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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SUMTER COUNTY  
COURT OF COMMON PLEAS  
The Hon. W. Jeffrey Young

Case No. 2013-000770

RECEIVED

APR 25 2013

SC Court of Appeals

Berry, Quackenbush & Stuart, P.A. .... Appellant,

v.

BEI Sensors & Systems Company, Inc, d/b/a BEI Duncan  
Electronics and The Commercial Collection Corporation  
of New York, Inc., Defendants,

Of Whom The Commercial Collection Corporation  
of New York, Inc is the ..... Respondent.

RESPONDENT'S MOTION TO DISMISS APPEAL

The Respondent, by and through its attorneys, hereby moves to dismiss the appeal filed in the present case, on the ground that the Order appealed from is not a Final Order as required by Rule 201(a), South Carolina Rules of Appellate Procedure.

The underlying case is asserted by the Plaintiff against the Defendant BEI Sensors & Systems Company, Inc., the client of the Plaintiff, and Commercial Collection Corporation of New York, Inc., a collection agency who acted as agent for BEI Sensors in communicating with the Plaintiff (copy of Complaint attached to affidavit of counsel). The Plaintiff has asserted that Defendant BEI Sensors & Systems Company, Inc. breached its contract of employment of the Appellant law firm, and that Respondent Commercial Collection

Corporation of New York, Inc. improperly interfered with that contract. Respondent Commercial Collection Corporation of New York filed a counterclaim against the Appellant for breach of contract, and for frivolous litigation (Copy of Answer and Counterclaim attached to affidavit of counsel). The Order which is the subject of this appeal granted summary judgment to the Respondent on the Appellant's second cause of action only; the appealed order did not grant judgment as to the Appellant's action against BEI Sensors, nor did it grant judgment as to the pending counterclaims (Copy of Summary Judgment Order attached to affidavit of counsel).

Prior to trial of the remaining issues in the lower court, the Appellant filed the present appeal, thereby depriving the lower court of jurisdiction to consider and rule upon the remaining issues between the parties. The Order of the lower court granting summary judgment as to the Appellant's second cause of action is interlocutory, and not a final order subject to immediate appeal.



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ATTORNEYS FOR RESPONDENT

April 22, 2013

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SUMTER COUNTY  
COURT OF COMMON PLEAS  
The Hon. W. Jeffrey Young

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Electronics and The Commercial Collection Corporation  
of New York, Inc., Defendants,

Of Whom The Commercial Collection Corporation  
of New York, Inc is the .....Respondent.

MEMORANDUM IN SUPPORT OF  
RESPONDENT'S MOTION TO DISMISS APPEAL

The Respondent submits the present Memorandum in Support of its Motion to Dismiss the Appeal in the present action as being premature, in that the Order which forms the basis of the Appeal is not a Final Oder as required by Rule 201(a), South Carolina Rules of Civil Procedure. Rule 201(a), SCRAP, provides that "Appeal may be taken, as provided by law, from any final judgment, appealable order or decision." "South Carolina adheres to the final judgment rule. Accordingly, with certain exceptions, an appeal lies only from a final judgment." *Brunson v. American Koyo Bearings*, 367 S.C. 161, 165, 623 S.E. 2d 870, 872 (Ct.App. 2005). A "final order" is one which fully and finally determines all the rights of the parties. *Doe v Howe*, 362 S.C. 212, 607 S.E. 2d 354 (Ct.App. 2004). An Order will be deemed interlocutory and not immediately appealable if there is some further act which

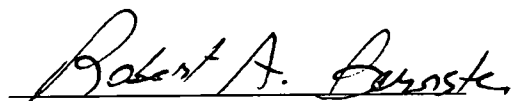
must be done by the trial court prior to a determination of the parties' rights. *Ex parte Capital U-Drive It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006). "An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review is considered an interlocutory order from which no immediate appeal is allowed." *Hagood v. Sommerville*, 362 S.C. 191,195, 607 S.E. 2d 707, 709 (2005).

The present case involves an action against two Defendants; a breach of contract action against Defendant BEI Sensors & Systems Company, Inc., and a claim of Interference with Contractual Relations against Defendant Commercial Collections Corporation of New York, Inc. Defendant CCC-NY asserted a counterclaim against the Plaintiff for breach of contract, and for liability for frivolous litigation. In the present case, the Court issued an Order finding that the Plaintiff failed to present facts supporting the Plaintiff's cause of action for Interference with Contractual Relations, and thus granted summary judgment to Defendant Commercial Collections Corporation on that claim alone. The Court did not, however, grant summary judgment as to the cause of action of the Plaintiff against Defendant BEI Sensors & Systems Company, Inc., nor did it render any final ruling upon the counterclaim asserted by Defendant Commercial Collections Corporation of New York, Inc. against the Plaintiff. The Defendants have filed this appeal of the Order granting summary judgment as to one claim. The lower court has not yet entered a final order which can be the subject of an appeal since the Plaintiff's claim against BEI Sensors, and the counterclaim asserted against the Plaintiff, are still pending.

