

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION**

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| Sommers Oil Company, |) | Civil Action No. 9:14-3382-RMG |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | ORDER AND OPINION |
| |) | |
| Sand Hill Stations of Bluffton LLC, |) | |
| |) | |
| Defendant. |) | |
| |) | |

This matter is before the Court on Plaintiff’s unopposed motion for summary judgment. For the reasons set forth below, the Court grants summary judgment for Plaintiff.

I. Background

Sommers Oil Company is a wholesale distributor of petroleum products in the southeast United States. Sand Hill Stations of Bluffton is a company that owned a gas station in Bluffton, South Carolina. Beginning in June 2010, the parties entered into a series of contracts, which Sommers Oil alleges Sand Hill Stations has breached.

On June 23, 2010, Sand Hill Stations, entered into a Branded Petroleum Supply Contract with Sommers Oil Company. The Branded Petroleum Supply Contract made Sommers Oil the exclusive supplier of gasoline to Sand Hill Stations for a period of ten years. Sommers Oil alleges Sand Hill Stations breached that agreement by failing to pay outstanding fuel charges of \$67,123.06.

On August 30, 2010, Sommers Oil entered into a Retail Facility Development Incentive Program Agreement with Motiva Enterprises, LLC (Shell) to the benefit of Sand Hill Stations. The Retail Facility Development Incentive Program Agreement identified Sand Hill Stations as Sommers Oil’s “Outlet” and offered incentives to Sand Hill Stations in exchange for Sand Hill

Stations being branded as a Shell station for ten years. Sand Hill Stations benefited from the Agreement by receiving rebates at the Agreement's inception based upon the station's expected sales volume for the first year, as well as subsequent monetary incentives based upon Sand Hill Stations' sales volume. All rebates or incentives paid by Motiva Enterprises under the Agreement were first paid to Sommers Oil and then distributed to Sand Hill Stations.

Sommers Oil alleges that Paragraph 1 of the Branded Petroleum Supply Contract, which states that "all monies invested by Sommers and or Shell Oil Company will be repaid" in the event of a breach, shows that Sand Hill Stations' agreement that amounts it received as rebates and incentives under the Retail Facility Development Incentive Program Agreement would be required to be paid back to Motiva in the event the station ceased being a branded Shell station. In April 2014, Sand Hill Stations ceased operations and stopped being a branded Shell station. As a result, Sommers Oil alleges it is obligated to reimburse Motiva \$107,449.72 in fees and rebates paid, and that under the Branded Petroleum Supply Contract, Sand Hill Stations must also repay all monies invested by Sommers Oil and Shell Oil Company.

On October 26, 2010, Sand Hill Stations executed a Promissory Note dated October 19, 2010 in favor of Sommers Oil for \$279,946.75 to enable Sand Hill Stations to purchase equipment for the station. Sommers Oil alleges that Sand Hill Stations stopped making payments under the note in January 2014 and that \$114,386.01 is due on the loan.

On November 29, 2011, Sand Hill Stations executed a Promissory Note dated October 6, 2011 in favor of Sommers Oil for \$35,000.00. Sommers Oil alleges Sand Hill Stations failed to make any payments under the October 6, 2011 promissory note and that there is an outstanding balance of \$36,750.00.

Sommers Oil filed the present breach of contract action on August 21, 2014. On November 17, 2015, Sommers Oil moved for summary judgment. Sand Hill Stations has not responded to the motion for summary judgment. Sand Hill Stations has been unrepresented since its most recent attorney withdrew on January 29, 2016. (Dkt. No. 44.)

II. Legal Standard

Summary judgment is appropriate if a party “shows that there is no genuine dispute as to any material fact” and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In other words, summary judgment should be granted “only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts.” *Pulliam Inv. Co. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir. 1987). “In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities in favor of the nonmoving party.” *HealthSouth Rehab. Hosp. v. Am. Nat’l Red Cross*, 101 F.3d 1005, 1008 (4th Cir. 1996). The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. *Id.* at 324. Rather, the non-moving party must demonstrate that specific, material facts exist that give rise to a genuine issue. *Id.* Under this standard, “[c]onclusory or speculative allegations do not suffice, nor does a ‘mere scintilla of evidence’” in support of the non-moving party’s case. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002) (quoting *Phillips v. CSX Transp., Inc.*, 190 F.3d 285, 287 (4th Cir. 1999)).

