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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas**

IN CASE No. 18-CP-10-3825; THE HONORABLE R. KIRK GRIFFIN

Case No. 2021-001269

K-Con, Inc.,.....Appellant.

v.

King Street Enterprises, LLC, Ohio Imaging Associates, Inc.,
Mary Ann Kanters Cook a/k/a Mary Ann Kanters,
and Dr. Albert James Cook II, Respondents,

**APPELLANT’S MEMORANDUM
IN RESPONSE TO COURT’S REQUEST
DATED NOVEMBER 17, 2021**

This memorandum is filed in response to the Court of Appeals letter dated November 17, 2021, and explains why the orders are immediately appealable.

The Order denying K-Con, Inc.’s Motion for Partial Summary Judgment is immediately appealable because the Order is in fact a *sua sponte* order granting partial summary judgment in favor of Ohio Imaging finding that the liquidated damages rate is reasonable. There was no motion requesting the relief provided by the Order and the court lacked jurisdiction to issue the Order because the Order was issued more than ten (10) days after the court issued a simple Form 4 Order denying the Motion for Partial Summary Judgment.

The Order denying K-Con’s Motion to Stay is immediately appealable pursuant to S.C. Code § 14-3-330(b) because the Order affects Appellant’s substantial right provided by the South Carolina Notice and Opportunity to Cure Nonresidential Defects Act. S.C. Code § 40-11-500, *et seq.* The Act mandates that the court shall stay the case until the claimant complies with the Act, S.C. Code § 40-11-520, and provides complete defense to claims when the Act has not been followed.

OVERVIEW

K-Con, Inc. (hereinafter referred to as “K-Con” or “Appellant”) filed a Complaint against Ohio Imaging Associates, Inc. and King Street Enterprises, LLC (hereinafter referred to collectively as “Ohio Imaging” or “Respondents”) relating to an up-fit of an office building at 484 King Street, Suite 205.¹ King Street Enterprises, LLC is the owner of the property and Ohio Imaging leased the property. K-Con alleged a cause of action against Ohio Imaging for breach of contract, a cause of action against King Street Enterprise for foreclosure under the mechanics’ lien statute, S.C. Code § 29-5-10, and for unjust enrichment/quantum meruit. Ohio Imaging filed a Counterclaim for breach of contract and breach of warranty, including claims for liquidated damages and for incomplete/defective work. K-Con filed an Answer to the Counterclaim that

¹ K-Con filed an Amended Complaint alleging claims against Ms. Kanters for fraud in the inducement and negligent misrepresentation, and claims against Dr. Cook for interference with a contract and negligent misrepresentation as the result of their individual tortious actions. Ms. Kanters is the managing member of KSE and the owner’s representative for Ohio Imaging. Dr. Cook is the President of Ohio Imaging. Ms. Kanters and Dr. Albert J. Cook, II are married. Almost two years after the K-Con case was filed, Ohio Imaging filed a separate action, *Ohio Imaging Associates, Inc. v. Pat Kiernan, Dan D’Orio, Edward Kirsch, Luther Ramsey, and Shawn Cantey*, No. 2020-CP-10-02895, alleging causes of action for fraud and civil conspiracy against Pat Kiernan, Dan D’Orio, Edward Kirsch, Luther Ramsey, and Shawn Cantey, the President and four employees, or prior employees, of K-Con relating to the same contract at issue in the K-Con case. The cases were subsequently consolidated.

included the defense of failure to comply with the South Carolina Notice and Opportunity to Cure Nonresidential Defects Act.

FACTS AND CHRONOLOGY RELATING TO THE APPEAL

K-Con filed two (2) separate motions, one Motion for Partial Summary Judgment requesting the court find the liquidated damages amount stated in the contract was an impermissible penalty (Exhibit 1, K-Con's Mot. for Partial Summ. J.), and another Motion to Stay pursuant to S.C. Code § 40-11-520. (Exhibit 2, K-Con's Mot. to Stay).

The motions were heard via WebEx on July 28, 2021, by Judge Griffin.

Judge Griffin issued a letter dated July 30, 2021, that stated the court denied both motions and requested that Respondents' counsel prepare an order within 15 days and provide Appellant's counsel an opportunity to review it. (Exhibit 3, 7/30/21 Letter).

Respondents' counsel advised the court that "[w]e are content with a Form 4 denial of the motions, if that suits the Court." (Exhibit 4, 7/30/21 E-mail from Brent Halversen).

The court issued two Form 4 Orders filed on August 2, 2021, one denying the Motion for Partial Summary Judgment (Exhibit 5, Order), and the other denying the Motion to Stay. (Exhibit 6, Order). Both Orders simply stated the Plaintiff's motion "is respectfully DENIED." *Id.* Neither Order indicated that a formal order would follow. *Id.*

On August 10, 2021, K-Con filed a Motion for Reconsideration of the Form 4 Order denying the Motion to Stay. (Exhibit 7, K-Con's Mot. for Recons.).

K-Con **did not** file a motion for reconsideration of the Form 4 Order denying the Motion for Partial Summary Judgment. Therefore, the Form 4 Order denying K-Con's Motion for Partial Summary Judgment became final ten (10) days after the Order was filed, August 12, 2021, and the court lost jurisdiction over the matter. *See* Rule 59(e), SCRCPP; Rule 203, SCACR; *Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 432 (2018)(the ten-day limit for serving a Rule 59(e)

motion is an absolute deadline); *Leviner v. Sonoco Prod. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000)(when no motion for reconsideration is filed, court loses jurisdiction over the matter and any subsequent order is a nullity).

On September 13, 2021, Judge Griffin issued a letter addressing K-Con's Motion for Reconsideration. (Exhibit 8, 9/13/21 Letter). The letter states that "[t]he motion for reconsideration is granted to the extent that the Court will require a detailed formal order to supplement the Form 4 entered on July 30, 2021." *Id.* The letter requests Ohio Imaging's counsel "prepare **an order** consistent with your memorandum in opposition to the Plaintiff's **motions** within 15 days and provide Mr. Scott an opportunity to review **it**. Then please submit **it** to efile for my review" *Id.* (emphasis added).

On September 22, 2021, Ohio Imaging's counsel provided two (2) proposed orders to K-Con's counsel, one denying the Motion to Stay, and the other denying the Motion for Partial Summary Judgment. (Exhibit 9, 9/23/21 E-mail Chain).

K-Con's counsel responded the next day with comments on the proposed order denying the Motion to Stay and also advised that no order was required on the Motion for Partial Summary Judgment because no motion for consideration of the Form 4 Order denying the Motion for Partial Summary Judgment had been filed. *Id.*

Despite counsel's email stating there was no need for an order denying the Motion for Partial Summary Judgment, on September 27, 2021, Ohio Imaging's counsel filed a proposed order denying the Motion to Stay (Exhibit 10, Notice of Filing) and a proposed order denying the Motion for Partial Summary Judgment. (Exhibit 11, Notice of Filing).

On September 30, 2021, the trial court signed both proposed orders submitted by Ohio Imaging's counsel and are the two Orders appealed in this case.

By letter dated October 4, 2021, K-Con's counsel requested Judge Griffin vacate the Order denying the Motion for Partial Summary Judgment. (Exhibit 12, 10/4/21 Letter). Citing the *Leviner v. Sonoco Prod. Co.* case, the letter explained that since no motion for reconsideration had been filed, the Form 4 Order became final ten (10) days later and any subsequent order is a nullity. *Id.*

By email dated October 6, 2021, Judge Griffin declined to vacate the Order denying the Motion for Partial Summary Judgment. (Exhibit 13, 10/6/21 E-mail).

On October 7, 2021, K-Con filed a Motion for Reconsideration of the Order denying the Motion for Partial Summary Judgment dated September 30, 2021. (Exhibit 14, Mot for Recons.).

Judge Griffin denied the Motion for Reconsideration by Order filed November 1, 2021. (Exhibit 15, Order).

K-Con filed a second Notice of Appeal on November 8, 2021, based on the trial court's denial of the Motion for Reconsideration. (Exhibit 19, Notice of Appeal).²

ARGUMENT

1. The Order Denying Plaintiff's Motion for Partial Summary Judgment is Immediately Appealable Because It is In Fact a *Sua Sponte* Order Granting Partial Summary Judgment to the Defendant.

The appeal deals with the enforceability of the liquidated damages rate. K-Con's Motion for Partial Summary Judgment requested that the court dismiss Ohio Imaging's claim for liquidated damages because the liquidated damages amount is an impermissible penalty that has no relationship to any potential actual damages. Significantly, Ohio Imaging did not file a cross-

² Appellant filed a second Notice of Appeal on the denial of the Motion for Reconsideration filed November 1, 2021, as a precaution. While no previous motion for reconsideration of the Form 4 Order denying the Motion for Partial Summary Judgment had been filed, considering the unusual facts and chronology leading up the appeal, Appellant has attempted to cover its bases to ensure all orders were timely appealed.

motion for summary judgment. Therefore, there was no motion before the court requesting that the court find the liquidated damages amount was enforceable and not a penalty. The Order filed September 30, 2021, states:

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. (emphasis added). (Exhibit 16)

The affirmative finding by the court that the liquidated damages amount is not a penalty and is fair and reasonable is a *sua sponte* order granting a motion that was not before the court. Ohio Imaging had not filed a motion seeking a decision that the liquidated damages amount was fair and reasonable and not a penalty. Summary judgment in favor of Ohio Imaging is not appropriate when it did not seek summary judgment. *Foreign Acad. & Cultural Exch. Servs., Inc. v. Tripon*, 394 S.C. 197, 715 S.E.2d 331 (2011).

