

STATE OF SOUTH CAROLINA )  
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COUNTY OF CHARLESTON )  
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K-CON, INC., )  
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Plaintiff, )  
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vs. )  
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KING STREET ENTERPRISES, LLC and )  
OHIO IMAGING ASSOCIATES INC. )  
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Defendants. )  
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IN THE COURT OF COMMON PLEAS  
CASE NO. 2018-CP-10-3825

**ORDER DENYING PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

**RECEIVED**  
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SC Court of Appeals

This matter came before the Court July 28, 2021, 11:30 A.M. via Web-Ex on Plaintiff's Motion for Partial Summary Judgment filed of record January 25, 2021. Bill Scott, Esq. appeared on behalf of the Plaintiff and Brent Halversen, Esq. appeared on behalf of the Defendants. This matter is also consolidated with Case No. 2020-CP-10-2895. Upon review of Plaintiff's Motion, it appears Mr. Scott also moved for partial summary judgment for his individual clients in the companion case of Case No. 2020-CP-10-2895. This Order addresses the motion as it pertains to parties in both of the consolidated actions. The Motion for Partial Summary Judgment sought a ruling that there were no issues of material fact based upon four grounds, as set forth in the motion: (1) That pursuant to S. C. Code Ann. § 27-1-15, K-Con is entitled to attorneys' fees and interest at the judgment rate against Ohio Imaging Associates, Inc. because Ohio Imaging failed to make a reasonable and fair investigation and unreasonably refused to pay the undisputed amount within forty-five (45) days; (2) That Ohio Imaging's claim for liquidated damages must be dismissed

because the liquidated damages amount in the contract is an impermissible penalty; (3) That Ohio Imaging's claim for liquidated damages must be dismissed because Ohio Imaging is claiming actual damages for delay; and (4) That Ohio Imaging's claim against the individual defendants for conspiracy must be dismissed because there are no unique special damages. During the hearing, Mr. Bill Scott withdrew his request for summary judgment on this fourth ground based upon the recently decided case of Paradis v. Charleston Cty. Sch. Dist., No. 2018-002025, 2021 WL 1992245, at \*6 (2021). Accordingly, the Court will not address the fourth ground in the motion, but has addressed herein the other three grounds and finds there are material issues of fact as to each of these other three grounds and the Court therefore respectfully denies the motion, for the reasons stated herein.

Summary judgment is a drastic remedy and is appropriate only when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 329 (2009); *U.S. Leasing Corp. v. Janicare, Inc.*, 294 S.C. 312, 364 S.E.2d 202 (Ct. App. 1988); *South Carolina National Bank v. Joyner*, 289 S.C. 382, 346 S.E.2d 329 (Ct. App. 1986). "In determining whether any trial issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Id.* at 330. A party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Additionally, summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. *McAlhany v. Carter*, 415 S.C. 54, 781 S.E.2d 105 (Ct. App. 2015).

Applying this standard of review to the Plaintiff's first ground, the Court believes that Plaintiff has no present right to any attorney's fees while the merits of Plaintiff's claims for monies owed are presently being litigated, pending, and are being disputed by the Defendants. At the hearing, the Defendants submitted evidence suggesting they did perform an investigation under S.C. Code §27-1-15, however, and notwithstanding this evidence, pursuant to South Carolina law, the determination of whether a reasonable and fair investigation was performed is an issue of fact for the jury and not for the Court sitting in summary judgment:

The party seeking an award of attorney's fees and interest under the statute has the initial burden of presenting prima facie evidence that the opposing party did not make a fair and reasonable investigation. *Moore Elec. Supply, Inc. v. Ward*, 316 S.C. 367, 374-75, 450 S.E.2d 96, 100 (Ct.App.1994). Whether a party's steps taken were "reasonable and fair" is a question of fact.

Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 229, 647 S.E.2d 488, 495 (Ct. App. 2007).

Additionally, under Hardaway, a litigant has to be "successful" in order to get an award of attorney's fees. In that case, "the Court addressed the issue of the appropriate attorneys' fees award for a plaintiff that prevailed in litigation where one of the statutory remedies available to a successful litigant is an award of attorneys' fees." Crossmann Communities of N. Carolina, Inc. v. Harleystville Mut. Ins. Co., No. 4:09-CV-1379-RBH, 2013 WL 5437712, at \*21 (D.S.C. Sept. 27, 2013). Here, the Plaintiff would need to first be successful in its claims against Ohio Imaging to even be able to claim attorney's fees. The Plaintiff's success on its claims in this matter is presently disputed, undetermined, and will eventually be decided by a jury. Accordingly, Plaintiff's argument it is entitled to attorney's fees is not ripe for a determination.

