey Losses were included then there would be no balance due on the Note. R. p. 159 (Tr. p. 101). Littlefield's expert did clarify that his response was based on the hypothetical posed but did not alter his response. R. p. 163 (Tr. p. 105).

At trial and on appeal, Littlefield argues that the Massey losses were based on a deviation from business practices.[8] The Trial Court agreed, finding fault with Cromer for the Massey losses.[9] However, the record reflects that the parties intended to continue in the same manner they had by dividing any bad debts as offsets on calculated payments.[10] For that reason, the Trial Court's reliance on *Kline Iron & Steel Co. v. Superior Trucking Co. Inc*. remains misplaced.[11] The *Kline* Court emphasized the special circumstances related to the transaction at issue.[12] In this case, ***the parties*** emphasized the special nature of the business associated with funds loaned under the Promissory Note. Their agreement specifically addressed those expectations, as had their existing business relationship, and provided for calculations of interest accordingly. In holding to the contrary, the Trial Court erred.

Two final points merit reiteration.[13] First, if Littlefield or her processor in interest were unhappy with Cromer's business practices they had an easy and obvious remedy: demand for immediate payment. Pursuant to the language of the Promissory Note, the Holder was entitled to payment of all principal "in full one hundred eighty (180) days after demand."[14] Second, Littlefield emphasizes, as did the Trial Court, that

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8 R. pp. 86-119. *See also* Respondent's Brief at 11.
9 R. p. 5 (Final Order at ¶16.
10 R. p. 272 (Plaintiff's Exhibit #1, Promissory Note).
11 The *Kline* Court found that "[t]he rule is well settled that 'notice at the time of the contract of circumstances from which special damages may reasonably be expected to result will make the defendant liable for such damages on the ground that they were within the contemplation of the parties, and therefore are regarding as forming a part of the contract." In this case, the opposite is true. The parties were aware at the time of contracting that they would experience problems collecting bad debts, which they did not further specify, and included bad debts as a means to calculate interest.
12 *Id*.
13 Cromer's position remains that the error below was based, *inter alia*, on using evidence of fault that was inapplicable to either the contract causes of action or the parties' intent. Cromer stands by that position.
14 R. p. 272 (Plaintiff's Exhibit #1, Promissory Note).

Cromer had previously encountered bad debts in his dealing with Mr. Massey.[15] However, if the history of the parties is relevant to determine their intent in construing the Note- an agreement that unmistakably calculates interest based on bad debts- it is difficult to justify excluding the very type of bad debts that 1) had occurred before, 2) with the same party, 3) in the same manner. If the contracting parties had a different understanding of bad debts associated with Darrell Massey, or similar losses occurring with another party, then the issue could have been addressed in the Note itself. It was not.[16] The relevant inquiry is whether the Massey losses were bad debts within the meaning of the Note.[17] They were- and exclusion of bad debts serves to re-write, rather than enforce, the contractual language chosen by the parties.

2. Cromer Properly and Timely Plead to Reduce or Defeat Recovery

The issue of the so-called Massey losses was raised at the outset of this case, as it was included in Littlefield's Complaint.[18] Cromer then raised the issue of credit for losses in his Answer and Counterclaim**.**[19] At trial and on appeal, Littlefield wanted to have it both ways: allow allegations of misconduct to put the Massey losses at issue and simultaneously exclude such losses from the Accounting pursuant to the Note. This Court should afford Cromer credit for the Massey losses as bad debts.

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15 R. p. 5 (Final Order at ¶15).
16 Plaintiff's expert noted that the parties did not account for the Massey losses occurring after execution of the promissory Note. R. p. 150. However, that testimony only reflects that the parties had not yet accounted for those specific losses and sheds little light on how the parties had previously treated losses associated with Mr. Massey or others.
17 R. p. 272 (Plaintiff's Exhibit #1, Promissory Note). Black's Law Dictionary defines bad debts as "generally speaking, one which is uncollectible". Revised 4th Ed. (1968). Having pursuant a collection action against Massey to judgment, and having been unable to collect on the judgment, it is difficult to imagine how the Massey losses are not bad debts within the meaning of the Note.
18 R. p. 17.
19 R p. 26.

a. Cromer Correctly Raised the Issue of Credit for Payments.

Whether denominated as a claim for recoupment or set-off, Cromer properly raised the issue of credit for losses. At trial, Cromer requested affirmative relief, seeking judgment against Littlefield; however Cromer has abandoned that argument on appeal. Instead, Cromer seeks credit for bad debts in calculation of amounts due on the Note. While Cromer plead this matter as a Counterclaim, that was sufficient to raise the issue. Indeed, that proposition is already squarely before this Court as both parties rely on *Tuloka v. Affiliates, Inc. v. Moore.*[20] In *Tuloka*, the Court interpreted claims denominated as Counterclaims and found those claims sufficient to allege recoupment, either to reduce or defeat recovery. The same is true here. Regardless of how he characterized his initial claims, Cromer sought to have the Trial Court adjust any recovery on account of credits he was entitled to under the Promissory Note.

b. The Statute of Limitations Does Not Bar Recoupment

At Trial, the Court held that any reduction was bared by the statute of limitations.[21] While Respondent now contends that only Cromer's claim for affirmative relief was barred, that position mischaracterizes the Trial Court's Order.[22] Cromer was denied credit for losses within the meaning of the Promissory Note and that finding was in error.

