

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2019-CP-18-689
Appellate Case No. 2020-000077

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SC Court of Appeals

The Shops at Wescott, LLC,

Respondent,

v.

Sake House IV, Inc. d/b/a Sake House IV
and Lei Jiang,

Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court improperly rule that Appellant should have total liability for breach of contract because Respondent mitigated its damages through its alleged attempts to re-lease the Property?
2. Did the trial court improperly rule that Appellant should be liable for actual damages for conversion because Respondent met its burden of proof regarding the alleged damage to the Property?

STATEMENT OF THE CASE

On or about March 21, 2016, Appellants entered into a Lease Agreement with Respondent for the rental of commercial space located at 9770 Dorchester Road, Suites 103 and 104, Summerville, SC (the "Property"). The underlying litigation between the parties commenced after Sake House IV, Inc. ("Sake House") vacated the Property. By Complaint filed on April 22, 2019, Respondent initially commenced its action against Appellants. (R. p. 13). Respondent's Complaint asserted causes of action against Appellants for (1) Breach of Contract - Rent; (2) Breach of Contract - Fixtures; (3) Breach of Contract - Lease Term; and (4) Guaranty. On May 30, 2019, Appellants filed an Answer with Affirmative Defenses and also alleged a Counterclaim for Attorneys' Fees, Costs and Suit Money. (R. p. 20). On February 28, 2020, Respondent filed an Amended Complaint (Breach of Contract, Negligence, Conversion) (R. p. 27). Respondent's Amended Complaint asserted causes of action against Appellants for (1) Breach of Contract - Rent, Fixtures, Lease Term; (2) Negligence; and (3) Conversion. (R. p. 27). On March 30, 2020, Appellants filed an Answer with Affirmative Defenses and also alleged a Counterclaim for Attorneys' Fees, Costs and Suit Money. (R. p. 33). The trial on the matter was held on August 3, 2021. (R. p. 39). On October 11, 2021, the trial court entered an Order ("Order") granting judgment in favor of Respondent. (R. p. 1). The Appellants then filed a Motion to Reconsider, Alter or Amend the Judgment on October 21, 2021. (R. p. 139). The trial court then issued an Order Denying Defendants' Motion to Reconsider, Alter or Amend the Judgment dated on December 21, 2021. (R. p. 9). The Notice of Appeal of the Order was served on the Respondent on January 20, 2022.

STANDARD OF REVIEW

Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible. See Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000). Actual damages are awarded to a litigant in compensation for his actual loss or injury. Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964). Actual damages are such as will compensate the party for injuries suffered or losses sustained. Id. They are such damages as will simply make good or replace the loss caused by the wrong or injury. Actual damages are damages in satisfaction of, or in recompense for, loss or injury sustained. Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162 (1989). The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. Clark, 339 S.C. at 378, 529 S.E.2d at 533.

Actual or compensatory damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant. See Rogers v. Florence Printing Co., 233 S.C. 567, 106 S.E.2d 258 (1958). The basic measure of actual damages is the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position he would have been in if there had been no wrongful injury. See Rogers, 233 S.C. at 578, 106 S.E.2d at 264; Hutchison v. Town of Summerville, 66 S.C. 442, 45 S.E. 8 (1903).

