THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2019-CP-08-02445

Appellate Case No. 2021-001227

Gerald R. Smith, Respondent

vs.

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

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF CASE

On May 22, 2017, the Parties entered into a contract in writing. (Declaratory Order, Exhibit "6", Memorandum in Support of Motion For Summary Judgment, Exhibit "A").

Even though the Defendants partially performed under the contract by way of the payment of partial installments, Defendants later denied and disputed the validity and enforceability of the contract.

Plaintiff initiated a Declaratory Judgment action seeking a determination by the Court of Common Pleas regarding the viability of the contract. (Amended Complaint, Case No. 2018-CP-08-2241).

The Declaratory Judgment action was referred to the Master-in-Equity for Berkeley County by Order of Reference With Finality.

Following a full evidentiary hearing before the Master in Equity on May 15, 2019, Judge Dale E. Van Slambrook entered his Declaratory Order on July 30, 2019[1]. (Declaratory Order).

In his order, Judge Van Slambrook made the following specific and detailed findings of salient facts (Declaratory Order, pp. 2-5):

1. The parties acknowledged in open court that there has been a long and largely cordial course of dealings among and between them going back to an original transaction which took place in 2006, when the corporate defendants purchased the assets of United Cable Construction Co., Inc., a company founded by the Plaintiff many years ago and which was owned solely by him at the time of sale.

2. Multiple agreements associated with and incidental to the original transaction were stipulated to and were admitted into evidence without objection which memorialized the understandings of the involved parties. Additionally, various subsequent agreements

[1] All Defendants were adjudged to be in default by Order of Default. At the call of the case, notwithstanding the default status of the Defendants, Plaintiff consented to the full participation of the Defendants in the hearing given the declaratory nature of the proceedings. (Declaratory Order, p.2).

modifications and amendments thereto were admitted into evidence without objection, collectively, *Plaintiff's Ex. 1, 2, 3, 4 and 5.*

3. About the status and relations of the parties as to the agreements and understandings, as modified, contained in *Plaintiff's Ex. 1, 2, 3, 4 and 5,* there is no dispute or controversy before this Court.

4. What is before this Court however, is a real and considerable dispute and controversy concerning the validity of a single instrument dated May 22, 2017, which was admitted in evidence as *Plaintiff's Ex. 6*, without objection.

5. The disagreement about *Plaintiff's Ex. 6* is stark. Plaintiff contends that *Plaintiff's Ex. 6* reduces to writing and memorializes the clear and unambiguous expression of a binding contract. Plaintiff contends further that *Plaintiff's Ex. 6* embodies the product of a meeting of the minds of the parties and the same now controls their mutual promises and undertakings going forward.

6. Defendants assert just the opposite. They contend that *Plaintiff's Ex. 6* and the intentions of the parties expressed therein are aspirational only and not a valid contract.

7. Plaintiff unequivocally represented to the Court that the relief he seeks is not presently related to the enforcement of *Plaintiff's Ex. 6.*

8. Rather, Plaintiff contends that he has been compelled to seek an order of this Court determining the status and relations of the parties relative to *Plaintiff's Ex. 6*, after which Plaintiff may better determine which instrument(s) form the lawful basis for enforcement of any alleged breach by the Defendants and the remedies he may seek to pursue, if any.

9. Plaintiff specifically contends that he is required to seek the declaratory relief set forth in his Amended Complaint because of Defendants' position disavowing any obligation or imperative by any and all Defendants to perform as set forth in *Plaintiff's Ex. 6.*

10. Defendants forcefully argued that while there are features to *Plaintiff's Ex. 6* which are very attractive to the Defendants; specifically a huge discount in the total payoff amount, there is an element of *Plaintiff's Ex. 6*, that is to say the required conveyance to the Plaintiff by the record owners of certain real properties located at 144 Frankie Lane, Ladson, South Carolina, that according to Defendants cannot be done without creating collateral issues for the Defendants vis-a-vis other lienholders and creditors.

11. In support of their position regarding the 144 Frankie Lane properties, Defendants introduced *Defendants' Ex. 1, 2 and 3*, which are excerpts from the record in a mortgage foreclosure case bearing Case No. 2016-CP-08-2352.