Generally, orders granting partial summary judgment may be immediately appealable under either the "involving the merits" or "substantial right" categories of section 14-3-330(1) and (2)(c)." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 306, 705 S.E.2d 475, 480 (Ct. App. 2011). Issues relating to whether liquidated damages are unenforceable penalties are routinely appealed on summary judgment. In *ERIE Ins. Co. v. Winter Const. Co.*, the parties filed cross motions for summary judgment on whether the liquidated damages amount was an unenforceable penalty. The trial court held that the liquidated damages were an unenforceable penalty. The Court of Appeals reversed the decision. *ERIE Ins. Co. v. Winter Const. Co.*, 393 S.C. 455, 465, 713 S.E.2d 318, 323 (Ct. App. 2011). Similarly, in *Foreign Acad. & Cultural Exch. Servs., Inc. v. Tripon*, on an appeal from summary judgment, the Supreme Court held that the liquidated damages provision in a recruiting contract was an unenforceable penalty provision. *Foreign Acad.*

& Cultural Exch. Servs., Inc. v. Tripon, 394 S.C. 197, 715 S.E.2d 331 (2011). Most recently, in 2020, the Court of Appeals heard an appeal from summary judgment relating to whether a relocation fee was an unenforceable penalty. *DD Dannar, LLC v. SC LAUNCH!, Inc.*, 431 S.C. 9, 19, 846 S.E.2d 883, 888 (Ct. App. 2020). These cases demonstrate that an order granting summary judgment on an issue relating to the enforceability of a liquidated damages provision is immediately appealable.

K-Con did not file a motion for reconsideration on the Form 4 Order denying the Motion for Partial Summary Judgment. Therefore, the Form 4 Order filed on August 2, 2021, denying K-Con's Motion for Partial Summary Judgment became final ten (10) days later, August 12, 2021. The trial court lost jurisdiction and any subsequent order is a nullity. *See Leviner v. Sonoco Prod. Co.*, 339 S.C. at 494, 530 S.E.2d at 128. The Order filed September 30, 2021, is a nullity and should be vacated. Since the *sua sponte* Order involves the merits of the case as discussed above, it is immediately appealable.

While the Form 4 Order that simply denied Appellant's Motion for Partial Summary Judgment is not appealable, the subsequent *sua sponte* Order issued by the court is immediately appealable.

2. The Order Denying the Motion to Stay is Immediately Appealable under S.C. Code § 14-3-330(b) Because the Order Affects the Substantial Right to a Stay as Mandated by the South Carolina Notice and Opportunity to Cure Nonresidential Defects Act.

The appeal of the Order denying the Motion to Stay deals with the statutory requirement to stay an action when the claimant, Ohio Imaging in this case, failed to comply with the South Carolina Notice and Opportunity to Cure Nonresidential Defects Act. S.C. Code § 40-11-500, *et seq.* Here, Ohio Imaging filed a counterclaim alleging construction defects. (Exhibit 17, Ohio Imaging's Answer and Countercl., ¶¶ 74 and 78). Appellant filed an Answer to the Counterclaim

alleging Ohio Imaging failed to comply with the Notice and Opportunity to Cure Act. (Exhibit 18, Answer to Countercl., ¶ 12).³ K-Con contends that Ohio Imaging failed to provide the required notice, failed to provide an adequate description of the alleged defects, and made repairs before it provided the required notice or opportunity to cure.

The Order denying Plaintiff's Motion to Stay is immediately appealable pursuant to S.C. Code § 14-3-330(b) which provides for the immediate appeal from "[a]n order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action." S.C. Code § 14-3-330(b). "An order which involves the merits is one that 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense.' *Mid-State Distribs. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). Interlocutory orders affecting a substantial right may be immediately appealed pursuant to § 14-3-330(2). Orders affecting a substantial right 'discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.' *Id.* at 335 n. 4, 426 S.E.2d at 780 n. 4." *Edwards v. SunCom*, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006).

In this case, K-Con filed a Motion to Stay pursuant to the South Carolina Notice and Opportunity to Cure Nonresidential Defects Act. S.C. Code § 40-11-500, *et seq.* The Act generally requires that a claimant must provide notice, provide a description alleged defects, and provide an opportunity to cure any alleged construction defects before it files a civil action. *Id.* If the claimant does not comply with the Act, the Act mandates that the court shall stay the case until the claimant

³ The Answer to Counterclaim erroneously refers to the Residential Right to Cure Act, S.C. Code Ann. § 40-59-810, *et seq.* It should have referred to S.C. Code § 40-11-500, *et seq.*

complies with the Act.

If the claimant files a civil action or initiates an arbitration before first complying with the requirements of this article, on motion of a party to the action, **the court or arbitrator shall stay the action until the claimant has complied with the requirements of this article.** (emphasis added).

S.C. Code § 40-11-520, Stay of Action or arbitration.

There is no case law regarding the Notice and Opportunity to Cure Nonresidential Construction Defects Act; however, the South Carolina Supreme Court has addressed an essentially identical statute regarding residential construction defects, S.C. Code § 40-59-800, *et seq.*, South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act. In *Grazia v. S.C. State Plastering*, the Supreme Court stated:

The Right to Cure Act has an express public policy intent of: (1) addressing the need for an alternative dispute resolution method to promote settlement of construction disputes without litigation, while adequately protecting the rights of homeowners; and (2) requiring a would-be plaintiff in certain construction defect matters to file a notice of claim with the would-be defendant and provide an opportunity to resolve the claim without litigation. See 2003 South Carolina Laws Act 82 (S.B. 433). **The stated public policy, therefore, is not abridged when a court, on motion, is required to stay a proceeding in order to require compliance with the Right to Cure Act's notice provisions.** (emphasis added).

Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 572, 703 S.E.2d 197, 202 (2010).

In a similar fashion, the stated public policy intent of the Nonresidential Right to Cure Act is “to provide procedures for the right to cure nonresidential construction defects **before a civil action or other remedy provided by law or contract may be instituted or continued.**” (emphasis added). See 2006 South Carolina Laws Act 371 (S.B. 807).

The plain language of a statute is the best evidence of the General Assembly's intent. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 538, 725 S.E.2d 693, 697 (2012). The plain, clear, and unambiguous language mandates the court “shall stay the action” until a claimant complies with the notice and opportunity to cure requirements. The only conclusion is that the Act is intended

to provide a “substantial right” to litigants. There is no other way to interpret the statute. The stay provision works as an absolute defense to any claims that a claimant may allege when the claimant fails to comply with the Act. When the Act is not followed, a claimant cannot pursue claims for the allegedly defective work until it complies with the Act.

The appeal process is the only means a party has to require compliance with the Act. For the Act to have any meaning, an order denying a stay must be immediately appealable. Otherwise, the intent of the statute is completely frustrated, claims for defective work can proceed in violation of the statute, and the moving party loses a complete defense to claims for defective work.

CONCLUSION

For all the foregoing reasons, both the *sua sponte* Order denying the Motion for Partial Summary Judgment that is, in reality, a motion granting partial summary judgment and the Order denying the Motion to Stay are immediately appealable.

Respectfully submitted,

s/William A. Scott
William A. Scott
Pedersen & Scott, P.C.
2565 Royal Oak Drive
Johns Island, SC 29455
Tel: (843) 556-5656
Fax: (843) 556-5635
E-Mail: bscott@pslawpc.com

Attorney for Appellant

Dated: November 29, 2021

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

K-CON, INC.,
Plaintiff,

v.

KING STREET ENTERPRISES, LLC, and
OHIO IMAGING ASSOCIATES, INC.,
Defendants.

CASE NO. 2018-CP-10-3825
(Consolidated with
CASE NO. 2020-CP-10-2895)

**NOTICE OF MOTION
AND MOTION FOR PARTIAL
SUMMARY JUDGMENT**

OHIO IMAGING ASSOCIATES, INC.,
Plaintiff,

v.

EDWARD KIRSCH, LUTHER RAMSEY,
SHAWN CANTEY, PATRICK KIERNAN,
AND DAN D'ORIO,
Defendants.

YOU WILL PLEASE TAKE NOTICE that K-Con (“K-Con”), by and through the undersigned counsel, will, in ten (10) days or as soon thereafter as counsel may be heard, move for partial summary judgment on the following issues in this case.

1. 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. (“Ohio Imaging”). K-Con submitted a claim pursuant to S.C. Code Ann. § 27-1-15, however, Ohio Imaging failed to make a reasonable and fair investigation and unreasonably refused to pay the undisputed amount within forty-five (45) days.