By filing the current appeal, the Appellant has deprived the lowed court of the jurisdiction to proceed to final judgment upon the remaining causes of action. Upon the

entry of that Order, the Appellant can file any appeal it deems appropriate. For the foregoing reasons, the Respondent respectfully requests that this Court dismiss the present appeal as being premature, being an appeal from an interlocutory order.

Respectfully Submitted,

A handwritten signature in black ink that reads "Robert A. Bernstein". The signature is written in a cursive style and is positioned above a horizontal line.

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ATTORNEY FOR THE RESPONDENT

April 22, 2013

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SUMTER COUNTY  
COURT OF COMMON PLEAS  
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Case No. 2013-000770

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BEI Sensors & Systems Company, Inc, d/b/a BEI Duncan  
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Of Whom The Commercial Collection Corporation  
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AFFIDAVIT OF ROBERT A. BERNSTEIN

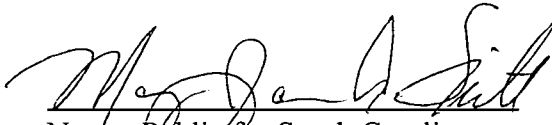
Personally appeared before me, Robert A. Bernstein, who being first duly sworn,  
deposes and says:

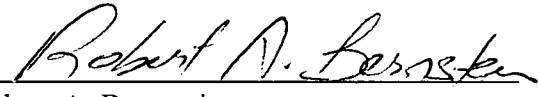
1. He is the attorney for the Respondent in the above referenced appeal.
2. Attached as Exhibit A hereto is a true and correct copy of the Amended  
Complaint in the case underlying this appeal.
2. Attached as Exhibit B hereto is a true and correct copy of the Answer and  
Counterclaim in the case underlying this appeal.
3. Attached as Exhibit C hereto is a true and correct copy of the Order which is  
the subject of this appeal.

4. Attached as Exhibit D hereto is a true and correct copy of the Order which denied summary judgment to Defendant BEI Sensors & Systems Company, Inc.

FURTHER DEPONENT SAYETH NOT.

Sworn and Subscribed before me }  
this 23<sup>rd</sup> day of April, 2013 }  
}

  
Notary Public for South Carolina: }  
My Commission Expires: 08-26-18 }

  
Robert A. Bernstein

STATE OF SOUTH CAROLINA )  
COUNTY OF SUMTER )

IN THE COURT OF COMMON PLEAS  
CASE NO.: 2011-CP-43-1418

Berry, Quackenbush & Stuart, P.A., )  
Plaintiff, )  
-vs- )  
BEI Sensors & Systems Company, Inc. )  
d/b/a BEI Duncan Electronics and The )  
Commercial Collection Corporation of )  
New York, Inc., )  
Defendants. )

**RECEIVED**  
APR 25 2013  
**SC Court of Appeals**  
**AMENDED COMPLAINT**  
(Breach of Contract; Tortious Interference with Contract)  
Non-Jury

The Plaintiff, complaining of the Defendants above-named, would respectfully show unto this Honorable Court:

1. The Plaintiff is a professional association organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County.

2. The Defendant, BEI Sensors & Systems Company, Inc., d/b/a BEI Duncan Electronics ("BEI"), upon information and belief, is a corporation organized and existing under the laws of the State of Delaware and is subject to the jurisdiction of this Court.

3. The Defendant, The Commercial Collection Corporation of New York, Inc. ("Commercial"), upon information and belief, is a corporation organized and existing under the laws of the State of New York and is subject to the jurisdiction of this Court.

4. Upon information and belief, from about September 24, 2008, through April 15, 2009, BEI sold on credit to Fluid Power of the Carolinas, Inc. ("Fluid") certain products having a value of \$27,600.00.

5. Upon information and belief, Fluid failed and refused to pay to BEI the debts due by Fluid on these credit sales.

6. On May 26, 2010, Commercial contacted the Plaintiff, a law firm, concerning the collection of the aforesaid debt owed to BEI by Fluid.

7. Commercial proposed to retain the Plaintiff to attempt to collect the debt owed to BEI by Fluid on the following contingency-fee basis:

20% of first \$300.00  
18% of next \$1,700.00  
13% of amount over \$2,000.00  
Plus a 10% suit fee

8. The Plaintiff accepted the contingency-fee proposal, entering into a contract to perform legal services; and it began work to collect the debt.

9. Under this contract, the Plaintiff expected to receive an attorney's fee of at least \$7,500.00, if the amount owed plus interest was collected.

10. As Commercial alleges that it disclosed that it was acting at all times as an agent for BEI, a disclosed principal, and assuming that BEI does not dispute that there was a binding contract between BEI and the Plaintiff with regard to the collection of the debt owed to BEI by Fluid, the Plaintiff acknowledges and asserts that the contract was between BEI and Plaintiff and that Commercial was not a party to the contract.

11. The Plaintiff worked the account for well over one year, pursuant to said contract, during which time it encountered a complete lack of cooperation from Commercial, which (upon information and belief) remained the agent of BEI and through which the Plaintiff was expected to communicate with regard to the collection of the debt owed to BEI by Fluid.