12. Over the period from 2006 through April, 2017 periodic payments of varying amounts were paid to the Plaintiff by the named obligors. It is undisputed that as of the end of April, 2017, Gerald R. Smith was owed $1,084,244.51.

13. During mid-May, 2017, Gerald R. Smith and Brandon Linder, acting individually and for the corporate defendants agreed that it was mutually beneficial that the then balance due be greatly reduced. Doing so would produce a direct benefit to Gerald R. Smith in that he would see his money during his lifetime and simplify his estate planning efforts. The payoff reduction would obviously assist the obligors by reducing the total debt service costs going forward substantially.

14. Gerald R. Smith and Brandon Linder then mutually decided to meet at the law offices of Gerald R. Smith's longtime attorney Grover C. Seaton, III of Moncks Corner for the purpose of communicating to Mr. Seaton the terms of their "deal" and to mutually ask Mr. Seaton to prepare an instrument in writing memorializing their latest agreement.

15. Mr. Seaton met with Gerald R. Smith and Brandon Linder on May 21, 2017 at his office in Moncks Corner. Mr. Seaton made it clear to Brandon Linder that he represented Gerald R. Smith only in the matter. Mr. Seaton inquired of Brandon Linder whether he and/or his entities were represented by counsel and if so who was his/its lawyer.

16. Brandon Linder declared to Mr. Seaton that he did not need or want a lawyer to represent him; the agreement with Gerald R. Smith was simple, plain, straightforward and specific and that he wanted to proceed with reducing the latest agreement with Gerald Smith to writing.

17. Mr. Seaton then immediately drafted the agreement which was presented to Mr. Smith, Brandon Linder and his wife Karla Linder the following day by Mr. Seaton's employee George Talbert and the same was executed and witnessed in Mr. Talbert's presence.

18. From September, 2017 until November, 2018, Brandon Linder, individually and as agent for the other Defendants made payments to Mr. Seaton per ¶ 2 of *Plaintiff's Ex. 6* on account of the agreed upon balance due of $300,000 in varying amounts for a total undisputed amount of $33,000. *Plaintiff's Ex. 7.*

In his order, Judge Van Slambrook further articulated with specificity his conclusions of law, including a full summary of the elements of a contract, the meeting of the minds standard and the South Carolina Uniform Declaratory Judgements Act, *S.C. Code Ann. § 15-53-20 et seq.* (Declaratory Order, pp. 5-7).

At the conclusion of his order, Judge Van Slambrook declared (Declaratory Order, p. 8):

Based upon the findings of facts and conclusions of law, I find, conclude and declare that Plaintiff's Ex. 6 is a valid and binding contract between and among the parties to this case. (Emphasis added).

No appeal was taken to the Declaratory Order.

Demand was thereafter made by the Plaintiff to the Defendants for performance and compliance with the contract. (Memorandum in Support of Plaintiff's Motion For Summary Judgment, Exhibit "C").

Upon failure of the Defendants to satisfy Plaintiff's demand for payment and performance, Plaintiff then initiated a separate breach of contract and specific performance action by the filing of a Summons and Complaint in the Court of Common Pleas for Berkeley County on October 7, 2019. (Summons and Complaint in Case No. 2019-CP-08-02445).

In his 2019 Complaint, Plaintiff alleged a cause of action for breach of the contract by the Defendants because of a default in payment when due and damages for the breach, along with prejudgment interest and a cause of action for specific performance relating to a life insurance policy.

Defendants filed their timely responsive pleadings (Answer and Counter-Claim). Plaintiff timely filed his Reply. (Reply).

Plaintiff thereafter deposed the Defendant Brandon W. Linder. After the deposition of Brandon W. Linder on May 12, 2021, Plaintiff filed his motion for summary judgment.

Circuit Court Judge Jennifer B. McCoy heard Plaintiff's Motion For Summary Judgment on August 4, 2021 at the Berkeley County Courthouse. She entered her Order Granting Plaintiff's Motion For Summary Judgment and Dismissing Defendant's Counterclaim With Prejudice on August 24, 2021. (Order Granting Plaintiff's Motion For Summary Judgment and Dismissing Defendant's Counterclaim With Prejudice).

