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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Alex Kinlaw, Jr., Circuit Court Judge

Case No. 2021-001151

Greenville Dental Office Management Group, LLC, a limited liability company proceeding pursuant to 33-44-1101 by and through its member, Bhaskar Savani, D.M.D…… Respondent,

v.

Jon Julian, D.D.S., Blake Julian, D.D.S. Greenville Dental Management Group, P.A……Appellants.

BRIEF OF RESPONDENT

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May 18, 2022

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STATEMENT OF THE CASE

Plaintiff, Greenville Dental Office Management Group by and through its member Bhaskar Savani, D.M.D., ("Management Company") initiated this action by filing a summons and complaint on August 19, 2020. (R. pp. 47-55). On August 27, 2020, the complaint was amended to correct the name of Greenville Dental Office Management Group, LLC. (R. pp. 56-96). After an unsuccessful motion to dismiss, Defendants ("the Julians") filed their answer and counterclaims on February 1, 2021. (R. pp. 97-111).

On February 9, 2021, Management Group filed a Motion for Appointment of Receiver. (R. pp. 119-141). On April 8, 2021, the circuit court granted Management Group's motion and appointed a receiver. (R. pp. 1-3). On May 12, 2021, the court filed a formal order appointing a receiver. (R. pp. 4-10).

On May 24, 2021, the Julians filed a Motion to Alter and Amend Order Appointing Receiver. (R. pp. 148-165). After considering the Julians' motion, the court filed an Amended Order Appointing Receiver on September 9, 2021. (R. pp. 11-21).

This appeal followed.

SUMMARY OF FACTS

At the hearing on Management Company's Motion for Appointment of Receiver, the only evidence presented to the court was a Memorandum of Understanding executed June 26, 2017 ("the MOU"), (R. pp. 122-130), an Affidavit of Bhaskar Savani, D.M.D., (R. pp. 131-141), and an Affidavit of Jon Julian in Opposition to Motion to Appoint Receiver, (R. pp. 146-147).

On June 26, 2017, Jon Julian, The Dental Retreat at Mountain Park, LLC, Northstar Dental Education for Dental Professionals, LLC, Blake Julian, Signature Smiles, LLC, Bhaskar Savani, and American Dental Management Group, LLC executed a memorandum of understanding. (R. pp. 122-130). Pursuant to the MOU, Jon Julian and Blake Julian formed Greenville Dental Management Group, P.A. ("Clinical Company"). Also, pursuant to the MOU, Jon Julian, Blake Julian, and Bhaskar Savani formed Management Company.

Pursuant to the MOU, Management Company is required to "secure leases for the initial Practice locations and future locations." (R. p. 124 ¶ 5). Management Company is also required to provide to the Clinical Company "all the dental 'fit-out', equipment, furniture, fixtures, tools and supplies (collectively 'Practice Assets') necessary to operate the Practice." (R. p. 124 ¶ 5). To date, Management Company has secured leases and provided Practice Assets for at least four locations: (1) Traveler's Rest, (2) Greenville, (3) Taylors, and (4) Columbia.[1]

Pursuant to the MOU, Plaintiff's source of funds for these expenses is the assignment of collections from the Clinical Company to Management Company:

> Clinical Company shall assign to [Plaintiff] all collections for clinical dental services rendered by Clinical Company dental professionals and all revenues derived from dental related sales commissions and professional educational seminars, lectures and

[1] Management Company has also provided Practice Assets for a fifth location in Duncan, South Carolina; however, this assertion is contested by the Julians and has no bearing on this appeal.

> course materials. Clinical Company shall deposit all revenue after payment for Clinical Company payroll and compensation for dental professionals to the Management Company.

(R. p. 124 ¶ 4). Further, pursuant to the MOU, "No party shall take a draw, compensation or share of profits unless Clinical Company/[Management Company] has sufficient funds in excess of three months' working capital." (R. p. 124 ¶ 6).

Between early 2018 and May 1, 2020, the Julians and Savani generally operated their business pursuant to the MOU. Pursuant to paragraph 9 of the MOU, the Julians each executed service agreements. (R. pp. 74-84; R. pp. 85-96). Management Company was responsible for providing business support and administrative services to Clinical Company. (App. Br. 6). Clinical Company pooled revenue and expenses and delivered its revenue to Management Company. (App. Br. 6-7). Management Company managed those pooled revenues and expenses and controlled the financial information and accounts of Clinical Company. (App. Br. 7).