Turning to the Plaintiff's second ground, that Ohio Imaging's claim for liquidated damages must be dismissed because the liquidated damages amount in the contract is an impermissible

penalty, the Court finds that the Plaintiff has not overcome its burden to characterize the liquidated damages provision in the contract as a penalty. “[t]he burden is on the party contesting the characterization set forth in the parties’ contract to show that a specified sum is actually a penalty.” Rental Unif. Serv. of Greenville, S.C., Inc. v. K & M Tool & Die, Inc., 292 S.C. 571, 573, 357 S.E.2d 722, 724 (Ct. App. 1987) (noting that the contract being examined by the court expressly stated that the provision was for “liquidated damages” and acknowledging that although the designation was “not necessarily conclusive of the issue of whether the sum specified in the contract is either liquidated damages or a penalty, the designation is indicative of the intention of the parties and must be accepted as the true expression of their intention until it is shown that the provision is for a penalty.”

In this matter, the Defendants submitted the Affidavit of Ms. Mary Ann Kanters into the record, filed before the hearing on July 26, 2021. The Affidavit made representations that Ms. Kanters discussed with Plaintiff that the “\$500 liquidated damages provision was discussed at length” and, “the importance of having this office finished on time as it was going to effect operations of the tele-radiology suite.” (Affidavit, ¶ 4).

“South Carolina law allows parties to prospectively set an amount of damages for breach through the inclusion of a liquidated damages provision.” ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011). “The question of whether a sum stipulated to be paid upon breach of a contract is liquidated damages or a penalty is one of construction and is generally determined by the intention of the parties.” Moser v. Gosnell, 334 S.C. 425, 431, 513 S.E.2d 123, 126 (Ct. App. 1999). “The determination does not necessarily depend upon the language used in the contract.” *Id.* “Rather, the determination depends upon the nature of the contract in light of the circumstances, and the attitude and intentions of the parties.” *Id.*

Specifically, whe[n] the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages; and whe[n] the stipulation is not based upon actual damages in the contemplation of the parties, but is intended to provide punishment for breach of the contract, the sum stipulated is a penalty. ERIE, 393 S.C. at 460–61, 713 S.E.2d at 321 (quoting Tate v. Le Master, 231 S.C. 429, 441, 99 S.E.2d 39, 45–46 (1957)). Further, [i]n order to determine whether the sum named in a contract as a forfeiture for noncompliance is intended as a penalty or liquidated damages, it is necessary to look at the whole contract, its subject-matter, the ease or difficulty in measuring the breach in damages and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach. *Id.* at 462, 713 S.E.2d at 322 (emphasis added) (quoting Foster v. Roach, 119 S.C. 102, 107, 111 S.E. 897, 899 (1922)). “Whe[n] ... the sum stipulated is plainly disproportionate to any probable damage resulting from breach of contract, the stipulation is an unenforceable penalty.” Foreign Acad. & Cultural Exch. Servs., Inc. v. Tripon, 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011) (quoting Lewis v. Premium Inv. Corp., 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002)).

Applying this law in the light most favorable to the non-moving party, and having recognized above that the burden is upon the Plaintiff- the party contesting the liquidated damages provision to establish a penalty- the Court finds there is record evidence on behalf of the non-moving party that the \$500 per day liquidated damages provision was bargained for based upon the Affidavit of Ms. Kanters and that a tele-radiology medical office would generate more than \$500 per day, as this amount was reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of non-performance.

Finally, the Court finds that \$500.00 a day can hardly be seen as a penalty in proportion of the overall amount of the contract, to wit, \$364,214.00. Accordingly, the liquidated damages provision is fair and reasonable, and not a penalty, and the Plaintiff's motion for summary judgment on this ground is denied as well.

Turning the Court's attention to the Plaintiff's third and final ground, that Ohio Imaging's claim for liquidated damages must be dismissed because Ohio Imaging is claiming actual damages for delay, the Court finds no merit. The damages claims of Defendant Ohio Imaging against K-Con under the contract in the 2018-CP-10-3825 case are grounded in the contract provision which call for liquated damages between the contracting parties K-Con, Inc. and Ohio Imaging Associates, Inc. in the event of breach. In the 2020-CP-10-2895 case, by comparison, Ohio Imaging Associates Inc. made common law tort claims against named individual Defendants, which are not subject to any contract limitation on damages. Accordingly, the Court also denies this ground for partial summary judgment on this ground as well.

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The Hon. R. Kirk Griffin  
Circuit Court Judge



Charleston Common Pleas

**Case Caption:** K Con Inc VS King Street Enterprises LLC , defendant, et al

**Case Number:** 2018CP1003825

**Type:** Order/Summary Judgment

So Ordered

s/ R. Kirk Griffin 2768

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