20 275 S.C. 199, 202, 268 S.E.2d 293 (1980).
21 R. pp. 5-6. Assuming without admitting that proposition is correct as to an affirmative judgment, that limited point is also moot as Cromer no longer seeks affirmative recovery.
22 *See* Respondent's Brief at 13. *See also* R. pp. 5-6 (Order at ¶ 17) (finding offset barred by statute of limitations). While not specifically characterized as such, the Order below effectively concluded that the statute of limitations served as an independent bar to Cromer's defense based on the statute of limitations.

Tuloka is again instructive.[23] In that case, Defendant sought affirmative recovery based on the federal Truth in Lending Act.[24] The trial court granted summary judgment based on the statute of limitations.[25] On appeal, in addition to characterizing the counterclaim as a defense, that Court found the one-year limitations period that would otherwise bar applicable counterclaims did not bar use of the same law in the nature of a recoupment defense.[26] While the context of the claims (lending disclosures) may be different in *Tuloka*, the principle is the same. A party seeking to enforce the terms of a contract should not be heard to complain, on the grounds of timeliness, about defenses seeking to invoke full consideration the same transaction.[27]

While *Tuloka* is sufficient authority for the proposition that the statute of limitations does not bar recoupment, Littlefield also waived the issue in seeking an accounting.[28] Cromer would again compare waiver in this context to governmental waiver of sovereign immunity.[29] Littlefield assumes for herself the ability to seek

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23 275 S.C. 199, 201-202, 268 S.E.2d 293.
24 *Id*.
25 *Id*. at 201.
26 *Id*. at 202.
27 Respondent also characterizes the issue as collapsing into the Court's analysis of bad debts, claiming that the Trial Court did not prevent Cromer from asserting recoupment. *See* Respondent's Brief at 15. That mischaracterizes the Order below and Cromer's argument. The issue is, first, whether Cromer is entitled to credit for bad debts, and second, whether the statute of limitations barred such debts. If the Massey losses are bad debts within the meaning of the Promissory Note, the statute of limitations is no bar- as it does not apply in the context of recoupment. Indeed, the *Tuloka* Court was clear that statute of limitations in that case "may not be used to defeat the equitable defense of recoupment." 275 S.C. 199, 202, 268 S.E.2d 293.
28 Littlefield now contends that her request for an accounting is a "misnomer." *See* Respondent's Brief at 14. Littlefield, as Plaintiff, was the master of her Complaint and determined what relief to seek. Furthermore, Littlefield was not only specific in seeking an accounting but invoked Mr. Massey in the context of that cause of action. Having sought accounting and specifically invoked transactions related to "Darrell Massey and/or Massey Motors" to determine "the amounts fully due to Plaintiff" Littlefield risked having the Court find information unfavorable to her collection under the Note. *See* R. p. 21 Seen as such, Littlefield's claim request accounting for any amounts related to Massey so long as they would aid or increase her recovery. Such a one-sided proposition cannot be correct.
29 *See United States v. Capital Transit Co.*, 108 F.Supp. 348 (D.D.C. 1952). *See also, e.g., Bull v. United States*, 295 U.S. 247 (1934); In Re Monogahela Rye Liquors, 141 F.2d 864 (3rd. Cir. 1944).

accounting and payment without the possibility of any adverse determination. Cromer's case is even stronger where, as here, Littlefield demanding an accounting specifically because of Cromer's dealings with Massey.[30] The issue was properly before the Court and the statute of limitations did not bar defensive use of claims that may have been otherwise time-barred.

CONCLUSION

Cromer has paid all amounts due on the Note. The Massey losses were bad debts within the meaning of the Promissory Note such that exclusion from the Court's calculation was error. The Court below erred in finding Cromer's conduct, characterized as outside the intent of the parties as oppose to tortious, as a basis to redefine the agreement of the parties and exclude some bad debts. Cromer sufficiently plead his defenses to request recoupment, the issue of the relevant losses having been alleged by Littlefield herself. Finally, the statute of limitations is no bar where, as here, the issue has been raised by the adverse party. Regardless, even where Cromer may be barred from wielding the Massey losses as a sword to assert counterclaims he retained the ability to use those same losses as a shield to overpayment. This Court should REVERSE the judgment below and declare the Note satisfied. In the alternative, to the extent this Court cannot calculate the amount due under the Note with proper credit for all bad debts, the Court should REVERSE the lower court's exclusion of bad debts and REMAND for calculation of the amount due, if any.

[signature page to follow]

30 R. p. 17 (Complaint)

Respectfully Submitted,

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