III. Discussion

Because Sand Hill Stations ceased participation in this litigation years ago, as a threshold issue the Court must determine whether a default judgment or summary judgment is appropriate for this case.

A default judgment and a summary judgment are two very different types of judgments. If a court has personal jurisdiction over a defendant and the defendant fails to appear, a default judgment may be rendered against him. In an action in which the defendant defaults, the well pled allegations of the complaint as to liability are established. However, they are not litigated but established by default. Judgment by default commands the full effects of claim and defense preclusion; but, judgment by default does not warrant issue preclusion for the very reason that the issues have not been litigated or decided.

On the other hand, summary judgments that rest on the lack of any genuine issue of material fact going to the merits of claim or defense, invoke both claim and issue preclusion. The styling of a decision as a summary judgment may not give increased preclusive effect to a judgment if summary judgment was an inapt procedural vehicle for the judgment.

Phillips Factors Corp. v. Harbor Lane of Pensacola, Inc., 648 F. Supp. 1580, 1582–83 (M.D.N.C. 1986) (internal quotation marks, ellipses, and brackets omitted). The Court proceeds to consider the pending motion for summary judgment, rather than considering default judgment, because Sand Hill Stations was represented by counsel through discovery and when its response to the motion for summary judgment was due. Simply failing to respond to a motion is insufficient to avoid a fully preclusive adjudication of that motion.

Sand Hill Station’s failure to respond to the motion for summary judgment does not automatically satisfy Sommers Oil’s burden as movant to show entitlement to judgment as a matter of law. “Although the failure of a party to respond to a summary judgment motion may leave uncontroverted those facts established by the motion, the moving party must still show that the uncontroverted facts entitle the party to ‘a judgment as a matter of law.’ . . . Thus, the court, in considering a motion for summary judgment, must review the motion, even if unopposed, and

determine from what it has before it whether the moving party is entitled to summary judgment as a matter of law.” *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 416 (4th Cir. 1993)

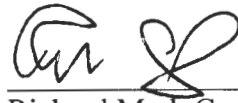
This is a breach of contract action. The contracts at issue have choice of law clauses specifying Georgia law. “The elements for a breach of contract claim in Georgia are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken.” *Kuritzky v. Emory Univ.*, 669 S.E.2d 179, 181 (Ga. 2008). Sommers Oil’s factual assertions that the parties entered into valid contracts, that Sand Hill Stations breached those contracts, and that Sommer Oil suffered resultant damages amounting to \$325,708.79 are supported by affidavit and copies of the contracts at issue. (Dkt. No. 42-2.) It appears to the Court that at trial Plaintiff could offer ample admissible evidence to prove breach of the contracts by Sand Hill Stations and resultant damages to Sommers Oil of \$325,708.79.¹ Because Sand Hill Stations has failed to address Sommers Oil’s factual assertions, the Court considers those assertions undisputed for the purposes of summary judgment. Fed. R. Civ. P. 56(e)(2). Because those undisputed facts establish Sommers Oil’s entitlement to judgment as a matter of law, the Court grants Sommers Oil’s motion for summary judgment. *See* Fed. R. Civ. P. 56(e)(3).

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiff’s motion for summary judgement (Dkt. No. 42). The Clerk is directed to enter judgment for Plaintiff for \$325,708.79.

¹ The complaint seeks damages of \$443,958.79. The difference of \$118,250.00 is the claim for “lost profits in the amount of approximately \$120,000 for Defendant Sand Hill Station’s breach of the Supply Agreement.” (Dkt. No. 1 ¶ 10.) The Court deems that claim abandoned because Sommers Oil’s motion for summary judgment does not mention it.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Court Judge

July 18, 2017
Charleston, South Carolina