After May 1, 2020, the Julians unilaterally decided to stop delivering collections to Management Company as required by the MOU. (R. p. 131 ¶ 5). Further, during this period, the Julians used the collections belonging to Management Company to pay themselves compensation in violation of the MOU. (R. p. 147 ¶ 4). The Julians also breached their service agreements by failing to provide care for their patients at Clinical Company's Columbia and Taylors offices. (App. Br. 7-8).

STANDARD OF REVIEW

The standard of review of an order appointing a receiver is abuse of discretion. *See, e.g. Kirven v. Lawrence*, 244 S.C. 572, 137 S.E.2d 764 (1964); *Vasiliades v. Vasiliades*, 231 S.C. 366, 98 S.E.2d 810 (1957); *Andrick Dev. Corp. v. Maccaro*, 280 S.C. 103, 311 S.E.2d 95 (Ct. App. 1984). The appointment of a receiver rests in the sound discretion of the court to which application

is made." *Andrick*, 280 S.C. at 106, 311 S.E.2d at 97 (citing *Vasiliades*). The court's exercise of discretion must not lightly be disturbed and should only be nullified where it is manifest error of law. *Southern Trust Co. v. Cudd*, 166 S.C. 108, 114, 164 S.E. 428, 430 (1932) (citing *Peeples v. Agricultural Loan Ass'n*, 156 S.C. 429, 153 S.E. 283 (1930)).

ARGUMENT

I. THE COURT PROPERLY APPOINTED A RECEIVER OF THE FUTURE COLLECTIONS OF A BUSINESS ENTERPRISE WHERE IT IS IMPOSSIBLE TO DISCERN THE FUTURE VALUE OF THOSE COLLECTIONS.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible." *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015). "Statutes should not be construed so as to lead to an absurd result." *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137, 143 (1999). The court should reject a meaning when to accept it would lead a to a result so plainly absurd that it could not have been intended by the legislature. *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994).

> No receiver of the property of any person or corporation shall be appointed before final judgment in the cause if the party claiming the property so sought to be placed in the hands of a receiver or the party in possession thereof shall offer a bond, in the penalty of double the value of the property, with sufficient security, approved by the clerk of the court of common pleas of the court in which the action is brought, fully to account for and deliver over, whenever thereafter required by any final adjudication in the cause, the property sought to be placed in the hands of a receiver and to meet and satisfy any decree or judgment or order that may be made in the cause.

S.C. Code Ann. § 15-65-50. Respondent agrees with Appellant that the legislature's intent was to allow a person or entity from whom property is taken and placed in the hands of a receiver to pay a bond equal to double the value of the property to have said property returned to that person or entity.

In *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343 (1928), the value of the property delivered to the receiver could be defined. There, the receiver took possession of the tangible property of the company, except its book and records. *Id.* at 192, 142 S.E. at 343. As such, the property received should have been inventoried and valued.

However, when the language of Section 15-65-50 is applied to the current circumstances its leads to an absurd result that could not have been the legislature's intent. Here, Management Company does not have an apparent right to a tangible property or business to which a value can be assigned. Instead, Management Company has an apparent right to all collections from the signatories of the MOU, including: (1) Greenville Dental Management Group, P.A., (2) Dr. Jon Julian, (3) The Dental Retreat at Mountain Park, LLC, (4) the business formerly known as Northstar Dental Education for Dental Professionals; (5) Dr. Blake Julian; and (6) Signature Smiles, LLC d/b/a Signature Smiles Family Dentistry. (R. p. 133, lines 1-11; R. p. 135 ¶ 4). It would be impossible for the court to assign a value to these future collections.

Further, even if the court set an arbitrary value for the bond, it would not be possible for Appellants to post the bond without using the collections to which Management Company has an apparent right. Appellants have assigned all of their "collections for clinical dental services rendered by Clinical Company dental professionals and all revenues derived from dental related sales commissions and professional education seminars, lectures and course materials" to Management Company. (R. p. 135 ¶ 4).[2] Because the bond would necessarily have to be set at twice those collections, it would be impossible for Appellants to pay any such bond.

[2] The Julians have also foregone any compensation unless Clinical Company and Management Company have sufficient funds in excess of three months' working capital. (R. p. 135 ¶ 6).

As such, interpretation of Section 15-65-50 in the manner suggested by Appellants would lead to an absurd and impossible result that could not have been the intent of the legislature.

Therefore, Respondent respectfully requests that this Court affirm the circuit court's appointment of a receiver.