12. The Plaintiff's investigation resulted in a proposal by the Plaintiff of certain collection tactics, which tactics, the Plaintiff believed, were likely to result in a full collection from Fluid of the debt owed to BEI.

13. In or about February 2011, the Plaintiff communicated with both BEI and Commercial and was given the go-ahead to advance monies to complete its investigation and to prepare to institute two suits.

14. At this point, the Plaintiff proposed, and expected to receive, in addition to the basic collection suit, a 20% suit fee (contingency-fee) due to the tactic of filing a second, related suit against Fluid, under which related arrangement the Plaintiff expected to collect an additional attorney's fee of at least \$6,500.00, if the amount owed plus interest was collected.

15. Also at this point, the Plaintiff advanced the amount of \$181.12 for title examination and miscellaneous expenses in connection with its investigation, for which it billed on February 16, 2011, but its bill for said expenses was ignored by BEI and Commercial until after this suit was instituted. (This advancement was reimbursed by BEI in September 2011, only after BEI was notified of this suit.)

16. The Plaintiff drafted two sets of suit papers and presented same to Commercial for approval and for BEI to sign a Verification.

17. Subsequently, after various reminders from the Plaintiff requesting the return of the executed Verification, BEI, acting through Commercial, informed the Plaintiff to cease all collection efforts against Fluid.

FOR A FIRST CAUSE OF ACTION  
(Breach of Contract)  
(As to BEI Sensors & Systems Company, Inc.)

18. The Plaintiff realleges Paragraphs 1 through 17 above as fully as if repeated herein verbatim.

19. The Plaintiff assumed that it would receive the complete cooperation and good faith from BEI and its agent, Commercial, in connection with the contract and the Plaintiff's collection efforts.

20. The Plaintiff failed to receive proper cooperation and good faith, including reasonably timely responses to its inquiries and requests for information and instructions, notwithstanding the Plaintiff's appropriate requests and numerous reminders.

21. Due to the failure of BEI to cooperate, in and of itself and through Commercial, its agent, with the Plaintiff's reasonable and appropriate requests for information and instructions, the Plaintiff was denied the opportunity to institute suit to collect the debt allegedly owed by Fluid.

22. The decision by BEI to stop collection is curious and seems to imply that BEI had received payment, accommodation or accord and satisfaction from Fluid, and the Plaintiff

believes that BEI may be guilty of settling the matter with Fluid without remitting to the Plaintiff the attorney's fee earned under its contract with BEI.

23. The Plaintiff is informed and believes that it is entitled to a judgment against BEI on the contract for its reasonably anticipated attorney's fees (lost profits) in the amount of at least \$14,000.00 plus pre-judgment interest and costs of collection of this suit.

24. The judgment sought by the Plaintiff will not exceed \$75,000.00.

FOR A SECOND CAUSE OF ACTION  
(Tortious Interference with Contract)  
(As to Commercial Collection Corporation of New York, Inc.)

25. The Plaintiff realleges Paragraphs 1 through 24 above as fully as if repeated herein verbatim.

26. By its failure to act in good faith in furtherance of the contract between BEI and the Plaintiff, Commercial, as agent for BEI, through which all communication between the parties to the contract were intended, and necessarily were required, to flow, Commercial caused the delays in the collection of the debt and ultimately contributed to the decision of BEI to stop the collection effort.

27. The Plaintiff is informed and believes that Commercial acted intentionally and without justification to effectively sabotage the efforts made by, and the tactics designed by, the Plaintiff to collect the debt owed by Fluid.

28. Through the actions and inactions of Commercial, the Plaintiff has been denied the opportunity to collect the debt owed by Fluid and to earn potentially significant attorney's fees as contemplated by the contract between BEI and the Plaintiff.

29. The Plaintiff is informed and believes that it is entitled to a judgment against Commercial for Commercial's tortious interference with the contract for its reasonably anticipated attorney's fees (lost profits) in the amount of at least \$14,000.00 plus pre-judgment interest and costs of collection of this suit.

WHEREFORE, the Plaintiff demands:

1. Judgment against the Defendant, BEI Sensors & Systems Company, Inc., d/b/a BEI Duncan Electronics, in the amount of at least \$14,000.00, plus pre-judgment interest and the costs of this action.

2. Judgment against the Defendant, The Commercial Collection Corporation of New York, Inc., in the amount of at least \$14,000.00, plus pre-judgment interest and the costs of this action.