Defendants appealed that order.

STANDARD OF REVIEW

In reviewing a motion for summary judgment, a trial court's task is well-known and well-settled. Under *Rule 56, SCRCP*, summary judgment is proper when both:

(a) No genuine issue as to any material fact exists, and

(b) The moving party is entitled to judgment as a matter of law.

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

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

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

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

In the case of *Gibson v. Epting,* 426 S.C. 346, 827 S.E. 2d 178 (Ct. App. 2019), in discussing the scintilla rule, the Court observed, "the summary judgment standard governing Gibson's claims requires her to produce only a "scintilla" of evidence to avoid judgment as a matter of law, but a scintilla is a perceptible amount. There still must be a verifiable spark, not something conjured by shadows. Bethea v. Floyd, 177 S.C. 521, 529, 181 S.E. 721, 724 (1935) (" 'Scintilla' means, according to 56 C. J. 863, 'a gleam,' 'a glimmer,' 'a spark,' 'the least particle,' 'the smallest trace.' "); Crosby v. Seaboard Air Line Ry., 81 S.C. 24, 31–32, 61 S.E. 1064, 1067 (1908) ("[A] scintilla

of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror."); *Scintilla*, The Oxford English Dictionary (2nd ed. 2018) ("A spark ... a minute particle, an atom."); *see Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) ("When opposing a summary judgment motion, the nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.' " (citations omitted)); *Grimsley v. S.C. Law Enf't Div.*, 415 S.C. 33, 42, 780 S.E.2d 897, 901 (2015) (affirming trial court's grant of summary judgment and noting court of appeals improperly "cherry-picked" an isolated portion of the record, placed it out of context, and "elevated what is, at best, a metaphysical doubt into a genuine issue of material fact"); *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984) ("The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine."); *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir.1985) (explaining that party opposing summary judgment "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another").

A non-moving party cannot evade summary judgment by creating and relying on "an inference that is not reasonable or an issue of fact that is not genuine. *Town of Hollywood v. Floyd*, 403 S.C. 466, 744 S. E, 2d 161, 166 (2013).

When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c)[of the South Carolina Rules of Civil Procedure (SCRCP)], which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."); *Wilson v. Style Crest Prods., Inc.*, 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006) ("In determining whether any triable 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 non-moving party."); *id.* ("Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied."); *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary

judgment"); *Sims v. Amisub of S.C., Inc.*, 408 S.C. 202, 208, 758 S.E.2d 187, 190-91 (Ct. App. 2014) ("Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." (quoting *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004))); *Eadie v. Krause*, 381 S.C. 55, 64 n.5, 671 S.E.2d 389, 393 n.5 (Ct. App. 2008) ("[T]o survive a motion for summary judgment , the plaintiff must offer some evidence that a genuine issue of material fact exists as to each element of the claim unless that element is either uncontested or agreed to by stipulation; otherwise, the plaintiff cannot meet his burden of proof and the claim may be determined as a matter of law by the trial judge."); *Legette v. Piggly Wiggly, Inc.*, 368 S.C. 576, 579, 629 S.E.2d 375, 377 (Ct. App. 2006).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF/RESPONDENT.

Plaintiff's Notice of Motion and Motion For Summary Judgment (Notice of Motion and Motion For Summary Judgment) was based upon Rule 56, SCRCP, which provides in pertinent part:

> (c) Motions and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than two days before the hearing. **The judgment sought shall be rendered forthwith if 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 (emphasis added).** A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
>
> (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. **When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (emphasis added).**

After consideration of the record before her, including Plaintiff's Memorandum in Support of Motion For Summary Judgment, Exhibits "A-E", which included Plaintiff's affidavit[2] (Exhibit "E") and excerpts from Mr. Linder's deposition transcript[3] (Exhibit "D"), wherein he conceded default in payment to the Plaintiff and his failure to procure a life insurance policy as required by the contract, and after she considered the absence of any counter-affidavit by the Defendants/Appellants, Judge McCoy issued her Order Granting Plaintiff's Motion For Summary Judgment and Dismissing Defendant's Counter-claim With Prejudice wherein she found the following salient facts:

