STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS

Case No. 2019-CP-08-02445

Gerald R. Smith,

Plaintiff,

vs.

United Cable Construction Co., Inc. South Atlantic Communications, Inc., Brandon W. Linder and Karla Linder,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING DEFENDANTS' COUNTER-CLAIM WITH PREJUDICE

Plaintiff's Motion for Summary Judgment came before the Court for hearing at the Berkeley County Courthouse on August 4, 2021.

Present at hearing were Plaintiff's attorney John S. West, Esq. of the West Law Firm, PA of Moncks Corner and Defendants' attorney Joshua D. Giancola, Esq. of Koontz Mlynarczyk, LLC of North Charleston.

In support of his motion, properly filed and served, Plaintiff submitted his Memorandum in Support of Motion for Summary Judgment, along with five (5) exhibits, Exhibits A-E, including Plaintiff's affidavit, Exhibit "E".

Defendants submitted their Memorandum in Opposition to Plaintiff's Motion For Summary Judgment and no affidavits.

From the pleadings, filings and the proceedings before me and based upon arguments by counsel in open court, I find and conclude as follows:

FINDINGS OF SALIENT FACTS

1. The salient facts which I find herein are uncontroverted.
2. The parties in Case No. 2018-CP-08-2241, a declaratory judgment action, and the parties to this case are the same.

3. The Findings of Salient Facts contained in the Declaratory Order of Judge Dale E. Van Slambrook in Case No. 2018-CP-08-2241 are merged and incorporated herein *verbatim.*
4. The parties entered into a contract dated May 22, 2017, ("Contract").
5. The Contract terms reduced and discounted a prior mutually acknowledged contract amount due from the Defendants to the Plaintiff by $784,244.51.
6. The Contract specifies a new total contract amount of $300,000.00 to be paid by the Defendants to the Plaintiff in monthly installments of $10,000.00 each and a balloon payment of the balance upon the December 22, 2018 payment.
7. During the period May, 2017 through November, 2018 Plaintiff did not receive monthly payments as required by the Contract.
8. Plaintiff did not receive the balloon payment on December 22, 2018.
9. Plaintiff did receive sporadic partial payments from Defendants for a total of $33,000.00, the last payment being made to Plaintiff on November 26, 2018 in the amount of $5,000.00.
10. Defendants attribute their failure to pay the balance of the money owed the Plaintiff solely because of a lack of funds.
11. Defendants acknowledge that if they had the money to satisfy their full obligation on the fixed sum, they would have paid the Plaintiff.
12. Plaintiff is owed a balance of $267,000.00 by the Defendants on the Contract, which sum is specific, fixed and certain.
13. The Contract requires Defendants to procure a life insurance policy on the life of Brandon W. Linder with a death benefit payable to the Plaintiff as the named beneficiary in the amount of $1,000,000.00.
14. Defendants admit that the life insurance policy has not been procured as provided and required in the Contract.
15. Defendants are in default under the Contract as to payment of monies due and owing the Plaintiff.
16. Defendants are in default as to the procurement of a life insurance policy on the life of Brandon W. Linder with a death benefit payable to the Plaintiff as the named beneficiary in the amount of $1,000,000.00.

17. After default, demand was made by Plaintiff for performance under the Contract and Defendants were given an opportunity to cure the default. The default was not cured.
18. Plaintiff alleges in ¶17 of his Complaint and in his prayer for relief, *inter alia*, that he is entitled to pre-judgment interest on the $267,000.00 balance due.

CONCLUSIONS OF LAW

I. Summary Judgment Standard

Under *Rule 56, SCRCP*, summary judgment is proper when both:

(a) No genuine issue as to any material fact exists, and
(b) The moving party is entitled to judgment as a matter of law.

In making the determination of whether or not any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn must be viewed in the light most favorable to the nonmoving party. Summary judgment should not be granted if further inquiry into the facts is desirable to clarify the application of the law.

To prevail on a summary judgment motion, the moving party has to show that there is no genuine issue as to any material fact. To determine whether any trial issues of fact exist for summary judgment purposes, the evidence and all inferences which can reasonably be drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Carolina Convenience Stores, Inc. v, City of Spartanburg*, 398 S.C. 27, 727 S.E.2d 28 (Ct. App. 2012).

Summary judgment has been held to be appropriate only when plain, palpable and undisputed facts exist on which reasonable minds cannot differ. *Bessinger v. Bi-Lo*, 329 S.C. 617, 496 S.E.2d 33,34 (Ct.App.1998).

In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt.*, 381 S.C. 326, 673 S.E. 2d 801, 803 (2009). A scintilla of evidence is material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror.