2. Ohio Imaging's claim for liquidated damages must be dismissed because the liquidated damages amount in the contract is an impermissible penalty.

3. Ohio Imaging's claim for liquidated damages must be dismissed because Ohio Imaging is claiming actual damages for delay.

4. Ohio Imaging's claim against the individual defendants for conspiracy must be dismissed because there are no unique special damages. The claimed damages are the same exact damages claimed in the fraud cause of action and are for delays, the same damages claimed against K-Con.

The motion is supported by applicable law, case law, affidavits, memoranda, and arguments of counsel as may be appropriate.

Respectfully submitted,

PEDERSEN & SCOTT, P.C.

/s/ William A. Scott

William A. Scott
775 St. Andrews Boulevard
Charleston, SC 29407
Tel. 843-556-5656
Fax. 843-556-5635
Email: bscott@pslawpc.com

Attorney for Plaintiff, K-Con, Inc.

Dated this 25th day of January 2021.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

K-CON, INC.,
Plaintiff,

v.

KING STREET ENTERPRISES, LLC, and
OHIO IMAGING ASSOCIATES, INC.,
MARY ANN KANTERS COOK a/k/a
MARY ANN KANTERS,
AND DR. ALBERT JAMES COOK II,

Defendants.

CASE NO. 2018-CP-10-3825
(Consolidated with
CASE NO. 2020-CP-10-2895)

**NOTICE OF MOTION
AND MOTION TO STAY
CLAIMS RELATED TO ALLEGED
CONSTRUCTION DEFECTS**

OHIO IMAGING ASSOCIATES, INC.,
Plaintiff,

v.

EDWARD KIRSCH, LUTHER RAMSEY,
SHAWN CANTEY, PATRICK KIERNAN,
AND DAN D'ORIO,

Defendants.

Pursuant to the South Carolina Notice and Opportunity to Cure Nonresidential Construction Defects Act, specifically S.C. Code Ann. § 40-11-520, K-Con, Inc., moves for an order staying some or all claims based on alleged construction defects asserted by Ohio Imaging Associates, Inc.'s ("Ohio Imaging") and King Street Enterprises, LLC ("KSE"). The basis for this motion is that Ohio Imaging and KSE failed to comply with the requirements of S.C. Code Ann. § 40-11-530. Notice of claim; contents; request for clarification. The motion is supported

by applicable law, case law, affidavits, memoranda, and arguments of counsel as may be appropriate.

Respectfully submitted.

PEDERSEN & SCOTT, P.C.

/s/ William A. Scott

William A. Scott (SC Bar #15148)

775 St. Andrews Blvd.

Charleston, SC 29407

Tel: (843) 556-5656

Fax: (843) 556-5635

Email: bscott@pslawpc.com

Attorney for Plaintiff, K-Con, Inc.

Dated this 25th day of January 2021.



State of South Carolina
The Circuit Court of the Third Judicial Circuit

R. Kirk Griffin
Judge

215 North Harvin Street, Suite 226
Sumter, SC 29150
Phone: (803) 436-2150
Fax: (803) 436-2403
rgriffinj@sccourts.org

July 30, 2021

TO: WILLIAM A. SCOTT, ESQ.
BRENT SOUTHER HALVERSEN, ESQ.
DANIEL SCOTT SLOTCHIVER, ESQ.

FROM: R. KIRK GRIFFIN

RE: K CON INC V. KING STREET ENTERPRISES LLC, ET AL.
2018-CP-10-03825

This matter was heard via WebEx on July 28, 2021. After reviewing the issue under advisement, the arguments of counsel, the pleadings, and all memoranda submitted, the Court respectfully denies Plaintiff's Motion to Stay and Plaintiff's Motion for Partial Summary Judgment.

Mr. Halversen, please prepare an order within 15 days and provide Mr. Scott an opportunity to review it. Then please submit it to efile for my review and I will accept if proper.

If you have any questions, please feel free to contact my office.

From: Brent Halversen <Brent@halversenlaw.com>
Sent: Friday, July 30, 2021 5:35 PM
To: Griffin, Ryan K. Law Clerk (Kristen M. Johnson); Tracy Braceland; Daniel S Slotchiver; Bill Scott
Cc: Griffin, Ryan K. Secretary (Debra Flinchum)
Subject: RE: K Con Inc v. King Street Enterprises LLC

Thanks Judge. We are content with a Form 4 denial of the motions, if that suits the Court.

Brent

Halversen & Halversen, LLC

751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, South Carolina 29464
(843) 284-5790 tel.
(864) 326-4844 fax.

brent@halversenlaw.com

www.halversenlaw.com

HALVERSEN &
HALVERSEN, L.L.C
Attorneys-at-Law

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K Con Inc
PLAINTIFF(S)

King Street Enterprises LLC et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED** (*CHECK REASON*): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN** (*CHECK REASON*): Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's motion for partial summary judgment filed on January 25, 2021 is respectfully DENIED.

ORDER INFORMATION

This order ends does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/30/2021 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Charleston Common Pleas

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

Case Number: 2018CP1003825

Type: Order/Electronic Form 4

So Ordered

s/ R. Kirk Griffin 2768

K Con Inc
PLAINTIFF(S)

King Street Enterprises LLC et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (*CHECK REASON*):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (*CHECK REASON*):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's motion to stay filed on January 25, 2021 is respectfully DENIED.

ORDER INFORMATION

This order ends does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/30/2021 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Charleston Common Pleas

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

Case Number: 2018CP1003825

Type: Order/Electronic Form 4

So Ordered

s/ R. Kirk Griffin 2768

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

K-CON, INC.,
Plaintiff,

CASE NO. 2018-CP-10-3825
AND
CASE NO. 2020-CP-10-2895

v.

KING STREET ENTERPRISES, LLC, and
OHIO IMAGING ASSOCIATES, INC.,
MARY ANN KANTERS COOK a/k/a
MARY ANN KANTERS,
AND DR. ALBERT JAMES COOK II,

**MOTION FOR RECONSIDERATION
ON PLAINTIFF'S MOTION TO STAY
PURSUANT TO
S.C. CODE § 40-11-520**

Defendants.

OHIO IMAGING ASSOCIATES, INC.,
Plaintiff,

v.

EDWARD KIRSCH, LUTHER RAMSEY,
SHAWN CANTEY, PATRICK KIERNAN,
AND DAN D'ORIO,

Defendants.

Pursuant to Rule 59, SCRPC, K-Con, Inc. ("K-Con") moves for reconsideration of the Form 4 Order denying K-Con's Motion to Stay as required by S.C. Code § 40-11-520, Notice and Opportunity to Cure Nonresidential Construction Defects Act ("the Act"). The Form 4 Order does not state the basis for denying the motion to stay and the statute states the court "shall stay the action until the claimant has complied with the requirements of this article." S.C. Code § 40-11-520. Stay of action or arbitration. Under the undisputed facts of this case, the court must issue a stay to comply with the statute.

The facts of this case are straightforward.

Ohio Imaging Associates, Inc. (“Ohio Imaging”) issued a letter that purported to be a notice under the right to cure statute that identified four issues that “span, but are not limited to, deficiencies with the glass work, IT work, controlled access, and water heaters.” (K-Con Mem., Ex. 2).¹

K-Con immediately responded and advised the letter did not comply with the statute. The letter was not served as required by the statute, either by personal service or certified mail, and did not provide a description of alleged defects with reasonable detail. (K-Con Mem., Ex. 6). Despite non-compliance with the statute, K-Con responded and advised what it understood each alleged deficiency to be and what action it would take on each of the four issues.

Ohio Imaging and King Street Enterprises, LLC (“KSE”) did not provide any further description of the alleged deficiencies until after the counterclaim was filed and after the alleged deficiencies were repaired. K-Con could not fix something it was not aware of or given an opportunity to repair.

Even if the court determines the “notice to cure” letter dated July 5, 2018 (K-Con Mem., Ex. 2), meets the requirements of the statute, it does not and cannot apply to alleged deficiencies that were not identified with reasonable detail in the letter, or that were not disclosed until later. At best, it can only apply to alleged deficiencies reasonably described in the “notice to cure” letter that K-Con understood to be issues.

Ohio Imaging and KSE are not claiming damages for deficiencies that were not addressed in the “notice to cure,” but were only raised after the counterclaim was filed and after repairs

¹ Exhibits are those included in K-Con’s Memorandum in Support to Motion to Stay or Ohio Imaging’s Response to Plaintiff’s Motion to Stay.

were made. Any claims relating to the alleged deficiencies addressed below must be stayed as required by the statute.