3. For such other and further relief as this Court may deem appropriate.



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Leonard R. Jordan, Jr.  
BERRY, QUACKENBUSH & STUART, P.A.  
1122 Lady Street, 5th Floor  
Post Office Box 394  
Columbia, South Carolina 29202  
Phone: (803) 779-2650  
Attorney for Plaintiff

Columbia, South Carolina  
November 17, 2011

U:\Stephanie\Jordan Misc\Fluid Power.BEI Sensors 8268.0002\Summons & Complaint.Amended.fm

STATE OF SOUTH CAROLINA ) RECORDED ) IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER ) 2013 MAR -6 ) PM 1:12 ) CASE NUMBER 2011-CP-4118

Berry, Quackenbush & Stuart, P.A. ) JAMES G. CAMPBELL )  
CLERK OF COURT )  
SUMTER COUNTY, S.C. )

APR 25 2013

SC Court of Appeals

Plaintiff, )  
 )  
v. )  
 )  
BEI Sensors & Systems Company, Inc., )  
d/b/a BEI Duncan Electronics and The )  
Commercial Collection Corporation )  
of New York, Inc., )  
 )  
Defendants. )  
\_\_\_\_\_ )

ORDER GRANTING SUMMARY  
JUDGMENT TO DEFENDANT  
COMMERCIAL COLLECTION  
CORPORATION OF NEW YORK

CERTIFIED TRUE COPY  
OF ORIGINAL FILED

*[Signature]*  
DEPUTY CLERK OF COURT  
SUMTER COUNTY  
SOUTH CAROLINA

The Plaintiff herein has brought the present action seeking recovery against Defendant BEI Sensors & Systems Company, Inc. asserting a cause of action for breach of contract, and a cause of action against Defendant Commercial Collection Corporation of New York, Inc. for tortious interference with contractual relations. The matter is before the Court upon the Motion for Summary Judgment filed by Defendant Commercial Collection Corporation of New York, Inc. A hearing was conducted on December 17, 2012 in Sumter County. For the reasons which follow, the Court hereby grants summary judgment to the Defendant Commercial Collection Corporation of New York, Inc. upon the cause of action asserted in the Complaint.

Commercial Collection Corporation of New York, Inc. was retained by BEI Sensors & Systems Company, Inc. to attempt collection of the balance owed to it by Fluid Power of the Carolinas, a company operating in Sumter County. Having been unable to collect the balance, Commercial Collection Corporation of New York, Inc. contacted the Plaintiff regarding representation of BEI Sensors & Systems Company, Inc. in the attempted collection of the balance due from Fluid Power of the Carolinas. By letter to the Plaintiff, Commercial Collection

Corporation of New York, Inc. wrote that "Claimant has authorized us as its agent to forward to you the enclosed claim for collection on the rates and conditions stated." Thereafter, the Plaintiff took on the case and attempted collection pursuant to the collection rates stated in the collection referral letter. Having been unsuccessful in collecting any amount from Fluid Power of the Carolinas, the Plaintiff proposed that it file suit on behalf of BEI Sensors & Systems Company, Inc. against Fluid Power of the Carolinas. The Plaintiff proposed two different suits and two different fee structures, and relayed the proposal to BEI Sensors & Systems Company, Inc. through Commercial Collection Corporation of New York, Inc., as its agent. The Plaintiff disputes whether the employees of Commercial Collection Corporation of New York acted diligently in passing along its suit recommendations or in influencing BEI Sensors & Systems Company, Inc. to file suit. BEI Sensors & Systems Company, Inc. declined to proceed with litigation.

The Plaintiff thereafter brought this action, claiming breach of contract against the Defendants. In response to the Complaint, Defendant Commercial Collection Corporation of New York, Inc. advised the Plaintiff that it was not a party to the contract, since it was acting as a disclosed agent for the principal, BEI Sensors & Systems Company, Inc. Thereafter, the Plaintiff amended the Complaint to assert the breach of contract action only against BEI Sensors & Systems Company, Inc., and asserted a cause of action against Commercial Collection Corporation of New York, Inc. for tortious interference with contractual relations.

In support of its motion for summary judgment, Commercial Collection Corporation of New York, Inc. has filed the affidavit of Frank Vecchio. Mr. Vecchio's affidavit asserts that the company was acting solely as agent of BEI Sensors & Systems Company, Inc. in its communications with the Plaintiff and that it passed along all of the communications from the Plaintiff to BEI Sensors & Systems Company, Inc., and that BEI Sensors & Systems Company, Inc. declined to pursue litigation. The Plaintiff has filed the affidavit of Leonard Jordan, asserting that he believed from

the circumstances that the debtor may have paid the balance due to the creditor, and that Commercial Collection Company of New York acted unprofessionally in failing to respond to a number of his communications suggesting that suit be pursued, which he believes may have contributed to the decision by BEI Sensors & Systems Company, Inc. not to pursue litigation.

In the present action, it is undisputed that Commercial Collection Corporation of New York, Inc. was acting as agent for BEI Sensors & Systems Company, Inc. in relaying communications from the Plaintiff to BEI Sensors & Systems Company, Inc., and in relaying responses thereto. Neither the Complaint nor the affidavit of the Plaintiff alleged or established any independent benefit to Commercial Collection Corporation of New York, Inc. to be gained by interfering with the contract between the Plaintiff and Defendant BEI Sensors & Systems Company, Inc. In Dutch Fork Development Group II, LLC v. SEL Properties, LLC, 398 S.C. 406, 730 S.E.2d 290 (2012), the Court set forth the elements for the cause of action and addressed the circumstances under which an agent can be held responsible for interfering with the contract of its principal.