STATEMENT OF FACTS

On or about March 21, 2016, Appellants entered into a Lease Agreement with Respondent for the rental of commercial space located at 9770 Dorchester Road, Suites 103 and 104, Summerville, SC (the "Property"). On the same day, Appellant Lei Jiang ("Jiang") individually executed a Guaranty of Full Performance. The monthly rent under the Lease Agreement was set at six thousand nine hundred eighty-nine and 06/100 (\$6,989.06) dollars per month. Rental payments by Respondents commenced on or shortly after October 1, 2016. Sometime prior to November 1, 2017, Sake House IV, Inc., by and through its representative, began requesting a reduced rent. Respondent prepared a First Addendum to Lease Agreement, which offered to reduce Defendants' rental payments to the amount of five thousand and 00/100 (\$5,000.00) dollars for a period from November 1, 2017 to April 30, 2018, after which time the rent would increase to the rate set forth in the Lease Agreement. The First Addendum to Lease Agreement was never executed by parties. However, Respondent accepted the amount of five thousand and 00/100 (\$5,000.00) dollars for rent for the months between November 1, 2017 and April 30, 2018. Following April 30, 2018, Respondents continued to pay five thousand and 00/100 (\$5,000.00) dollars in rent for each subsequent month. Respondent asserts that it, by and through their agent, that payment of five thousand and 00/100 (\$5,000.00) dollars was not sufficient under the Lease Agreement. Respondent initiated eviction proceedings against Sake House on or about February 4, 2019. As a result of the eviction proceedings, Sake House was forced to vacate the Property but was given additional time to do so. During the period that Respondents were vacating the Property, Respondent asserts and alleges that Appellants caused substantial damage to the Property and also removed equipment that they were not authorized to remove from the Property. Respondent also asserts and alleges that it had to expend the sum of twenty-two thousand and 00/100 (\$22,000.00)

dollars to repair the Property and to purchase replacements for the equipment which was removed. Respondent further asserts and alleges that it attempted to re-lease the Property from March 2019 until January 2020 and ultimately succeeded in obtaining a new tenant for the Property. Respondent also asserts that it used Sake House's five thousand and 00/100 (\$5,000.00) dollar security deposit to offset some of its alleged damages.

ARGUMENTS

I. IT WAS IMPROPER FOR THE TRIAL COURT TO FIND THAT APPELLANTS SHOULD HAVE TOTAL LIABILITY FOR BREACH OF CONTRACT BECAUSE RESPONDENT FAILED TO MEET ITS BURDEN OF PROOF REGARDING MITIGATION OF DAMAGES.

The trial court abused its discretion in finding that Respondent “properly mitigated its damages through its attempt to re-lease the Property.” (Order p. 4). As such, Appellants should not be adjudged to have total liability for breach of contract. Respondent’s representative, Brian Aiken (“Aiken”) supposedly “attempted to re-lease the Property from March 2019 until January 2020.” (Order p. 3). However, at trial, Aiken was not able to specifically set forth the efforts that he made to re-lease the Property during the time period in question. (R. p. 39). Yet, he did testify that he had contacts specifically in the restaurant business which would have been suitable candidates for tenancy in the Property, but he stated that he did not make any effort to directly contact those entities and/or individuals. (Transcript p. 59-64). Certainly, it stands to reason that direct contact to qualified candidates would be a more likely path to a new tenant. Further, Aiken testified that his business partner in The Shops at Wescott, LLC, Brent Case (“Case”) had suitable contacts as well, but he did not utilize those contacts. (Transcript p. 59-64). Finally, Aiken did not put forth any listing documents or any other documents or evidence that would support the supposed attempt to re-lease the Property. (Transcript p. 59-64). As such, the entire amount of sixty-nine thousand eight hundred twenty-five and 60/100 (\$69,860.00) dollars cannot be considered a definite amount of actual damages. Further, the late fees in the amount of eight thousand nine hundred sixty-eight and 62/200 (\$8,968.62) dollars cannot be considered a definite amount of actual damages.

II. IT WAS IMPROPER FOR THE TRIAL COURT TO FIND THAT APPELLANTS SHOULD BE LIABLE FOR ACTUAL DAMAGES RELATED TO CONVERSION BECAUSE RESPONDENT FAILED TO MEET ITS BURDEN OF PROOF REGARDING CONVERSION.