- **Hot Water Heater:** Almost a year after the project was complete and after the counterclaim was filed, Ohio Imaging claimed that one hot water heater did not work. (K-Con Mem., Ex. 11).
- **IT Work:** Other than issues with the conduit identified in K-Con's response to the "notice to cure," K-Con was not aware of any other issues with the IT system. Ms. Kanters testified during her deposition that she could not recall the details but alleged the network was not complete, the wiring was not complete, she believed conduit was not installed, and pull strings were not installed. (K-Con Memo, Ex. 3 at 81:10-83:11). In response to a request for admission, Ohio Imaging stated "K-Con failed to install wiring per the contract plans and specifications." (K-Con Mem., Ex. 16, Ohio Imaging's Answer to Canty Req. for Admis., Req. No. 18).
- **Cook and Boardman:** Ms. Kanters testified "[t]here were locks that were installed backwards, or they unlocked when they were supposed to lock, and lock when they weren't supposed to lock." (K-Con Mem., Ex. 18, 9/24/19 Kanters Dep. at 70:24-71:6).
- **Arnett Construction:** Ohio Imaging first identified alleged deficiencies with the electrical panels in its Supplemental Responses to K-Con's interrogatories when it provided a Change Order to Arnett Custom Homes to "transfer all circuit breakers and wiring in the 206 and 205 panels installed improperly by the original contractor." (K-Con Mem., Ex. 19, 6/13/19 Arnett Change Order).
- **VSCF:** K-Con was not provided any notice or an opportunity to cure for this alleged deficiency until discovery after the counterclaim was filed.

Any argument that K-Con should have known what the alleged defects were is unsupported. Ohio Imaging and KSE included an email dated May 25, 2018, with a list of “incomplete work.” (Ohio Imaging Resp., Ex. B). That document cannot support alleged deficiencies that existed as of July 5, 2018, when the “notice to cure” letter was emailed to K-Con. K-Con’s response to the “notice to cure” letter states exactly what it understood the issues to be. If Ohio Imaging contended something else was defective, it should have so stated. It did not. The May 25th letter does not address any of the five (5) issues addressed above. K-Con did not learn what Ohio Imaging now claims the alleged deficiencies to be until discovery, after the counterclaim was filed, and after the repairs were made.

Any argument that K-Con waited too long to file the motion is unsupported. The statute does not state when a motion to stay must be filed. K-Con raised the Right to Cure statute as a defense in its responsive pleadings. Ohio Imaging and KSE did not disclose the alleged deficiencies until well into discovery, and then only after the alleged deficiencies had been allegedly repaired. By that time, any evidence of the alleged deficiencies was destroyed. When the motion was filed makes no difference.

For the foregoing reasons, K-Con respectfully requests the court reconsider the matter and issue a stay as required by the statute. At a minimum, the statute requires the court stay all claims relating to deficiencies that were not identified in the letter and that were not identified until after the counterclaim was filed, which include: (1) defective hot water heater, (2) IT deficiencies, (3) Cook and Boardman (locks); (4) Arnett Construction (power panel); and (5) the VSCF.

Respectfully submitted.

PEDERSEN & SCOTT, P.C.

/s/ William A. Scott

William A. Scott (SC Bar #15148)

2565 Royal Oak Drive

Johns Island, SC 29455

Tel: (843) 556-5656

Fax: (843) 556-5635

E-mail: bscott@pslawpc.com

Attorney for Plaintiff, K-Con, Inc.

Dated this 10th day of August 2021.



State of South Carolina
The Circuit Court of the Third Judicial Circuit

R. Kirk Griffin
Judge

215 North Harvin Street, Suite 226
Sumter, SC 29150
Phone: (803) 436-2150
Fax: (803) 436-2403
rgriffinj@sccourts.org

September 13, 2021

TO: WILLIAM A. SCOTT, ESQ.
BRENT HALVERSEN, ESQ.
DANIEL SLOTCHIVER, ESQ.

FROM: R. KIRK GRIFFIN

RE: K CON INC V. KING STREET ENTERPRISES LLC, ET AL.
2018-CP-10-03825

MOTION FOR RECONSIDERATION

This matter was originally heard via WebEx on July 28, 2021. After reviewing the issue under advisement, the arguments of counsel, the pleadings, and all memoranda submitted, the Court denied Plaintiff's Motion to Stay and Plaintiff's Motion for Partial Summary Judgment. A Form 4 was signed and issued on July 30, 2021. A Motion for Reconsideration was filed on August 10, 2021. The Court decides the Motion for Reconsideration without a hearing or oral argument pursuant to Rule 59(f), South Carolina Rules of Civil Procedure.

The motion for reconsideration is granted to the extent that the Court will require a detailed formal order to supplement the Form 4 entered on July 30, 2021.

Mr. Halversen, please prepare an order consistent with your memorandum in opposition of the Plaintiff's motions within 15 days and provide Mr. Scott an opportunity to review it. Then please submit it to efile for my review.

If you have any questions, please feel free to contact my office.

From: [Bill Scott](#)
To: [Brent Halversen](#)
Cc: [Slotchiver](#); [Tracy Braceland](#)
Subject: RE: C.A. No. 2018-CP-10-3825 K-Con, Inc. v. King Street Enterprises, LLC, et al. -K-Con, Inc.'s Motion for Reconsideration
Date: Thursday, September 23, 2021 10:54:27 AM
Attachments: [Order Denying Motion for Stay \(Rev by BS 9-23-21\).docx](#)

Brent:

Attached is the proposed order denying the motion to stay. I made some minor changes. The only substantive revision makes it clear that the alleged defects identified in discovery were already repaired when discovery responses were served.

I don't believe an order is required on the motion for summary judgment. I did not file a motion for reconsideration and the form 4 order is acceptable.

Bill

William A. Scott, Esq.
Pedersen & Scott, P.C.
2565 Royal Oak Drive
Johns Island, SC 29455
Tel. 843-559-2338
Mobile: 843-729-7863

Email: bscott@pslawpc.com

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-----Original Message-----

From: Brent Halversen <Brent@halversenlaw.com>
Sent: Wednesday, September 22, 2021 8:38 PM
To: Bill Scott <bscott@pslawpc.com>; Tracy Braceland <tracy@pslawpc.com>
Cc: Slotchiver <dan@slotchiverlaw.com>
Subject: FW: C.A. No. 2018-CP-10-3825 K-Con, Inc. v. King Street Enterprises, LLC, et al. -K-Con, Inc.'s Motion for Reconsideration

Bill,

In accordance with Judge Griffin's instructions, I am providing you Orders I have drafted which are consistent with the Memoranda I filed opposing your motion for stay and motion for partial summary judgment.

Brent

Halversen & Halversen, LLC
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, South Carolina 29464
(843) 284-5790 tel.

(864) 326-4844 fax.
brent@halversenlaw.com
www.halversenlaw.com

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-----Original Message-----

From: Griffin, Ryan K. <rgriffinj@sccourts.org>
Sent: Monday, September 13, 2021 3:58 PM
To: Brent Halversen <Brent@halversenlaw.com>; dan@slotchiverlaw.com; Bill Scott <bscott@pslawpc.com>
Subject: RE: C.A. No. 2018-CP-10-3825 K-Con, Inc. v. King Street Enterprises, LLC, et al. -K-Con, Inc.'s Motion for Reconsideration

Please find attached the Court's memorandum relating to the Plaintiff's Motion for Reconsideration.

R. Kirk Griffin
Circuit Court Judge
215 N. Harvin St.
Sumter, SC 29150
803-436-2150
rgriffinj@sccourts.org

-----Original Message-----

From: Griffin, Ryan K. Secretary (Debra Flinchum) <rgriffinsc@sccourts.org>
Sent: Tuesday, August 10, 2021 10:30 AM
To: Griffin, Ryan K. <rgriffinj@sccourts.org>
Subject: FW: C.A. No. 2018-CP-10-3825 K-Con, Inc. v. King Street Enterprises, LLC, et al. -K-Con, Inc.'s Motion for Reconsideration

I am sending you this because I did not see where you were copied.

Debra J. Flinchum
Administrative Assistant
Honorable R. Kirk Griffin
Circuit Court, At-Large Seat 2
215 North Harvin Street, Suite 226
Sumter, South Carolina 29150
(803) 436-2150
rgriffinsc@sccourts.org

-----Original Message-----

From: Tracy Braceland <tracy@pslawpc.com>
Sent: Tuesday, August 10, 2021 10:26 AM
To: Griffin, Ryan K. Secretary (Debra Flinchum) <rgriffinsc@sccourts.org>
Cc: Brent Halversen <Brent@halversenlaw.com>; dan@slotchiverlaw.com; Bill Scott <bscott@pslawpc.com>
Subject: C.A. No. 2018-CP-10-3825 K-Con, Inc. v. King Street Enterprises, LLC, et al. -K-Con, Inc.'s Motion for Reconsideration

*** EXTERNAL EMAIL: This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Dear Judge Griffin:

Attached for your consideration is the Motion for Reconsideration on Plaintiff's Motion to Stay Pursuant to S.C. Code Sec. 40-11-520 e-filed with the court today.

If you have any questions, please do not hesitate to contact us.

Please note the change of address.