II. THE COURT PROPERLY APPOINTED A RECEIVER WHERE RESPONDENT ESTABLISHED AN APPRARENT RIGHT TO THE COLLECTIONS OF THE CLINICAL COMPANY.

A. The Memorandum of Understanding and the conduct of the Julians evidence the existence of a valid contract.

"[F]or a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement." *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005). "[W]hen the existence of a contract is disputed or its terms are ambiguous, evidence that a party complied with the terms of the alleged contract or acted in conformity therewith is relevant and admissible on the issues of the contract's existence, the meaning of its terms, and whether the contract was breached." *Conner v. City of Forest Acres*, 363 S.C. 460, 473, 611 S.E.2d 905, 912 (2005) (citing *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 303, 468 S.E.2d 292, 300 (1996); *Gaskins v. Blue Cross-Blue Shield of S.C.*, 271 S.C. 101, 105, 245 S.E.2d 598, 600 (1978); *Baylor v. Bath*, 189 S.C. 269, 1 S.E.2d 139 (1938)). "A contract may arise from actual agreement of the parties manifested by words, oral or written, or by *conduct*." *Id.* at 474, 611 S.E.2d at 912 (emphasis in original) (citing *Prescott v. Farmers Tel. Co-op., Inc.*, 335 S.C. 330, 335, 516 S.E.2d 923, 926 (1999); *Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E.2d 432, 439 (Ct. App. 2003)).

A third-party beneficiary is a party that the contracting parties intend to directly benefit. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) (citing *Touchberry v. City of Florence*, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988)).

The MOU was executed by Jon Julian, The Dental Retreat at Mountain Park, LLC, Northstar Dental Education for Dental Professionals, LLC, Blake Julian, Signature Smiles, LLC, Bhaskar Savani, and American Dental Management Group, LLC. (R. p. 139). It states in detail the essential terms of the agreement between these parties. As such, it is a valid contract.

Through the assignment of collections, the parties to the agreement clearly intended Management Company to be a third-party beneficiary of the MOU. (R. p. 135 ¶ 4).

Further, the conduct of the Julians and Savani clearly evidences that they considered the MOU to be a valid contract and operated their business according to its terms. Pursuant to paragraphs 1 and 2 of the MOU, the parties formed Management Company and Clinical Company as South Carolina limited liability companies. Pursuant to paragraph 4, Clinical Company pooled revenue and expenses and delivered its revenue to Management Company. (App. Br. 6-7). Pursuant to paragraph 5, Management Company secured leases and provided equipment to at least two new offices in Columbia and Taylors. Pursuant to paragraph 9, the Julians each executed service agreements. (R. p. 84; R. p. 95). Pursuant to paragraph 11, Management Company provided business support and administrative services to Clinical Company, managed pooled revenues and expenses, and controlled the financial information and accounts of Clinical Company. (App. Br. 6-7).

It was only after the Julians wished to unilaterally breach their agreements and forgo their obligations to Clinical Company and Management Company that they decided to modify their conduct and contend that the MOU was not a valid contract. At that point, the Julians abandoned

Clinical Company's patients in Columbia and Taylors and refused to continue delivering Management Company's collections.

B. Management Company has an apparent right by assignment to the collections of Clinical Company.

A court has discretion to appoint a receiver prior to judgment where the movant has (1) an apparent right to property in possession of an adverse party; and (2) the property is in danger of being lost or materially injured or impaired. S.C. Code Ann. § 15-65-10. A court is within its discretion to appoint a receiver when one party is in possession of the property and the other party has an apparent right to the rents and profits from said property. *Andrick Dev. Corp. v. Maccaro*, 280 S.C. 103, 311 S.E.2d 95 (Ct. App. 1984).

"An assignment is the act of transferring to another all or part of one's property, interest, or rights." *Moore v. Weinberg*, 373 S.C. 209, 219, 644 S.E.2d 740, 745 (Ct. App. 2007) (citing *Black's Law Dictionary* 119 (6th ed. 1992)), aff'd, 383 S.C. 583, 681 S.E.2d 875 (2009). "Three elements constitute an assignment: (1) an assignor; (2) an assignee; and (3) transfer of control of the thing assigned from the assignor to the assignee." *Id.*

Pursuant to the MOU, Appellants and the entities they own have assigned all their collections to Management Company. As such, Management Company has an apparent right to possession of the collections from the signatories of the MOU, including: (1) Greenville Dental Management Group, P.A., (2) Dr. Jon Julian, (3) The Dental Retreat at Mountain Park, LLC, (4) the business formerly known as Northstar Dental Education for Dental Professionals; (5) Dr. Blake Julian; and (6) Signature Smiles, LLC d/b/a Signature Smiles Family Dentistry. (R. p. 124 ¶ 4). These individuals and entities are either defendants in this action or wholly owned by defendants in this action. (R. p. 128).