1. The salient facts which I find herein are uncontroverted.
2. The parties in Case No. 2018-CP-08-2241, a declaratory judgment action, and the parties to this case are the same.
3. The Findings of Salient Facts contained in the Declaratory Order of Judge Dale E. Van Slambrook in Case No. 2018-CP-08-2241 are merged and incorporated herein *verbatim.*
4. The parties entered into a contract dated May 22, 2017, ("Contract").
5. The Contract terms reduced and discounted a prior mutually acknowledged contract amount due from the Defendants to the Plaintiff by $784,244.51.

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[2] Exhibit "E" to Plaintiff's Memorandum in Support of Motion For Summary Judgement includes the following representations under oath by Plaintiff: Defendants have not paid the balance of the Contract sum or any portion thereof. Due and owing on the Contract sum is $267,000.00, plus pre-judgment interest as provided by law. Defendants were also required by the Contract to procure a life insurance policy on the life of Brandon W. Linder in the amount of $1,000,000 naming me [Gerald R. Smith] as a beneficiary... I am listed as a beneficiary of $300,000 which is contrary to the terms of the Contract.

[3] Exhibit "D" to Plaintiff's Memorandum in Support of Motion For Summary Judgement contains excerpts from Brandon W. Linder's Deposition taken on May 12, 2021 including *inter alia* the following exchanges:

Q: I'm going to hand you a document that's been marked Plaintiff's Exhibit 5 to your deposition and ask you if you are aware of the September 18, 2019 demand letter to your lawyer for payment in full. Do you know anything about this? (Linder Deposition Tr., p. 28, lines 19-24).
A: Yes, sir. (Linder Deposition Tr., p. 28, line 25).
Q: All right. And have you done anything in regard to making payment to Mr. Smith on the amount demanded in the letter? (Linder Deposition Tr., p. 29, lines 1-3).
A: I have not made any payments, no sir. (Linder Deposition Tr., p. 29, line 4).
Q: Why would you not pay him what you owe him other than the fact that you don't have it? (Linder Deposition Tr., p. 35, lines 6,7).
A: I wouldn't. If I had the money, I would pay him. (Linder Deposition Tr., p. 35, lines 8,9).
Q: So do you have a policy of insurance in force and effect that designates Mr. Smith, Gerald R. Smith, as beneficiary of a death benefit of $1 million? (Linder Deposition Tr., p. 38, lines 23-25, p. 39, line 1).
A: No sir, I don't. (Linder Deposition Tr., p. 39, line 2).

6. The Contract specifies a new total contract amount of $300,000.00 to be paid by the Defendants to the Plaintiff in monthly installments of $10,000.00 each and a balloon payment of the balance upon the December 22, 2018 payment.
7. During the period May, 2017 through November, 2018 Plaintiff did not receive monthly payments as required by the Contract.
8. Plaintiff did not receive the balloon payment on December 22, 2018.
9. Plaintiff did receive sporadic partial payments from Defendants for a total of $33,000.00, the last payment being made to Plaintiff on November 26, 2018 in the amount of $5,000.00.
10. Defendants attribute their failure to pay the balance of the money owed the Plaintiff solely because of a lack of funds.
11. Defendants acknowledge that if they had the money to satisfy their full obligation on the fixed sum they would have paid the Plaintiff.
12. Plaintiff is owed a balance of $267,000.00 by the Defendants on the Contract, which sum is specific, fixed and certain.
13. The Contract requires Defendants to procure a life insurance policy on the life of Brandon W. Linder with a death benefit payable to the Plaintiff as the named beneficiary in the amount of $1,000,000.00.
14. Defendants admit that the life insurance policy has not been procured as provided and required in the Contract.
15. Defendants are in default under the Contract as to payment of monies due and owing the Plaintiff.
16. Defendants are in default as to the procurement of a life insurance policy on the life of Brandon W. Linder with a death benefit payable to the Plaintiff as the named beneficiary in the amount of $1,000,000.00.
17. After default, demand was made by Plaintiff for performance under the Contract and Defendants were given an opportunity to cure the default. The default was not cured.
18. Plaintiff alleges in ¶17 of his Complaint and in his prayer for relief, *inter alia,* that he is entitled to pre-judgment interest on the $267,000.00 balance due.