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." Camp v. Springs Mortgage Corp., 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). "[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties." Threlkeld v. Christoph, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984). "Therefore, it does not protect a party to a contract from actions of the other party." Id.

It is generally recognized that when a contract is breached by a corporation as the result of the inducement of an officer or agent of the corporation acting on behalf of the corporation and within the scope of his employment, the inducement is privileged and is not actionable." Bradburn v. Colonial Stores, Inc., 273 S.C. 186, 188, 255 S.E.2d 453, 455 (1979). Thus, "[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract." CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 385 (3d Cir. 2004).

\* \* \*

"The reason for this privilege is that holding an agent liable would be like

holding the principal itself liable for the tort of interfering with its own contract, instead of holding the principal liable for breach of contract." CGB Occupational Therapy, Inc., 357 F.3d at 385. "The agent's privilege is qualified, however, because it applies only when the agent is acting within the scope of its authority." Id. "Conversely, an agent may be liable for tortious interference, just as if the agent were an outside third party, if the allegedly interfering acts were conducted outside the scope of the agent's authority." Id.; Kia v. Imaging Scis. Int'l, Inc., 735 F. Supp. 2d 256, 268 (E.D. Pa. 2010) ("[A] corporate officer can be liable for tortious interference only if he was acting in a personal capacity or outside the scope of his authority."

Dutch Fork Development Group II, LLC v. SEL Properties, LLC, 398 S.C. at 414-15, 730 S.E.2d at 294-95.

Applying these principles to the present action, the only basis upon which the Plaintiff has asserted the liability of Commercial Collection Corporation of New York, Inc. is that it failed to respond to numerous e-mails sent by the Plaintiff, and the Plaintiff believes that this may have contributed to the decision by BEI Sensors & Systems Company, Inc. not to proceed with the litigation<sup>1</sup>. In essence, the Plaintiff asserts that the agent of BEI failed to properly perform its duties as agent, inducing the principal to terminate the contract. Even if true or there were some evidence to this effect, the actions of Commercial Collection Corporation of New York, Inc. which form the basis of the Plaintiff's complaint are actions of the agent in the course and scope of its agency. Since the complained of acts are not actions outside the scope of the agency relationship, the actions are privileged and cannot form the basis for a cause of action for tortious interference with contractual relations.

The Plaintiff has asserted that the dictates of Dutch Fork Development Group II, LLC apply only to an employer-employee relationship, and do not apply where an independent agent performs

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<sup>1</sup> This assertion is denied by both Defendants; an agent for BEI Sensors & Systems Company, Inc. has submitted an affidavit asserting that it decided not to proceed because it did not deem the litigation worthwhile.

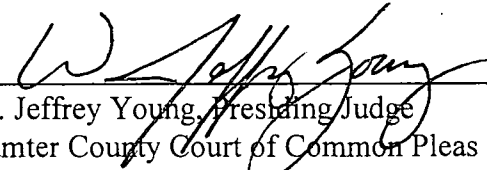
actions for a corporation. The language of the Dutch Fork Development Group II, LLC case does not so limit its holdings. The concept is the same whether or not the agency relationship exists in the employment setting or not. The actions of the agent in the scope of its are binding upon and are the actions of the principal; as such, the Plaintiff is really complaining of the actions of the principal in allegedly terminating the contract. "[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties." Threlkeld v. Christoph, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984). "Therefore, it does not protect a party to a contract from actions of the other party." Id. An agent can be held individually liable only if acting outside its authority; since Defendant Commercial Collection Corporation of New York, Inc. was acting solely as agent for BEI Sensors & Systems Company, Inc. in passing along information from the Plaintiff, and in relaying the response of BEI Sensors & Systems Company, Inc., the Plaintiff is essentially complaining of the actions of the other party to the contract.

For the foregoing reasons, the Plaintiff has failed to establish any triable issue of fact, and the Defendant Commercial Collection Corporation fo New York is entitled to judgment as a matter of law. Defendant Commercial collection Corporation of New York, inc. is therefore granted summary judgment upon the cause of action asserting interference with contractual relations.

IT IS SO ORDERED.

February 26, 2013

Sumter, South Carolina

  
W. Jeffrey Young, Presiding Judge  
Sumter County Court of Common Pleas

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER CASE NUMBER 2011-CP-43-1418

RECORDED  
2011 DEC 19 PM 12:55

Berry, Quackenbush & Stuart, P.A. JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

Plaintiff,

v.

ANSWER TO AMENDED COMPLAINT  
AND COUNTERCLAIM

BEI Sensors & Systems Company, Inc.,  
d/b/a BEI Duncan Electronics and The  
Commercial Collection Corporation  
of New York, Inc.,

Defendants.