Appellants admit that the parties signed the Memorandum of Understanding ("MOU") on June 26, 2017. (R. p. 98 ¶ 7; App. Br. 5). Appellants admit that the parties began a joint venture, (App. Br. 4), and operated this joint venture pooling revenue and expenses, (App. Br. 6-7).

Although Appellants make numerous allegations in their brief, the only actual evidence in the record is the MOU, (R. pp. 122-130), an Affidavit of Bhaskar Savani, D.M.D., (R. pp. 131-141), and an Affidavit of Jon Julian in Opposition to Motion to Appoint Receiver, (R. pp. 146-147).

In Jon Julian's affidavit, he does not present any evidence that Management Company has breached the MOU. (R. pp. 146-147). Further, he admits that Appellants have refused to deliver collections pursuant to said MOU. (R. p. 147 ¶ 5). Finally, he admits that he and Blake Julian use collections belonging to Management Company to compensate themselves in violation of the MOU. (R. p. 147 ¶ 4, R. p. 135 ¶ 6).

The facts in this case are similar to *Andrick*. In *Andrick*, the defendants were in possession of rental property, the ownership of which was disputed. *Andrick*, 280 S.C. at 104, 311 S.E.2d at 96. The plaintiff held title to the property, subject to a demand for specific performance of a contract for sale by the defendants. *Id.* The plaintiff moved for and was granted an order appointing a receiver to take possession of the property and collect all rents and profits while the case was pending. *Id.* at 105, 311 S.E.2d at 97. The Court of Appeals affirmed the appointment of a receiver. *Id.* at 106-107, 311 S.E.2d at 97.

Here, Appellants admit they executed the MOU. Pursuant to the MOU, Defendants assigned all collections for clinical dental services rendered by Clinical Company dental professionals and all revenues derived from dental related sales commissions and professional education seminars, lectures, and course materials to Management Company. Similar to the facts

in *Andrick*, the evidence shows that Management Company has an apparent right to the collections assigned in the MOU. It is not necessary for Management Company to have a definite right to the collections, only an apparent right.

Also similar to *Andrick*, where the defendants demanded specific performance, Appellants contest Respondent's right to the collections by alleging that the MOU is no longer effective. However, this dispute is precisely why a receiver is necessary to take possession of the collections while the case is pending. There would never be a need for a receiver in a case where there is no dispute over the parties' rights to property.

As such, based on Appellant's own admissions, it is clear that Management Company has an apparent right to the collections of Appellants and the aforementioned entities. Therefore, Respondent respectfully requests that this Court affirm the circuit court's appointment of a receiver.

III. THE COURT PROPERLY APPOINTED A RECEIVER WHERE RESPONDENT ESTABLISHED THE COLLECTIONS WERE IN DANGER OF BEING LOST OR MATERIALLY INJURED OR IMPAIRED.

A court has discretion to appoint a receiver prior to judgment where . . . the property is in danger of being lost or materially injured or impaired. S.C. Code Ann. § 15-65-10.

It is clear from Appellant's admissions that the collections belonging to Management Company were in danger of being lost or materially injured or impaired. Jon Julian admits that, despite withholding collection from Management Company, he and Blake Julian continue to take compensation "at or below the amounts set forth in the Services Agreement." (R. p. 147 ¶ 4). The service agreements being referred to set Jon Julian's salary at $600,000, (R. p. 77 ¶ 9), and Blake Julian's salary at $400,000, (R. p. 88 ¶ 9).

As such, in Jon Julian's affidavit, he is admitting that Appellants are reducing Management Company's collections by $1,000,000 annually, thereby materially injuring or impairing the property to which Management Company has an apparent right.

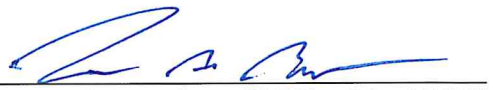
Therefore, Respondent respectfully requests that this Court affirm the circuit court's appointment of a receiver.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that this Court affirm the order of the circuit court.

Respectfully submitted,

May 18, 2022



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Certificate Of Counsel

The undersigned certifies that the final Brief of Respondent in the above-captioned case complies with Rule 211(b) of the *South Carolina Appellate Court Rules* and with Supreme Court Order dated April 15, 2014 regarding personal identifiers and sensitive information.

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