Judge McCoy also went on in her order to make the following conclusions of law:

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

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

Specifically, due to the breach of contract by Defendants, Plaintiff is entitled to judgment against all Defendants in the fixed sum certain of $267,000.00 in actual damages. (Order Granting Plaintiff's Motion For Summary Judgment and Dismissing Defendant's Counter-claim With Prejudice, p. 4).

Judge McCoy continued in her conclusions of law:

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

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

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

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

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

The total award of pre-judgment interest due Plaintiff is $65,475.30. (Order Granting Plaintiff's Motion For Summary Judgment and Dismissing Defendant's Counter-claim With Prejudice, p. 5).

Judge McCoy further and finally concluded as a matter of law:

Applying the summary judgment standard to the fully developed record before me on Plaintiff's prayer for specific performance of the procurement of a life insurance policy on the life of Brandon W. Linder, given the specialized and unique nature of a policy of life insurance, Plaintiff has established to my satisfaction that the

requisite elements of specific performance have been met with respect to the life insurance required to be procured, and because there is no genuine issue as to any material fact regarding the same, Plaintiff is entitled to judgment as a matter of law.

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

In further exercising my discretion given the facts and circumstances of this case and the course of dealing between and among the parties, I deem it equitable and necessary that Defendants shall procure the life insurance policy on the life of Brandon W. Linder with a death benefit of $1,000,000.00 naming Plaintiff as beneficiary within thirty (30) days of the entry of this order, with a certificate of insurance being concurrently provided in writing to Plaintiff's counsel. The policy shall remain in full force and effect for the lifetime of the Plaintiff. (Order Granting Plaintiff's Motion For Summary Judgment and Dismissing Defendant's Counter-claim With Prejudice, p. 6,7).

Judge McCoy's order provided judgment as follows:

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

1. Plaintiff is entitled to judgment as a matter of law against all Defendants for breach of contract for default on payment of monies due the Plaintiff;

2. Plaintiff is awarded actual damages for breach of contract for monies due the Plaintiff in the amount of $267,000.00;

3. Pre-judgment interest is due and owing the Plaintiff by the Defendants on the judgment amount in the amount of $65,475.30;

4. Plaintiff be and hereby is awarded a total judgment against all Defendants in the amount of $332,475.30; and

5. Plaintiff be and hereby is granted specific performance commanding and compelling Defendants to procure a life insurance policy on the life of Brandon W. Linder with a death benefit of $1,000,000.00 naming Plaintiff as beneficiary; said action to be accomplished within thirty (30) days of the entry of this order, with a certificate of insurance being concurrently provided in writing to Plaintiff's counsel. The policy shall remain in full force and effect for the lifetime of the Plaintiff.

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

Appellants assert a variety of reasons why Judge McCoy's order is flawed and should be reversed. In doing so they have attempted to introduce subjects outside of the record, ignore the key elements of the actual record and mischaracterize what is in the record. Appellants cannot change the record.

They contend that there is "at least a scintilla" of evidence in the record sufficient to defeat Plaintiff/Respondents' motion for summary judgment.

That argument failed at the hearing before Judge McCoy and must fail on appeal because Defendants/Appellants produced no evidence establishing that there was a genuine issue of material fact. For reasons known only to Defendants/Appellants they chose not to file any counter-affidavit(s) disputing the clear and unambiguous affidavit of Mr. Smith or to clarify the testimony of Mr. Linder in his deposition. There is no evidence in opposition to Plaintiff/ Respondent's motion for summary judgment which may constitute a scintilla of evidence. It is totally absent. Since there is no evidence in the record anywhere contrary to the evidence presented by the Plaintiff/Respondent there is no scintilla of evidence on which they can rely to defeat summary judgment.