RECEIVED  
APR 25 2013  
SC Court of Appeals

The Defendant, The Commercial Collection Corporation of New York, Inc., responds to the Amended Complaint and Counterclaims against the Plaintiff as follows:

1. Each and every allegation in said Amended Complaint not hereinafter specifically admitted is denied.
2. The allegations of Paragraphs One (1), Two (2), Three (3), Four (4), Five (5) and Six (6) of the Amended Complaint are admitted.
3. Responding to the allegations of Paragraph Seven (7) of the Amended Complaint, this Defendant admits that, as agent of the Defendant BEI Sensors, it offered on behalf of Defendant BEI Sensors to retain the Plaintiff upon the rates stated in the forwarding letter; any remaining allegation contained in Paragraph Seven (7) of the Amended Complaint not specifically admitted is denied.
4. Responding to the allegations of Paragraph Eight (8) of the Amended Complaint, this Defendant admits that the Plaintiff agreed to the terms and conditions of its retention to pursue collection of the balance due to BEI Sensors; any remaining allegation contained in Paragraph Eight

RAB  
#1

(8) of the Amended Complaint not specifically admitted is denied.

5. Responding to the allegations of Paragraph Nine (9) of the Amended Complaint, this Defendant admits that the Plaintiff anticipated collecting a fee if and only if the balance was collected from the Defendant, and was aware that if the balance was not collected it would not receive a fee; any remaining allegation contained in Paragraph Nine (9) of the Amended Complaint not specifically admitted is denied.

6. The allegations of Paragraph Ten (10) of the Amended Complaint are admitted.

7. Responding to the allegations of Paragraph Eleven (11) of the Amended Complaint, this Defendant admits that it was the agent of Defendant BEI and that the Plaintiff communicated with BEI through this Defendant; any remaining allegation contained in Paragraph Eleven (11) of the Amended Complaint not specifically admitted is denied.

8. Responding to the allegations of Paragraph Twelve (12) of the Amended Complaint, this Defendant admits that the Plaintiff proposed bringing a separate cause of action for fraudulent conveyance, but denies that the proposed action would likely result in a full or partial collection from Fluid Power; any remaining allegation contained in Paragraph Twelve (12) of the Amended Complaint not specifically admitted is denied.

RAS  
#2

9. Responding to the allegations of Paragraph Thirteen (13) of the Amended Complaint, this Defendant admits that the Plaintiff proposed incurring costs to further investigate the proposed fraudulent conveyance action and that it was authorized to incur that expense; any remaining allegation contained in Paragraph Thirteen (13) of the Amended Complaint not specifically admitted is denied.

10. Responding to the allegations of Paragraph Fourteen (14) of the Amended Complaint,

this Defendant admits that the Plaintiff proposed an additional fraudulent conveyance suit and proposed an additional contingency fee; and was aware that if the balance was not collected it would not receive a fee; any remaining allegation contained in Paragraph Fourteen (14) of the Amended Complaint not specifically admitted is denied.

11. Responding to the allegations of Paragraph Fifteen (15) of the Amended Complaint, this Defendant admits that the Plaintiff advanced some costs and for which it issued a bill, and this Defendant acknowledges that it sent the bill to Defendant BEI Sensors for payment; any remaining allegation contained in Paragraph Fifteen (15) of the Amended Complaint not specifically admitted is denied.

12. The allegations of Paragraphs Sixteen (16) and Seventeen (17) of the Amended Complaint are admitted.

**FOR A FIRST DEFENSE TO THE FIRST CAUSE OF ACTION**  
*(Denial)*

13. Responding to the allegations of Paragraph Eighteen (18) of the Amended Complaint, this Defendant repeats and realleges the allegations of Paragraphs One (1) through Twelve (12) of this Answer and Counterclaim as if repeated herein verbatim.

14. Responding to the allegations of Paragraph Nineteen (19) of the Amended Complaint, this Defendant admits that it provided its full cooperation and good faith acting as agent for BEI; this Defendant lacks sufficient information to respond to the remaining allegations of Paragraph Nineteen (19) of the Amended Complaint, and therefore denies the same and demands proof thereof.

15. The allegations of Paragraph Twenty (20) are denied.

16. Responding to the allegations of Paragraph Twenty-One (21) of the Amended

PA 76  
#3

Complaint, this Defendant admits defendant BEI decided not to pursue suit against Fluid Power and advised the Plaintiff to discontinue collection efforts, and advised it not to pursue litigation; the remaining allegations of Paragraph Twenty-One (21) of the Amended Complaint are denied.

17. The allegations of Paragraphs Twenty-Two (22) and Twenty-Three (23) of the Amended Complaint are denied.

18. The allegations of Paragraph Twenty-Four (24) are admitted.

**FOR A FIRST DEFENSE TO THE SECOND CAUSE OF ACTION**  
*(Denial)*

19. Responding to the allegations of Paragraph Twenty-Five (25) of the Amended Complaint, this Defendant repeats and realleges the allegations of Paragraphs One (1) through Eighteen (18) of this Answer and Counterclaim as if repeated herein verbatim.