Tracy Braceland
Paralegal
PEDERSEN & SCOTT, P.C
2565 Royal Oak Drive
Johns Island, SC 29455
Tel. 843-556-5656
Fax. 843-556-5635
Email: tracy@pslawpc.com

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**Bill Scott**

---

**From:** efiledonotreply@sccourts.org  
**Sent:** Monday, September 27, 2021 8:46 AM  
**To:** Bill Scott  
**Cc:** Tracy Braceland  
**Subject:** Courtesy NEF RE: 2018CP1003825

**\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\***  
**NOTICE OF ELECTRONIC FILING [NEF]**

---

**A filing has been submitted to the court RE: 2018CP1003825**

**Official File Stamp:** 09-27-2021 08:45:45 AM  
**Court:** CIRCUIT COURT  
Common Pleas  
Charleston  
**Case Caption:** K Con Inc VS King Street Enterprises LLC , defendant, et al  
**Event(s):** Order/Order Cover Sheet \$25.00  
**Document(s) Submitted:** Proposed Order/Stay  
**Filed by or on behalf of:** Brent Souther Halversen

This notice was automatically generated by the Court's auto-notification system.

---

**The following people were served electronically:**

Brent Souther Halversen for King Street Enterprises LLC, Ohio Imaging Associates Inc  
Daniel Scott Slotchiver for Mary Ann Kanters Cook, Cook, Albert James Dr II, Albert James Cook, II, Albert James Cook, Dr  
William A. Scott for K Con Inc

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

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Bill Scott

From: efiledonotreply@sccourts.org
Sent: Monday, September 27, 2021 8:48 AM
To: Bill Scott
Cc: Tracy Braceland
Subject: Courtesy NEF RE: 2018CP1003825

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP1003825

Official File Stamp: 09-27-2021 08:47:45 AM
Court: CIRCUIT COURT
Common Pleas
Charleston
Case Caption: K Con Inc VS King Street Enterprises LLC , defendant, et al
Event(s): Order/Order Cover Sheet \$25.00
Document(s) Submitted: Proposed Order/Summary Judgment
Filed by or on behalf of: Brent Souther Halversen

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Brent Souther Halversen for King Street Enterprises LLC, Ohio Imaging Associates Inc
Daniel Scott Slotchiver for Mary Ann Kanters Cook, Cook, Albert James Dr II, Albert James Cook, II, Albert James Cook, Dr
William A. Scott for K Con Inc

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

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**PEDERSEN & SCOTT, P.C.**  
ATTORNEYS AT LAW

P 843-556-5656  
F 843-556-5635  
bscott@pslawpc.com

October 4, 2021

Via E-Mail – rgriffinsc@sccourts.org  
and First Class Mail

The Honorable R. Kirk Griffin  
215 N. Harvin Street  
Sumter, SC 29150

Re: K-Con, Inc. v. King Street Enterprises, LLC, et al., C.A. No. 2018-CP-10-3825  
(Consolidated with Ohio Imaging Associates, Inc. v. Edward Kirsch, et al., Case  
No. 2020-CP-10-02895)

Dear Judge Griffin.

I respectfully request that you vacate the Order dated September 30, 2021, denying K-Con, Inc.'s ("K-Con") Motion for Partial Summary Judgment. A Form 4 Order denying the motion was filed on August 2, 2021. No motion for reconsideration was filed; therefore, that Form 4 Order became final ten (10) days later. Any subsequent order is a nullity. *See Leviner v. Sonoco Prod. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000).

The Order appears to be the result of some confusion. The court heard two motions on July 28, 2021, a Motion for Partial Summary Judgment and a Motion to Stay. K-Con filed a Motion for Reconsideration of the Form 4 Order denying the Motion to Stay. K-Con did not file a motion for reconsideration on the Form 4 Order denying the Motion for Partial Summary Judgment. On September 13, 2021, the Court issued a Memorandum granting the motion in part and asked Mr. Halversen to submit a proposed order within 15 days and provide me with an opportunity to review it. The Memorandum only addressed the Motion to Stay. Mr. Halversen provided me with two proposed orders, one denying the Motion for Summary Judgment and the other denying the Motion to Stay. I immediately advised Mr. Halversen that an order denying the Motion for Partial Summary Judgment was not required because I had not filed a motion for reconsideration on that matter and the Form 4 order was acceptable. Regardless, Mr. Halversen submitted two proposed orders. The order denying the Motion for Partial Summary Judgment should not have been submitted.

2565 Royal Oak Drive • Johns Island, South Carolina 29455

Please contact me if there are any questions.

With Highest Regards,

A handwritten signature in black ink, appearing to read "Bill Scott". The signature is fluid and cursive, with the first name "Bill" and the last name "Scott" clearly distinguishable.

William A. Scott

WAS/teb

cc: Brent Halversen, Esq.  
Daniel S. Slotchiver, Esq.

## Bill Scott

---

**From:** Griffin, Ryan K. <rgriffinj@sccourts.org>  
**Sent:** Wednesday, October 06, 2021 3:58 PM  
**To:** Bill Scott  
**Cc:** Brent Halversen; dan@slotchiverlaw.com; Tracy Braceland; Griffin, Ryan K. Law Clerk (Joseph D. Winterstein)  
**Subject:** RE: C.A. No. 2018-CP-10-3825 K-Con, Inc. v. King Street Enterprises, LLC, et al. -K-Con, Inc.'s Motion for Reconsideration  
**Attachments:** K Con Inc v King Street Enterprises LLC Ltr.pdf

Dear All:

I am in receipt of Mr. Scott's request to vacate the Order denying Plaintiff's Motion for Partial Summary Judgment. As you will all remember, the Court requested Mr. Halversen draft appropriate orders in its original memorandum which was emailed to the parties on July 30, 2021. Mr. Halversen asserted that a Form 4 was sufficient. Upon receiving and considering the Motion for Reconsideration of the denial of the Motion to Stay, the Court granted the motion to the extent that a formal order would be required. The Court directed Mr. Halversen to draft an order consistent with his written submissions. I have attached a copy of my original instructions. I believe the orders which were signed September 30, 2021, reflect the Court's rulings and intentions at the time these motions were decided. Therefore, I respectfully decline Mr. Scott's request to vacate the September 30, 2021 order denying Partial Summary Judgment.

R. Kirk Griffin  
Circuit Court Judge  
215 N. Harvin St.  
Sumter, SC 29150  
803-436-2150  
rgriffinj@sccourts.org

-----Original Message-----

From: Bill Scott <bscott@pslawpc.com>  
Sent: Monday, October 4, 2021 8:22 AM  
To: Griffin, Ryan K. <rgriffinj@sccourts.org>  
Cc: Griffin, Ryan K. Secretary (Debra Flinchum) <rgriffinsc@sccourts.org>; Brent Halversen <Brent@halversenlaw.com>; dan@slotchiverlaw.com; Tracy Braceland <tracy@pslawpc.com>  
Subject: RE: C.A. No. 2018-CP-10-3825 K-Con, Inc. v. King Street Enterprises, LLC, et al. -K-Con, Inc.'s Motion for Reconsideration

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Dear Judge Griffin:

Please find attached a letter concerning the Order Denying K-Con's Motion for Partial Summary Judgment filed last Friday.

Please contact me if you have any questions.

With highest regards.

Bill Scott

William A. Scott, Esq.  
Pedersen & Scott, P.C.  
2565 Royal Oak Drive  
Johns Island, SC 29455  
Tel. 843-559-2338  
Mobile: 843-729-7863

Email: bscott@pslawpc.com

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-----Original Message-----

From: Griffin, Ryan K. <rgriffinj@sccourts.org>  
Sent: Monday, September 13, 2021 3:58 PM  
To: Brent Halversen <Brent@halversenlaw.com>; dan@slotchiverlaw.com; Bill Scott <bscott@pslawpc.com>  
Subject: RE: C.A. No. 2018-CP-10-3825 K-Con, Inc. v. King Street Enterprises, LLC, et al. -K-Con, Inc.'s Motion for Reconsideration

Please find attached the Court's memorandum relating to the Plaintiff's Motion for Reconsideration.

R. Kirk Griffin  
Circuit Court Judge  
215 N. Harvin St.  
Sumter, SC 29150  
803-436-2150  
rgriffinj@sccourts.org

-----Original Message-----

From: Griffin, Ryan K. Secretary (Debra Flinchum) <rgriffinsc@sccourts.org>  
Sent: Tuesday, August 10, 2021 10:30 AM  
To: Griffin, Ryan K. <rgriffinj@sccourts.org>  
Subject: FW: C.A. No. 2018-CP-10-3825 K-Con, Inc. v. King Street Enterprises, LLC, et al. -K-Con, Inc.'s Motion for Reconsideration

I am sending you this because I did not see where you were copied.

Debra J. Flinchum  
Administrative Assistant  
Honorable R. Kirk Griffin  
Circuit Court, At-Large Seat 2  
215 North Harvin Street, Suite 226  
Sumter, South Carolina 29150  
(803) 436-2150  
rgriffinsc@sccourts.org

-----Original Message-----

From: Tracy Braceland <tracy@pslawpc.com>  
Sent: Tuesday, August 10, 2021 10:26 AM  
To: Griffin, Ryan K. Secretary (Debra Flinchum) <rgriffinsc@sccourts.org>  
Cc: Brent Halversen <Brent@halversenlaw.com>; dan@slotchiverlaw.com; Bill Scott <bscott@pslawpc.com>  
Subject: C.A. No. 2018-CP-10-3825 K-Con, Inc. v. King Street Enterprises, LLC, et al. -K-Con, Inc.'s Motion for Reconsideration

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Dear Judge Griffin:

Attached for your consideration is the Motion for Reconsideration on Plaintiff's Motion to Stay Pursuant to S.C. Code Sec. 40-11-520 e-filed with the court today.