Well-settled case law in South Carolina is consistent with the provisions of Rule 56(e), SCRCP, (emphasized above). In a case decided by this court, *Klippel v. Mid-Carolina Oil, Inc., 303 S.C. 127, 399 S.E. 2d 163 (Ct. App., 1990)*, this court held that when a party makes a motion for summary judgment and supports it by affidavits **the adverse party may not rest on the allegations of his pleadings but must respond by affidavits or other evidence demonstrating a genuine issue of material fact. (emphasis added)**. *Sheppard v. Kimbrough,* 282 S.C. 348, 318 S.E.2d 573 (Ct.App.1984).

Appellants argue further that there are genuine issues of material facts as to the validity and enforceability of the Contract. The remedy for the Appellants, which they opted not to pursue, was to appeal Judge Van Slambrook's Declaratory Order, in which specifically he specifically declared that the contract was valid and binding between and among the parties. They chose not to appeal. They cannot now re-litigate that which has been adjudicated in full.

It is not proper for the Appellants to now claim the contract is anything other than what Judge Van Slambrook declared it to be--- valid and binding. Appellants argument completely ignores a properly entered order of the Court.

Appellants argue further that there are genuine issues of material facts as to Appellants' affirmative defenses and Karla Linder's liability. Again, Rule 56 and the case law cited above is clear that when a motion for summary judgment is made and supported (which is the case here) an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Appellants missed their opportunity to show the court that genuine issues of facts existed by their failure to submit counter-affidavit(s) or any other evidence. Judge McCoy deemed it appropriate that summary judgment must have been entered.

Appellants further argue that subject matter jurisdiction is lacking. This argument fails because the contract in question, which has been declared to be valid and binding by the Master, contains the following:

> [¶6] Lastly, the parties agree to forgo [sic] and abandon any and all provisions of the sales contracts and addendums as to any arbitration in the event of default. (Declaratory Order, Exhibit 6, Memorandum in Support of Motion For Summary Judgment, Exhibit "A").

Appellants next contend that Judge McCoy's order violates public policy. This contention misses the point of the equitable nature of specific performance. The Circuit Court found as a matter of law:

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

The Court exercised her discretion based on the record before her and she agreed as a matter of law with the Plaintiff that specific performance was a proper and equitable remedy in this

instance. Her discretion should not be upset here. As to public policy, Appellants have chosen to dismiss that portion of public policy that promotes the idea that in an orderly society promises must be kept and if they are not there are consequences.

Appellants next contend that the Circuit Court erred in not granting their Motion To Amend its order.

In her Form 4 Order Judge McCoy made a detailed Statement of Judgment denying Defendants' Motion To Alter or Amend and Motion From Relief from Judgment. She denied the motions because none of the requirements for relief were shown by the Appellants. There was no showing that new evidence needed to be accounted for that was not available at hearing. There was no showing of an error of law or manifest injustice that needed to be prevented. (Defendants did not allege that any of those applications exist).

Defendants' motion was fatally flawed in form and substance and this Court properly denied the motion. (Order/Form 4)

Appellants next make an interesting and creative (although also fatally flawed) contention regarding the Court's denial of their motion to conform to the evidence.

Again, there is no evidence before the Court other than what was submitted by the Plaintiff. If the Court had exercised its discretion to grant the motion it would not have changed the outcome because Appellants presented no evidence. Appellants apparently conceded the fact that they presented no evidence in their brief on page 20,

> *"Here, the counterclaim and affirmative defenses raised ... creates at least a scintilla of evidence that Respondent is not entitled to judgment as a matter of law".*

Appellants challenge the Circuit Court's denial of Appellants' Rule 60(b), SCRCP motion. Rule 60(b), SCRCP provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud, misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. During the pendency of an appeal, leave to make the motion must be obtained from the appellate court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

The Circuit Court was unconvinced that any element of Rule 60 applied to the record before her. There was no clerical mistake. There was no mistake, inadvertence, excusable neglect, newly discovered evidence or fraud.

CONCLUSION

Based upon the foregoing, the Circuit Court's Order Granting Plaintiff's Motion For Summary Judgment and Dismissing Defendant's Counter-claim With Prejudice should be **AFFIRMED.**

Respectfully submitted,

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