20. The allegations of Paragraphs Twenty-Six (26), Twenty-Seven (27), Twenty-Eight (28) and Twenty-Nine (29) of the Amended Complaint are denied.

**FOR A SECOND DEFENSE TO THE SECOND CAUSE OF ACTION**  
*(Accord and Satisfaction)*

21. Further responding to the allegations of the Amended Complaint, this Defendant would show that the Plaintiff offered to dismiss all claims against it and release all claims it had against this Defendant if this Defendant conveyed certain information and engaged in certain communications with Defendant BEI Sensors & Systems Company, Inc.; that this Defendant did make such communications and conveyed such information on behalf of the Plaintiff and fully performed all obligations of its agreement; and that by reason thereof, the Plaintiff and this Defendant entered into an accord and satisfaction, for which reason the Plaintiff may not recover against this Defendant in any sum whatsoever.

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**FOR A THIRD DEFENSE TO THE SECOND CAUSE OF ACTION**  
*(Lack of Duty/Disclosed Agency)*

22. Further responding to the allegations of the Amended Complaint, this Defendant would show that it acted at all times as a disclosed agent of Defendant BEI Sensors & Systems Company, Inc., that it acted in the interests of and in good faith for the interest of Defendant BEI Sensors & Systems Company, Inc., and that this Defendant owed no duty in law or contract to the Plaintiff, for which reason the Plaintiff may not recover in any sum whatsoever.

**FOR A FIRST COUNTERCLAIM**  
*(Breach of Contract)*

23. Heretofore, the Plaintiff contacted this Defendant and advised that it intended to file the Complaint which is the subject matter of this action.

24. Thereafter, the Plaintiff requested that this Defendant communicate with Defendant BEI Sensors & Systems Company, Inc. and convey certain information, in return for which the Plaintiff agreed to dismiss this Defendant from the present litigation and waive any claims it may have against this Defendant.

25. This Defendant agreed to convey the requested information from the Plaintiff to Defendant BEI Sensors & Systems Company, Inc. in return for the dismissal of this action against it.

26. In reliance upon the promise of the Plaintiff, the Defendant conveyed the requested information to Defendant BEI Sensors & Systems, Inc.

27. This Defendant has fully performed its obligations under its agreement with the Plaintiff.

28. Despite this Defendant's performance, the Plaintiff has failed and refused to dismiss

the pending action and dismiss the claims against this Defendant.

29. The failure of the Plaintiff to dismiss this Defendant from the pending litigation constitutes a breach of contract.

30. As a proximate result of the breach of contract by the Plaintiff, the Defendant has suffered damages in that it has had to and in the future will be required to spend significant funds defending the present action and the allegations therein.

31. By reason of the aforesaid breach of contract, the Plaintiff is liable to the Defendant for any and all costs, expenses and attorneys' fees incurred in defending the present action.

**FOR A SECOND COUNTERCLAIM**  
*(Frivolous Litigation)*

32. The allegations of Paragraphs Twenty-Three (23) through Thirty-One (31) are realleged as if repeated herein verbatim.

33. At all times in its dealings with the Plaintiff, this Defendant identified that it was acting as agent for BEI Sensors & Systems Company, or its predecessor.

34. Under South Carolina agency law, an agent for a disclosed principal does not thereby become a party to a contractual relationship between the contracting party and the principal.

35. Under South Carolina law, this Defendant owed its obligation of loyalty and good faith to the Defendant BEI Sensors & Systems Company, and owed no duty in law or contract to the Plaintiff.

36. When the Plaintiff made initial demand upon this Defendant contending that this Defendant was responsible for an alleged breach of contract, this Defendant advised the Plaintiff that it was acting at all times as agent for a disclosed principal, and thus was not a party to or liable under

any contract between the Plaintiff and Defendant BEI Sensors & Systems Company.

37. Despite the notice of this Defendant's disclosed agency, the Plaintiff filed the present action asserting that this Defendant is liable for a breach of a contractual relationship, and has asserted a duty in law which does not exist.

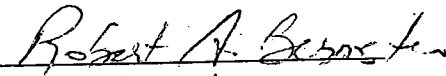
38. The assertion by the Plaintiff that this Defendant, as disclosed agent, is liable in breach of contract or for tortious interference with contractual relations is not supportable under South Carolina law or any reasonable argument for extension thereof.

39. The assertion of the present action by the Plaintiff is a violation of S.C. Code Ann. §15-36-10 et seq. and rule 11, South Carolina Rules of Civil procedure, and has caused damages to this Defendant.

#7 40. By reason of the foregoing, this Defendant is entitled to an award of damages equal to the costs, expenses and attorneys fees incurred in defending the present action.

WHEREFORE, having fully responded to the allegations of the Amended Complaint and Counterclaimed thereon, this Defendant prays that the same be dismissed, and that it be granted judgment against the Plaintiff for all costs, expenses and attorneys fees incurred in defending the allegations hereof.

BERNSTEIN & BERNSTEIN, P.A.