If you have any questions, please do not hesitate to contact us.

Please note the change of address.

Tracy Braceland  
Paralegal  
PEDERSEN & SCOTT, P.C  
2565 Royal Oak Drive  
Johns Island, SC 29455  
Tel. 843-556-5656  
Fax. 843-556-5635  
Email: tracy@pslawpc.com

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

K-CON, INC.,
Plaintiff,

v.

KING STREET ENTERPRISES, LLC, and
OHIO IMAGING ASSOCIATES, INC.,
MARY ANN KANTERS COOK a/k/a
MARY ANN KANTERS,
AND DR. ALBERT JAMES COOK II,
Defendants.

CASE NO. 2018-CP-10-3825
(Consolidated with
CASE NO. 2020-CP-10-2895)

**MOTION FOR RECONSIDERATION OF
THE ORDER DENYING
K-CON'S MOTION FOR PARTIAL
SUMMARY JUDGMENT
FILED SEPTEMBER 30, 2021**

OHIO IMAGING ASSOCIATES, INC.,
Plaintiff,

v.

EDWARD KIRSCH, LUTHER RAMSEY,
SHAWN CANTEY, PATRICK KIERNAN,
AND DAN D'ORIO,
Defendants.

Pursuant to Rule 59, SCRPC, K-Con, Inc. ("K-Con") moves for reconsideration of the Order filed September 30, 2021, denying K-Con's Motion for Partial Summary Judgment for the following reasons.

1. The Order is a Nullity and Should Be Vacated.

The hearing on K-Con's Motion for Partial Summary Judgment was held on July 28, 2021, along with K-Con's Motion to Stay. The Court issued two Form 4 Orders on August 2, 2021, one denying K-Con's Motion for Partial Summary Judgment, the other denying K-Con's Motion to

Stay. K-Con filed a Motion for Reconsideration of the Form 4 Order denying the Motion to Stay. K-Con **did not** file a motion for reconsideration on the Form 4 Order denying the Motion for Partial Summary Judgment. Therefore, the Form 4 Order filed on August 2, 2021, denying K-Con's Motion for Partial Summary Judgment became final ten (10) days later. Any subsequent order is a nullity. *See Leviner v. Sonoco Prod. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000). Based on the law and the facts, the Order filed September 30, 2021, is a nullity and should be vacated.

2. The *Sua Sponte* Order Filed September 30, 2021, Improperly Grants Partial Summary Judgment to Ohio Imaging Finding that the Liquidated Damages Amount is Fair and Reasonable and Not a Penalty When There Was Not a Motion Seeking that Relief.

K-Con's Motion for Partial Summary Judgment requested that the court dismiss Ohio Imaging's claim for liquidated damages because the liquidated damages amount is an impermissible penalty that has no relationship to any potential actual damages. Ohio Imaging is also seeking actual delay damages. Ohio Imaging did not file a cross-motion for summary judgment. The Order filed September 30, 2021, states:

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.

The finding by the Court that the liquidated damages amount is not a penalty and is fair and reasonable amounts to a *sua sponte* order granting a motion that was not before the Court. Ohio Imaging had not filed a motion seeking a decision that the liquidated damages amount was fair and reasonable and not a penalty. K-Con presented evidence showing that the liquidated damages was a penalty, including admissions by both Dr. Cook and Ms. Kanters. Further, K-

Con presented evidence that Ohio Imaging was not going to incur any damages regardless of when the work was completed. Ms. Kanters, the 30(b)(6) designee for Ohio Imaging, testified she did not have the underlying knowledge to testify about the actual potential damages that Ohio Imaging could have incurred. (*See* Ex. 11, Kanters Dep. at 58:24-59:3; 62:15-63:6; 65:8-15). Ms. Kanters testified she was not sure if the amount was a “standard” amount. (Ex 4, Kanters Dep. at 141:10-25). Finally, Ohio Imaging stated in response to a request for admissions about whether the \$500 per day liquidated damages amount stated in the Contract was a “standard amount,” that it did not have the knowledge or information to admit or deny whether the amount was a standard amount. (Ex. 12, Suppl. Resp. to Ramsey Req. for Admis., Req. No. 8). While K-Con believes the evidence unequivocally demonstrates the liquidated damages amount is a penalty, the evidence clearly demonstrates there are disputed facts that preclude the Court’s finding that the liquidated damages amount was fair and reasonable and not a penalty. Accordingly, the finding that the liquidated damages amount is fair and reasonable and not a penalty must be stricken.

Respectfully submitted.

PEDERSEN & SCOTT, P.C.

/s/ William A. Scott
William A. Scott (SC Bar #15148)
2565 Royal Oak Drive
Johns Island, SC 29455
Tel: (843) 556-5656
Fax: (843) 556-5635
E-mail: bscott@pslawpc.com

Attorney for Plaintiff, K-Con, Inc.

Dated this 7th day of October 2021.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

K-CON, INC.,)
)
Plaintiff,)
)
v.)
)
KING STREET ENTERPRISES, LLC)
AND OHIO IMAGING ASSOCIATES,)
INC., MARY ANN KANTERS COOK,)
a/k/a MARY ANN KANTERS, AND)
DR. ALBERT JAMES COOK, II)
Defendants)

ORDER
C/A NO. 2018-CP-10-3825
Consolidated with
C/A NO. 2020-CP-10-2895

OHIO IMAGING ASSOCIATES, INC.,)
)
Plaintiff,)
)
v.)
)
EDWARD KIRSH, LUTHER RAMSAY,)
SHAWN CANTEY, PATRICK KIERNAN)
AND DAN D'ORIO,)
)
Defendants.)

This matter is before the Court pursuant to Rule 59 (e) SCRPC. The Plaintiff seeks an Order of this Court amending or altering its Order of September 30, 2021.

Pursuant to Rule 59 (f) SCRPC, this Court determines that the motion to alter or amend may be decided on briefs filed by the parties and without oral argument.

Having duly considered the motion to alter or amend of the Plaintiff, this Court has determined that its original Order dated September 30, 2021 is fully supported by the law and the evidence and is hereby ratified and reconfirmed. The motion to alter or amend the earlier Order is therefore DENIED.

AND IT IS SO ORDERED.

Sumter, South Carolina

Dated: _____

R. Kirk Griffin
Judge, Ninth Judicial Circuit



Charleston Common Pleas

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

Case Number: 2018CP1003825

Type: Order/Other

So Ordered

s/ R. Kirk Griffin 2768

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. Harleysville 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 Kanter into the record, filed before the hearing on July 26, 2021. The Affidavit made representations that Ms. Kanter 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.

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

| | | |
|----------------------------------|---|--|
| STATE OF SOUTH CAROLINA |) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF CHARLESTON |) | CASE NO. 2018-CP-10-3825 |
| K-CON, INC., |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | <u>KING STREET ENTERPRISES, LLC</u> |
| |) | <u>AND OHIO IMAGING ASSOCIATES,</u> |
| |) | <u>INC.'S ANSWER, AFFIRMATIVE</u> |
| |) | <u>DEFENSES AND COUNTERCLAIMS</u> |
| |) | <u>TO PLAINTIFF'S AMENDED</u> |
| |) | <u>COMPLAINT</u> |
| KING STREET ENTERPRISES, LLC |) | |
| and OHIO IMAGING ASSOCIATES INC. |) | |
| |) | |
| |) | |
| Defendants. |) | |

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 WILLIE J. ARMSTRONG
 CLERK OF COURT
 FILED

Comes now Defendants, King Street Enterprises, LLC (hereinafter, "KSE") and Ohio Imaging Associates Inc. (hereinafter, "OIA") (alternatively, KES and OIA collectively referred to as, "Defendants"), by and through its undersigned attorneys and Answers the allegations of Plaintiff's Amended Complaint served on or about October 16, 2019, asserting certain Affirmative Defenses and Counterclaims and states the following:

1. Defendants are without knowledge of the allegations of Paragraph 1.
2. Defendants admit the allegations of Paragraphs 2 and 3.
3. Defendants deny that Ms. Cook "participated in , authorized, ordered, and helped perpetuate tortious actions," as alleged in Paragraph 4, but admit the remainder of the jurisdictional allegations.
4. Defendants deny that Dr. Cook "participated in , authorized, ordered, and helped perpetuate tortious actions," as alleged in Paragraph 5, but

admit the remainder of the jurisdictional allegations.