The trial court abused its discretion in finding that Appellants are “jointly and severally liable to Plaintiff for negligence and conversion in the amount of twenty-two thousand and 00/100 (\$22,000.00) dollars.” (Order p. 4). At the trial of this matter, Respondent put forth various documents demonstrating services supposedly rendered by the now-deceased contractor. (R. p. 39). However, Respondent failed entirely to put forth any evidence of the services actually being rendered, i.e. receipts for materials, photographs of the projects completed, purchase orders, or anything else which would evidence actual costs incurred. (R. p. 39). Further, no witness related to the contractor was put forth to verify the documents and corroborate Respondent’s testimony. Actual damages are awarded to a litigant in compensation for his actual loss or injury. Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964). The trial court must have a standard of proof for actual costs incurred by a party claiming injury. Herein, Respondent failed entirely to prove the costs incurred. (R. p. 39). Therefore, the costs are not proven and the twenty-two thousand and 00/100 (\$22,000.00) dollars cannot be considered actual damages.

III. RESPONDENT’S INITIAL BRIEF CONTAINS STATEMENTS WHICH ONLY BOLSTER THE SHORTCOMINGS RELATED TO THE TRIAL COURT’S RULING.

The Appellants would be remiss if they did not briefly address the factual statements set forth in Respondent’s initial brief which only serve to bolster the argument set forth in Appellants’ brief related to Respondent’s shortcomings at trial related to certain facts. As the Respondent properly sets forth in its initial brief, “Appellants must show that there was not enough evidence to reasonably support the court’s findings of fact. Townes Associated, Ltd., 266 S.C. at 81, at 221 S.E.2d 733 (1976).

Regarding the mitigation efforts apparently made by Shops at Wescott through Mr. Aiken, Respondent is not inaccurate as it relates to the facts highlighted in Respondent initial brief. Rather, the facts set forth further support the Appellant's position that Mr. Aiken's testimony was not sufficient to support a finding that he properly mitigated his damages. It is true that Mr. Aiken testified that he brought potential tenants to view the unit, marketed the vacancy to commercial brokers that specialize in restauranters, that his marketing effort was "100 percent" and that he would not handle it any differently than any other space, among other testimony (Hr'g Tr. 37:9-43:7 and Hr'g Tr. 74:6-14). However, it is also true that he did not put forth any supporting evidence of these efforts to go along with his testimony. Therefore, the absence of supporting evidence greatly reduces the ability of the trier of fact to determine whether Shops at Westcott acted reasonably to mitigate their damages. The same analysis and retort are necessary as it relates to the work that Shops at Wescott alleges was reasonable and necessary upon Sake House IV vacating the commercial space. Appellant believes that the record demonstrates a critical lack of supporting evidence put forth by Respondent.

IV. RESPONDENT IMPROPERLY AND INCORRECTLY APPLIED CASE LAW AND APPELLATE COURT RULES IN SUPPORT OF ITS ARGUMENT.

Respondent cites *Frampton v. S.C. Dep't of Natural Res.*, 432 S.C. 247, 851 S.E.2d 714 (2020) multiple times in its initial brief (Respondent's Br. 5-7) to support its argument. However, the supposedly supporting case law is entirely contained in the dissenting opinion of case. *Frampton*, 432 S.C. at 266, 851 SE.2d at 733. As such, the supporting case law should not be considered in this matter.

Additionally, Respondent cites Rule 207(b)(1)(B), (D), SCACR to support its argument that "failure to argue is an abandonment of the issue and precludes consideration on appeal. (Respondent's Br. 5) Rule 207, SCACR entirely pertains to "Transcript of Proceeding" and does

not have anything to do with “failure to argue” as used by Respondents. Finally, Respondent cites Rule 210(b), SCACR to support the same “failure to argue” argument (Respondent’s Br. 5). Rule 210(b) SCACR relates to Time for Filing and does not pertain to contents whereas Rule 210(c), SCACR states that “[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal.” Rule 210, SCACR is cited for “failure to argue is an abandonment” but Rule 210, SCACR states “(h) Review Limited to Record on Appeal. Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.”

CONCLUSION

For the reasons stated herein, this Court should reverse the judgment of the trial court. This case should be remanded to the trial court for re-trial.

September 9, 2022

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