  
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North Charleston, SC 29406-6129  
(843) 529-1111; (843) 529-0035 (Fax)  
ATTORNEYS FOR DEFENDANT  
THE COMMERCIAL COLLECTION  
CORPORATION OF NEW YORK, INC.

December 13, 2011

STATE OF SOUTH CAROLINA )  
COUNTY OF SUMTER )  
2013 MAR -1 PM 1:52 )  
RECORDED )  
IN THE COURT OF COMMON PLEAS )  
CASE NO.: 2011-CP-43-1418 )

Berry, Quackenbush & Stuart, P.A. )  
Plaintiff, )  
JAMES C. CAMPBELL )  
CLERK OF COURT )  
SUMTER COUNTY, S.C. )

-vs-

BEI Sensors & Systems Company, Inc. )  
d/b/a BEI Duncan Electronics and The )  
Commercial Collection Corporation of )  
New York, Inc., )

Defendants. )

**ORDER DENYING  
DEFENDANT BEI  
SENSORS & SYSTEMS  
COMPANY, INC.'S MOTION  
FOR SUMMARY JUDGMENT**

CERTIFIED TRUE COPY  
OF ORIGINAL FILED

*Sherry K. Horton*  
DEPUTY CLERK OF COURT  
SUMTER COUNTY  
SOUTH CAROLINA

By Motion dated July 18, 2012, the Defendant, BEI Sensors & Systems Company, Inc. d/b/a BEI Duncan Electronics, moved for summary judgment in its favor on all of Plaintiff's claims against it on the ground that the Plaintiff's allegations do not set forth a recognized cause of action under South Carolina law.

The Motion came to be heard before me on December 17, 2012. In attendance were Michael S. Hopewell, attorney for the movant, and Leonard R. Jordan, Jr., attorney for the Plaintiff, along with Robert A. Bernstein, attorney for the Defendant, Commercial Collection Corporation of New York, Inc., who participated in the arguments in support of the Motion.

FINDINGS

A. With regard to motions for summary judgment in general, I find that:

(1) "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), SCRPC." *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 730 S.E.2d 340, 347 (Ct.App. 2012);

(2) "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011);

(3) "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." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000);

(4) "Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991);

(5) "When the burden of proof is by a preponderance of the evidence, a non-moving party need only present a scintilla of evidence to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009);

(6) "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Moore v. Weinberg*, 373 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct.App. 2007) (other citations omitted); and

(7) "Summary judgment is a drastic remedy . . . . [S]ince it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." *Baughman, supra*, at 112 and 543.

B. With regard to the facts and allegations of this case, wherein the Plaintiff seeks compensation for its legal services pursuant to a contingency fee contract with the movant, which contract was terminated by the movant, I find that there is a genuine issue of material fact as to whether the contract was terminated "without cause." Based upon the following authorities, I further find that the termination of the Plaintiff's representation by the movant "without cause" might entitle the Plaintiff to compensation.

(1) The Supreme Court of South Carolina stated as *dictum* in the condemnation case of South Carolina Public Service Authority v. Weeks, 201 S.C. 199, 203, 22 S.E.2d 249, 250 (1942), "Undoubtedly, generally where an attorney is discharged without cause by his client after they have entered into a contingent fee agreement, he is entitled to compensation."

(2) In the case of Kiriakides v. School Dist. of Greenville County, 382 S.C. 8, 23, 24, 675 S.E.2d 439, 447 (2009), the Supreme Court held that attorneys' fees were properly awarded (under a specific condemnation statute) by the Master, who found that Kiriakides' attorneys had a contingency fee arrangement and had a reasonable expectation of payment for legal services even without an express contract.<sup>1</sup>

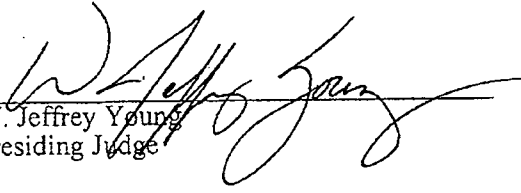
CONCLUSION

Based upon my aforesaid findings and the cited authorities, I conclude that there is a genuine issue of material fact which would have a direct bearing on the entitlement of the Plaintiff to compensation for its legal services and that, therefore, the Motion should be denied.

It is, therefore,

ORDERED that the Motion for Summary Judgment of the Defendant, BEI Sensors & Systems Company, Inc. d/b/a BEI Duncan Electronics, be and it is hereby denied.

AND IT IS SO ORDERED.

  
W. Jeffrey Young  
Presiding Judge

Sumter, South Carolina  
Feb 26, 2013

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<sup>1</sup>Kiriakides, *supra*, a condemnation case wherein the condemnor abandoned its condemnation efforts and the landowner sought attorneys' fees, clearly rejected authority denying attorneys' fees on a contingent fee contract "when the proceeding was abandoned by the condemnor" and, instead, followed authority recognizing "that the recovery of attorneys' fees in such a situation is not barred by the existence of a contingency fee agreement between the property owner and the owner's attorney, rejecting the contention that the contingent nature of the agreement meant that fees were not "incurred" by the landowner and thus not recoverable."