- 5. The Defendants deny the allegations of Paragraph 6**
- 6. The Defendants are without knowledge and deny the allegations of Paragraph 7.**
- 7. The Defendants are without knowledge and deny the allegations of Paragraph 8.**
- 8. The Defendants are without knowledge and deny the allegations of Paragraph 9.**
- 9. The Defendants are without knowledge and deny the allegations of Paragraph 10.**
- 10. The Defendants are without knowledge and deny the allegations of Paragraph 11.**
- 11. The Defendants are without knowledge and deny the allegations of Paragraph 12.**
- 12. The Defendants deny the allegations of Paragraph 13.**
- 13. The Defendants deny the allegations of Paragraph 14.**
- 14. The Defendants deny the allegations of Paragraph 15.**
- 15. The Defendants deny the allegations of Paragraph 16.**
- 16. The Defendants deny the allegations of Paragraph 17.**
- 17. Although no response is required to Paragraph 18, the Defendants deny all preceding allegations of the Complaint and incorporated those denials herein and below.**
- 18. The Defendants deny the allegations of Paragraph 19.**

19. The Defendants deny the allegations of Paragraph 20.

20. The Defendants deny the allegations of Paragraph 21.

21. The Defendants deny the allegations of Paragraph 22.

22. The Defendants deny the allegations of Paragraph 23.

23. The Defendants deny the allegations of Paragraph 24.

24. The Defendants deny the allegations of Paragraph 25.

25. The Defendants are without knowledge and deny the allegations of Paragraph 26.

26. The Defendants deny the allegations of Paragraph 27.

27. Although no response is required to Paragraph 28, the Defendants deny all preceding allegations of the Complaint and incorporated those denials herein and below.

28. The Defendants are without knowledge and deny the allegations of Paragraph 29.

29. The Defendants are without knowledge and deny the allegations of Paragraph 30.

30. The Defendants are without knowledge and deny the allegations of Paragraph 31.

31. The Defendants are without knowledge and deny the allegations of Paragraph 32.

32. The Defendants deny the allegations of Paragraph 33.

33. The Defendants deny the allegations of Paragraph 34.

34. The Defendants deny the allegations of Paragraph 35.

- 35. The Defendants deny the allegations of Paragraph 36.**
- 36. The Defendants deny the allegations of Paragraph 37.**
- 37. The Defendants deny the allegations of Paragraph 38.**
- 38. The Defendants deny the allegations of Paragraph 39.**
- 39. The Defendants deny the allegations of Paragraph 40.**
- 40. The Defendants are without knowledge and deny the allegations of Paragraph 41.**
- 41. The Defendants are without knowledge and deny the allegations of Paragraph 42.**
- 42. The Defendants are without knowledge and deny the allegations of Paragraph 43.**
- 43. The Defendants deny the allegations of Paragraph 44.**
- 44. Although no response is required to Paragraph 45, the Defendants deny all preceding allegations of the Complaint and incorporated those denials herein and below.**
- 45. The Defendants are without knowledge and deny the allegations of Paragraph 46.**
- 46. The Defendants are without knowledge and deny the allegations of Paragraph 47.**
- 47. The Defendants are without knowledge and deny the allegations of Paragraph 48.**
- 48. The Defendants are without knowledge and deny the allegations of Paragraph 49.**

49. The Defendants are without knowledge and deny the allegations of Paragraph 50.

50. The Defendants are without knowledge and deny the allegations of Paragraph 51.

51. The Defendants deny the allegations of Paragraph 52.

52. Although no response is required to Paragraph 53, the Defendants deny all preceding allegations of the Complaint and incorporated those denials herein and below.

53. The Defendants are without knowledge and deny the allegations of Paragraph 54.

54. The Defendants deny the allegations of Paragraph 55

55. The Defendants deny the allegations of Paragraph 56.

56. The Defendants deny the allegations of Paragraph 57.

57. The Defendants deny the allegations of Paragraph 58.

58. The Defendants deny the allegations of Paragraph 59.

59. The Defendants deny the allegations of Paragraph 60.

60. The Defendants deny the allegations of Paragraph 61.

61. The Defendants deny any and all Paragraphs of Plaintiff's Complaint not specifically enumerated herein, including the demands of its Wherefore clause.

FOR A FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

62. The Complaint, in whole or in part, should be dismissed pursuant

to Rule 12(b)(6) for failure to state a claim against the Defendant.

FOR A SECOND AFFIRMATIVE DEFENSE

(Breach of Contract/Breach of Covenant of Good Faith & Fair Dealing)

63. Any failure on the part of the Defendants to perform as agreed under any contract with the Plaintiff, although specifically denied, was excused because of the Plaintiff's breaches of the parties' Contract and Addenda and Plaintiff's breaches of the express or implied covenant of good faith and fair dealing, express warranties, in such particulars as the evidence will show.

FOR A THIRD AFFIRMATIVE DEFENSE

(First Material Breach)

64. Plaintiff's claims are barred in whole or part because the Plaintiff was the first to materially breach the Contract in such particulars as the evidence will show.

FOR A FOURTH AFFIRMATIVE DEFENSE

(Unclean Hands/Laches)

65. Plaintiff's claims are barred in whole or part by the doctrine of unclean hands and laches.

FOR A FIFTH AFFIRMATIVE DEFENSE

(Waiver)

66. Plaintiff's claims are barred in whole or part by the doctrine of waiver due to its own failures to perform, comply with, and/or conform with the terms of the parties' Contract and Addenda in such particulars as the evidence will show.

FOR A SEVENTH AFFIRMATIVE DEFENSE

(Estoppel)

67. Plaintiff s claims are barred in whole or part by the doctrine of estoppel due to their own failures to perform, comply with, and/or conform with the terms of the parties' Contract and Addenda in such particulars as the evidence will show.

FOR AN EIGHTH AFFIRMATIVE DEFENSE

(Set-Off /Recoupment)

68. To the extent that the Defendants are found liable to the Plaintiff, which liability is expressly denied, the claims alleged in the Complaint should be reduced under the doctrines of set-off, and/or recoupment for monies owed by the Plaintiff to the Defendant.

FOR AN NINTH AFFIRMATIVE DEFENSE

(Reservation of Additional and Further Defenses and Non-Waiver)

69. Defendant reserves any additional and further defenses as may be revealed by additional information through the course of discovery and investigation in a manner that is consistent with the South Carolina Rules of Civil Procedure.

FOR AN TENTH AFFIRMATIVE DEFENSE

(Fraudulent Lien)

70. Defendants assert that Plaintiff has liened for labor and/or materials that were never provided or furnished and as such it has asserted a fraudulent

lien as that term is defined in the common law.

**FOR AN ELEVENTH AFFIRMATIVE DEFENSE AND BY WAY OF
A FIRST COUNTERCLAIM AGAINST THE PLAINTIFF**
(Breach of Contract)

71. OIA readopts and incorporates by reference as if fully set forth herein their answers to the allegations contained in the Plaintiff's Complaint.

72. The Plaintiff and OIA entered into a Contract.

73. The Contract and Addenda contain mutually dependent obligations by and between the Plaintiff Contractor and OIA. Each party's performance of its obligations under the terms of the Contract and Addenda is a condition precedent to that party's enforcement of the terms and provisions of the Contract and Addenda.

74. Notwithstanding the above-referenced Contract and Addendum, and the full and continued performance on the part of OIA, Plaintiff has materially breached the terms and provisions of the parties' Contract and Addenda as stated herein by, *inter alia*:

- a) failing to complete the project according to the Contract, plans, specifications, course of dealing, and change orders;
- b) implementing cost over-runs;
- c) causing foreseeable lost profits to OIA, invoking the liquidated damages provision through Plaintiff's delays in completing the job as agreed on a time of the essence basis;

- d) causing foreseeable lost profits and consequential damages to KSE;
- e) causing damages to the commercial project office suite through inattentive, sloppy, untidy and unprofessional operations; and
- f) necessitating OIA to pay others to fix Plaintiff's defective or incomplete work which should have been performed under the Contract;

75. As a direct and proximate result of the Plaintiff's breaches of the Contract and Addenda described above, Defendants have been damaged in an amount to be determined by the trier of fact, specifically including liquidated damages as to OIA for Plaintiff's delay occasioned through no fault of OIA or KSE, and consequential damages as to KSE occasioned through no fault of OIA or KSE.

**FOR A TWELFTH DEFENSE AND BY WAY OF
A FOURTH COUNTERCLAIM AGAINST THE PLAINTIFF**
(Breach of Express Warranty as to Plaintiff)

76. OIA hereby incorporates the allegations of the foregoing Paragraphs as if fully restated herein.

77. Plaintiff expressly warranted all workmanship performed and materials furnished would be of good and workmanlike quality and expressly warranted its work for a period of one year.

78. Plaintiff breached this express warranty by constructing the building in a defective manner as set forth above.

79. As a direct, foreseeable and proximate result of the Plaintiff's breach of express warranties, the Defendants have damage to the building, as well as diminution in its value and loss of use. The Defendants have further been

damaged in that they have spent, and will continue to expend, large sums of money in order to determine the extent of the damage to the structure and to repair it.

WHEREFORE, the Defendants pray this Honorable Court inquire into the matters set forth herein and award judgment in favor of the Defendants against the Plaintiff, as follows:


1. For all actual and consequential damages against the Plaintiff as to OIA, in an amount to be shown at trial;
2. For all actual and liquidated damages against the Plaintiff as to OIA, in an amount to be shown at trial;
3. For prejudgment interest;
4. For all attorneys fees and costs associated with investigating and prosecuting this action; and
5. For all other relief this Honorable Court deems just and proper.