In *Gibson v. Epting*, 426 S.C. 346, 827 S.E. 2d 178 (Ct. App. 2019), in discussing the scintilla rule, the Court observed, "the summary judgment standard governing Gibson's claims requires her to produce only a "scintilla" of evidence to avoid judgment as a matter of law, but a

scintilla is a perceptible amount. There still must be a verifiable spark, not something conjured by shadows. *Bethea v. Floyd*, 177 S.C. 521, 529, 181 S.E. 721, 724 (1935) ("'Scintilla' means, according to 56 C. J. 863, 'a gleam,' 'a glimmer,' 'a spark,' 'the least particle,' 'the smallest trace.' "); *Crosby v. Seaboard Air Line Ry.*, 81 S.C. 24, 31–32, 61 S.E. 1064, 1067 (1908) ("[A] scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror."); *Scintilla*, The Oxford English Dictionary (2nd ed. 2018) ("A spark ... a minute particle, an atom."); *see Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) ("When opposing a summary judgment motion, the nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.' " (citations omitted)); *Grimsley v. S.C. Law Enf't Div.*, 415 S.C. 33, 42, 780 S.E.2d 897, 901 (2015) (affirming trial court's grant of summary judgment and noting court of appeals improperly "cherry-picked" an isolated portion of the record, placed it out of context, and "elevated what is, at best, a metaphysical doubt into a genuine issue of material fact"); *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984) ("The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine."); *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir.1985) (explaining that party opposing summary judgment "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another"). A non-moving party cannot evade summary judgment by creating and relying on "an inference that is not reasonable or an issue of fact that is not genuine. *Town of Hollywood v. Floyd*, 403 S.C. 466, 744 S. E, 2d 161, 166 (2013). When a motion for summary judgment is supported by affidavit(s), the nonmoving party cannot rest on the general denials of its answer, but must show that there is a genuine issue of material fact, through its own affidavits. *Rule 56(e), SCRCP*.

Applying the summary judgment standard to the fully developed record before me on Plaintiff's breach of contract cause of action for a sum certain due, there is no genuine issue as to any material fact as to the existence of a contract and the breach thereof by the Defendants.

Plaintiff is entitled to judgment as a matter of law that Defendants have breached the Contract for monies owed the Plaintiff.

Specifically, due to the breach of contract by Defendants, Plaintiff is entitled to judgment against all Defendants in the fixed sum certain of $267,000.00 in actual damages.

II. Pre-Judgment Interest

The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty. *Southern Welding Works, Inc. v. K & S Construction Co.*, 286 S.C. 158, 332 S.E.2d 102 (Ct.App.1985).

The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose. 47 C.J.S. *Interest & Usury* § 49 at 124–25 (1982). *Babb v. Rothrock*, 310 S.C. 350, 426 S.E. 2d 789 (1993).

Applying the summary judgment standard to the fully developed record before me on Plaintiff's prayer for an award of pre-judgment interest upon the monies I have adjudged to be due the Plaintiff, there is no genuine issue as to any material fact and Plaintiff is entitled to judgment as a matter of law.

Specifically, due to the breach of contract by Defendants, Plaintiff is entitled to pre-judgment interest on my award of judgment of actual damages from December 23, 2018 through August 5, 2021.

Interest shall be calculated according to the applicable annual orders of the South Carolina Supreme Court regarding the legal rate of interest for judgments and money decrees.[1]

The award of pre-judgment interest due the Plaintiff is set and established as follows:

1. For the period December 23, 2018 through January 14, 2019, 23 days @ 8.5%, applying a per diem rate of $62.178 for a sub-total of $1,430.09;
2. For the period January 15, 2019 through January 14, 2020, 365 days @ 9.50%, for a subtotal of $25,500.85;
3. For the period January 15, 2020 through January 14, 2021, 365 days @ 8.75%, for a subtotal of $25,718.96;
4. For the period January 15, 2021 through August 5, 2021, 202 days @ 7.25%, applying a per diem of $63.492, for a subtotal of $12,825.40;

The total award of pre-judgment interest due Plaintiff is $65,475.30.

[1] By Order #2018-01-04-02, the legal rate of interest for the period January 15, 2018 through January 14, 2019 was set at 8.5% compounded annually. By Order # 2019-01-04-01, the legal rate of interest for the period January 15, 2019 through January 14, 2020 was set at 9.5% compounded annually. By Order # 2020-01-06-01 the legal rate of interest for the period January 15, 2020 through January 14, 2021was set at 8.75% compounded annually. By Order # 2021-01-04-01 the legal rate of interest for the period January 15, 2021 through January 14, 2022 was set at 7.25% compounded annually.

III. Specific Performance

Plaintiff alleges in his Second Cause of Action in his Complaint that he is entitled to specific performance. He has alleged with particularity the elements of specific performance regarding the procurement of a life insurance policy as required by the Contract.

Specific performance may be awarded in the sound discretion of the court. *Guignard v. Atkins,* 282 S.C. 61, 317 S.E. 2d 137 (Ct. App 1984). The discretion to grant or refuse specific performance is a judicial discretion to be exercised in accordance with special rules of equity and with regard to the facts and circumstances of each case. *Holly Hill Lumber Co., Inc. v. McCoy,* 201 S.C. 427, 23 S.E.2d 372 (1942).

Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties. *King v. Oxford,* 282 S.C. 307, 318 S.E.2d 125 (Ct.App.1984) (citing *Monteith v. Harby,* 190 S.C. 453, 3 S.E.2d 250 (1939)).

In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract. *Gibson v. Hrysikos,* 293 S.C. 8, 358 S.E.2d 173 (Ct.App.1987) (citing *Thomson v. Scott,* 6 S.C. Eq. (1 McCord Eq.) 32 (1825).

Applying the summary judgment standard to the fully developed record before me on Plaintiff's prayer for specific performance of the procurement of a life insurance policy on the life of Brandon W. Linder, given the specialized and unique nature of a policy of life insurance, Plaintiff has established to my satisfaction that the requisite elements of specific performance have been met with respect to the life insurance required to be procured, and because there is no genuine issue as to any material fact regarding the same, Plaintiff is entitled to judgment as a matter of law.

Exercising my discretion and in the adjustment of equities herein, specific performance by Defendants as to the procurement of a life insurance policy on the life of Brandon W. Linder with a death benefit of $1,000,000.00 naming Plaintiff as beneficiary is appropriate, proper and warranted.

In further exercising my discretion given the facts and circumstances of this case and the

course of dealing between and among the parties, I deem it equitable and necessary that Defendants shall procure the life insurance policy on the life of Brandon W. Linder with a death benefit of $1,000,000.00 naming Plaintiff as beneficiary within thirty (30) days of the entry of this order, with a certificate of insurance being concurrently provided in writing to Plaintiff's counsel. The policy shall remain in full force and effect for the lifetime of the Plaintiff.

IV. Defendants' Counter-Claim For Breach of Covenant of Good Faith and Fair Dealing

In their Answer and Counter-claim, Defendants allege a Breach of Covenant of Good Faith and Fair Dealing.

There is no evidence before the court to support that claim.

Moreover, there is no independent cause of action for breach of covenant of good faith and fair dealing in South Carolina.

The Court of Appeals in *RoTec Services, Inc. v. Encompass Services, Inc.* 359 S.C. 467, 597 S.E. 2d 881 (Ct. App. 2004) held "[al]though South Carolina courts have not directly addressed this exact question, we do have precedent strongly suggesting there is no separate cause of action for the implied covenant of good faith and fair dealing. This court, in *Boddie–Noell Props., Inc. v. 42 Magnolia P'ship,* 344 S.C. 474, 485, 544 S.E.2d 279, 285 (Ct. App. 2000), affirmed the trial court's decision to send the breach of contract claim to the jury, in part, for breaching the implied covenant of good faith and fair dealing. When appealed to the supreme court, the supreme court also treated the implied covenant of good faith as merely another term of the contract at issue, concluding that "[the defendant] breached the express provisions of the purchase agreement as well as the implied covenant of good faith and fair dealing." *Boddie–Noell Props., Inc. v. 42 Magnolia P'ship,* 352 S.C. 437, 444, 574 S.E.2d 726, 730 (2002). Similarly, in *Parker v. Byrd,* 309 S.C. 189, 194, 420 S.E.2d 850, 853 (1992), the supreme court found that the parties' express agreement to act in good faith was merely a restatement of the covenant of good faith implied in every contract. Therefore, we conclude that the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract. Accordingly, we find no error in the trial court's dismissal of this claim.

Defendants' counter-claim for breach of covenant of good faith and fair dealing should and must be dismissed as a matter of law.

ORDER

Based upon the findings of salient facts hereinabove set forth and the conclusions of law, it is ordered, adjudged and decreed that Plaintiff's motion for summary judgment be and hereby is **GRANTED** in the following particulars:

1. Plaintiff is entitled to judgment as a matter of law against all Defendants for breach of contract for default on payment of monies due the Plaintiff;
2. Plaintiff is awarded actual damages for breach of contract for monies due the Plaintiff in the amount of $267,000.00;
3. Pre-judgment interest is due and owing the Plaintiff by the Defendants on the judgment amount in the amount of $65,475.30;
4. Plaintiff be and hereby is awarded a total judgment against all Defendants in the amount of $332,475.30; and
5. Plaintiff be and hereby is granted specific performance commanding and compelling Defendants to procure a life insurance policy on the life of Brandon W. Linder with a death benefit of $1,000,000.00 naming Plaintiff as beneficiary; said action to be accomplished within thirty (30) days of the entry of this order, with a certificate of insurance being concurrently provided in writing to Plaintiff's counsel. The policy shall remain in full force and effect for the lifetime of the Plaintiff.

Based upon the findings of salient facts hereinabove set forth and the conclusions of law, it is further ordered, adjudged and decreed that Defendant's counter-claim for breach of covenant of good faith and fair dealing, be and hereby is **DISMISSED** with prejudice.

JUDGE'S SIGNATURE AFFIXED HERETO ELECTRONICALLY

Berkeley Common Pleas

Case Caption:	Gerald R Smith VS United Cable Construction Co Inc , defendant, et al
Case Number:	2019CP0802445
Type:	Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764