Respectfully submitted,

DEMAND FOR JURY TRIAL

Defendants demand a jury trial on all legal counts stated above. These causes of action must be tried before any equitable causes of action asserted by either party can be disposed of. See Gardner v. Travis, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994).

Brent Souther Halversen, LLC

By: 

Brent S. Halversen
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

10/18, 2018.

CERTIFICATE OF SERVICE

I certify that I served the Answers to Plaintiff's Amended Complaint upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to the counsel's last known address on this 18th day of October, 2019.

Brent Souther Halversen, LLC

By: _____

Brent S. Halversen
Brent S. Halversen
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
T: 843-284-5790
F: 864-326-4844
Email: brent@halversenlaw.com

10/18, 2019.
Mount Pleasant, South Carolina

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2019 OCT 18 PM 4: 15

FILED

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 18-CP-10-3825

K-CON, INC.,

Plaintiff,

v.

KING STREET ENTERPRISES, LLC,
OHIO IMAGING ASSOCIATES, INC.,
MARY ANN KANTERS COOK a/k/a
MARY ANN KANTERS,
AND DR. ALBERT JAMES COOK II,

Defendants.

**PLAINTIFF, K-CON, INC.’S, ANSWER
TO DEFENDANTS, KING STREET
ENTERPRISES, LLC AND OHIO
IMAGING ASSOCIATES, INC.’S,
COUNTERCLAIMS TO PLAINTIFF’S
AMENDED COMPLAINT**

The Plaintiff answering the Counterclaim of Defendants, King Street Enterprises, LLC (“King”) and Ohio Imaging Associates, Inc. (“Ohio Imaging”) (hereinafter collectively, “Defendants”), would show as follows:

FOR A FIRST DEFENSE
(General Denial)

1. Any allegations contained in the Defendants’ Counterclaim not specifically admitted are expressly denied and strict proof demanded thereof. To the extent any allegation or part thereof may not be expressly referred to and specifically answered, it is hereby denied and strict proof demanded thereof.

2. The allegations in Paragraphs 1 through 70 refer to Defendants’ responses to the Amended Complaint and/or defenses to the Amended Complaint, and require no responsive pleading; however, to the extent that any responsive pleading is required, each and every allegation contrary or taking exception to the allegations in the Amended Complaint are denied.

3. The allegations in Paragraph 71 allege the prior allegations, and Plaintiff repeats and realleges the foregoing allegations as if fully set forth herein verbatim.

4. Plaintiff admits only so much of the allegations contained in Paragraph 72 of the Counterclaim as the Plaintiff and the Defendant, Ohio Imaging, entered into a contract which document speaks for itself. Any allegations that are not consistent with the contract are specifically denied.

5. Plaintiff admits only so much of the allegations contained in Paragraph 73 of the Counterclaim as the Plaintiff and the Defendant, Ohio Imaging, entered into a contract which document speaks for itself. Any allegations that are not consistent with the contract are specifically denied.

6. Plaintiff denies the allegations contained in Paragraphs 74 and 75 of the Counterclaim.

7. The allegations in Paragraph 76 allege the prior allegations, and Plaintiff repeats and realleges the foregoing allegations as if fully set forth herein verbatim

8. Plaintiff admits only so much of the allegations contained in Paragraph 77 of the Counterclaim as the Plaintiff and the Defendant, Ohio Imaging, entered into a contract which includes an express warranty and which document speaks for itself. Any allegations that are not consistent with the contract are specifically denied.

9. Plaintiff denies the allegations contained in Paragraphs 78 and 79 of the Counterclaim.

FOR A SECOND DEFENSE TO THE COUNTERCLAIM

(Failure to State a Claim)

10. Pursuant to Rule 12 (b) (6), SCRCP, Defendants have failed to state facts sufficient to constitute a cause of action.

FOR A THIRD DEFENSE TO THE COUNTERCLAIM

(Failure to Mitigate Damages)

11. Ohio Imaging has failed to act reasonably to prevent, mitigate, or otherwise lessen the alleged damages.

FOR A FOURTH DEFENSE TO THE COUNTERCLAIM

(Failure to Provide Notice to Cure)

12. Ohio Imaging has failed to comply with S.C. Code Ann. § 40-59-810, *et seq.*; Notice and Opportunity to Cure Statute.

FOR A FIFTH DEFENSE TO THE COUNTERCLAIM

(Waiver/Estoppel/Laches)

13. The claims set forth in the Counterclaim are barred by the doctrines of waiver, estoppel or laches.

FOR A SIXTH DEFENSE TO THE COUNTERCLAIM

(First to Breach)

14. The Defendants' claims are barred because Ohio Imaging was the first to breach the contract.

FOR A SEVENTH DEFENSE TO THE COUNTERCLAIM

(Reservation of Rights)

15. Plaintiff reserves the right to assert any other and additional defenses as may be allowed at law or equity.

16. WHEREFORE, having fully answered the Counterclaim of the Defendants, Plaintiff prays that the same be dismissed with costs, including reasonable attorney's fees, and for such other and further relief as this Court may deem to be just and proper.

Respectfully submitted,

PEDERSEN & SCOTT, P.C.

/s/ William A. Scott

William A. Scott

775 St. Andrews Blvd.

Charleston, SC 29407

Tel. (843) 556-5656

Fax. (843) 556-5635

Email: bscott@pslawpc.com

Attorney for Plaintiff, K-Con, Inc.

Dated 6th day of November, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Case No. 18-CP-10-3825

King Street Enterprises, LLC, Ohio Imaging Associates, Inc.,
Mary Ann Kanters Cook a/k/a Mary Ann Kanters,
and Dr. Albert James Cook II, Respondents,

v.

K-Con, Inc., Appellant.

NOTICE OF APPEAL

K-Con, Inc. appeals the Order of the Honorable R. Kirk Griffin dated October 29, 2021, denying Plaintiff's Motion for Reconsideration of Order Denying K-Con's Motion for Partial Summary Judgment Filed September 30, 2021. Appellant received written notice of entry of this Order on November 1, 2021.

November 8, 2021



William A. Scott
Pedersen & Scott, P.C.
2565 Royal Oak Drive
Johns Island, SC 29455
Tel: (843) 556-5656
Fax: (843) 556-5635
E-Mail: bscott@pslawpc.com

Attorney for Appellant

Attorneys for Respondents

Brent Halversen, Esq.
Brent Souther Halversen, LLC
751 Johnnie Dodds Blvd., Suite 200
Mount Pleasant, SC 29464
Email: brent@halversenlaw.com
(843) 284-5790

Daniel S. Slotchiver, Esq.
Slotchiver & Slotchiver, LLP
751 Johnnie Dodds Blvd., Suite 100
Mount Pleasant, SC 29464
Email: dan@slotchiverlaw.com
(843) 577-6531

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Case No. 18-CP-10-3825

King Street Enterprises, LLC, Ohio Imaging Associates, Inc.,
Mary Ann Kanters Cook a/k/a Mary Ann Kanters,
and Dr. Albert James Cook II, Respondents,

v.

K-Con, Inc., Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal of K-Con, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on November 8, 2021, addressed to their attorneys of record, Brent Halversen, Esq., Brent Souther Halversen, LLC, 751 Johnnie Dodds Blvd., Suite 200, Mount Pleasant, SC 29464, and Daniel S. Slotchiver, Esq., Slotchiver & Slotchiver, LLP, 751 Johnnie Dodds Blvd., Suite 100, Mount Pleasant, SC 29464.

November 8, 2021



William A. Scott
Pedersen & Scott, P.C.
2565 Royal Oak Drive
Johns Island, SC 29455
Tel: (843) 556-5656
Fax: (843) 556-5635
E-Mail: bscott@pslawpc.com

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Nov 29 2021
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

IN CASE NO. 18-CP-10-3825; THE HONORABLE R. KIRK GRIFFIN

Case No. 2021-001269

King Street Enterprises, LLC, Ohio Imaging Associates, Inc.,
Mary Ann Kanters Cook a/k/a Mary Ann Kanters,
and Dr. Albert James Cook II, Respondents,


v.

K-Con, Inc., Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Memorandum in Response to Court's Request dated November 17, 2021, by emailing and depositing a copy of it in the United States Mail, postage prepaid, on November 29, 2021, addressed to Brent Halversen, Esq., Brent Souther Halversen, LLC, 751 Johnnie Dodds Blvd., Suite 200, Mount Pleasant, SC 29464, and Daniel S. Slotchiver, Esq., Slotchiver & Slotchiver, LLP, 751 Johnnie Dodds Blvd., Suite 100, Mount Pleasant, SC 29464.

November 29, 2021



William A. Scott
Pedersen & Scott, P.C.
2565 Royal Oak Drive
Johns Island, SC 29455
Tel: (843) 556-5656
Fax: (843) 556-5635
E-Mail: bscott@pslawpc.com

Attorney for Appellant