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Mar 16 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Master-in-Equity

The Honorable Shannon M. Phillips, Master-in-Equity
Case No.: 2019-CP-42-03418

Appellate Case No. 2022-001304

Kesha Petty,

Appellant,

v.

Cathy Biggerstaff, individually and as owner of B&B Amusement, Inc., and B&B Amusement, Inc.,

Respondents.

INITIAL BRIEF OF RESPONDENTS

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INTRODUCTION

This matter involves a dispute between a property owner and a tenant. The tenant was in possession of Respondents' property for nine months and, during that time, stored inventory and held events at the space, all without paying a dime in rent, utilities, or taxes. Despite that, *Appellant* filed suit against *Respondents* on various causes of action and Respondents then asserted counterclaims. By the time the matter went to trial, only equitable claims for unjust enrichment remained. After hearing the evidence, Judge Shannon Phillips found that each side had valid claims and awarded the tenant, Kesha Petty Edwards $3,200.00 while awarding Respondents $10,265.80. The net of these numbers was an award to Respondents of $7,065.80. Ms. Edwards then appealed.

STATEMENT OF THE CASE

Respondent, B&B Amusement, Inc. (hereinafter "B&B") owned a parcel of property on Southport Road in Spartanburg, South Carolina (hereinafter the "Property"). See Transcript 14. In 2019, Appellant Kesha Petty Edwards sought to rent property for an event planning and event rental business. See Order of Judge Shannon Phillips, filed Sept. 2, 2022, at p.3. She made contact with B&B through its owner, Cathy Biggerstaff. See id.

Ms. Edwards and Ms. Biggerstaff then engaged in discussions about terms of a lease and a potential agreement to purchase the Property. See id. Though the details had not been worked out at that point and no documents signed, B&B allowed Ms. Edwards to move into the Property. See id. When she did so, Ms. Edwards performed some repair work including, among other things, cleaning and making drywall repairs. See id. at p.3 – 4. B&B paid Ms. Edwards for some of the work and material while they agreed on rent credits for some of the other work. See id. at p.18.

Ms. Edwards moved her inventory into the space and eventually began holding events. See id. at p.4. However, while B&B and Ms. Edwards were able to agree on some terms, they were ultimately unable to fully agree on the terms of a lease and Ms. Edwards was unable to obtain the financing to purchase. See id. Yet, Ms. Edwards refused to leave the Property, despite the fact that she had not paid any rent, utilities, or taxes to B&B. See id. at p.3. Ms. Edwards was actually in possession of the Property for nine months – from March of 2019 through November of 2019. See id.; Plaintiff's Responses to Requests for Admission No. 3. In fact, when Ms. Edwards filed the underlying lawsuit against the Respondents, Ms. Edwards was still in possession of the Property. See Order of Judge Phillips, p.3.

Ms. Edward's lawsuit asserted causes of action for (1) Breach of Contract; (2) Fraud; (3) Unjust Enrichment; and (4) Promissory Estoppel. Respondents file an Answer and Counterclaim, which also included a cause of action for Unjust Enrichment. Respondents filed a Motion to Dismiss the cause of action for Fraud and a Motion for Summary Judgment discussion. See Order of Judge Mark Hayes, filed June 5, 2020. Judge Mark Hayes granted these motions, leaving Ms. Edwards with the sole cause of action for Unjust Enrichment. See id. Respondents then moved to refer the matter to the Master-in-Equity, which motion was granted. See Order of Judge Keith Kelly, filed Nov. 24, 2021.

The case then proceeded to trial before the Honorable Shannon Phillips, Master-in-Equity for Spartanburg County. See Order of Phillips, p.1. At trial, Ms. Edwards claimed to be owed $12,253.27 in restitution. See id. at p.5. Of that amount, $6,560.00 was what Ms. Edwards represented as the cost of labor for the work. See id. Yet, all documentation for labor expenses was in the form of invoices that Ms. Edwards admitted she had written herself and had paid for in cash. See id.

After hearing the testimony, Judge Phillips determined that both parties were owed restitution under their theories of Unjust Enrichment. See id. She found that Ms. Edwards was entitled to a total of $3,200.00 based on cleaning of the Property and wall repair. See id. at p.5. However, Judge Phillips found that Ms. Edwards had failed to meet her burden as to the other amounts that she claimed. See id. As to the Respondents' claims, Judge Phillips found that Ms. Edwards "undoubtedly was benefited by being in possession of the Property for the nine-month period, during which she utilized the space for storage of her inventory and during which time she hosted a number of events. See id. at p.6 – 7.

The Court then ruled that, as B&B was entitled to $10,265.80, the smaller amount owed to Appellant should offset against this figure. See id. at p.7. The Court therefore determined that Appellant owed $7,065.80 to Respondent. See id. Respondent did not file a Motion to Reconsider but filed this appeal.

ISSUES PRESENTED

I. Did the Trial Court err in finding that a contract/agreement existed between the parties?[1]

II. Did the Trial Court err in finding that Cathy Biggerstaff and B&B Amusement were unjustly enriched by [Appellant] and that [Appellant] owed restitution to [Respondent]?

III. Did the Trial Court err in not declaring Cathy Biggerstaff?

STANDARD OF REVIEW

"A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another." Dema v. Tenet Physician Servs.–Hilton Head, Inc., 383 S.C.

[1] Though Respondent disagrees that the issues as stated by Appellant are truly the issues to be considered by this Court – as further explained below – Respondent is listing them as-written by Appellant and will address them in this order.

115, 123, 678 S.E.2d 430, 434 (2009). The remedy for unjust enrichment is restitution. See Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003). To recover restitution in the context of unjust enrichment, the plaintiff must show: (1) she conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. See Campbell v. Robinson, 398 S.C. 12, 24, 726 S.E.2d 221, 228 (Ct. App. 2012).

Notably, not just any benefit conferred meets the first element. See Inglese v. Beal, 403 S.C. 290, 742 S.E.2d 687 (Ct. App. 2013). Rather, the benefit must be non-gratuitous, either because it was conferred at the defendant's request or because the circumstances were such that the plaintiff could reasonably rely on the defendant for repayment. See id. at 298, 742 S.E.2d at 691.

When reviewing an action in equity, this Court may review the evidence to determine facts in accordance with its own view of a preponderance of the evidence." Skipper v. Perrone, 382 S.C. 53, 57, 674 S.E.2d 510, 512 (Ct. App. 2009). However, this Court must not disregard the findings of the trial court, which saw and heard the witnesses and was in a position to evaluate their credibility. See id.

DISCUSSION

I. DID THE TRIAL COURT ERR IN FINDING THAT A CONTRACT/AGREEMENT EXISTED BETWEEN THE PARTIES?

A. The Trial Court Made No Such Finding

The Appellant's primary argument in her brief is that Judge Phillips erred in finding that a contract and/or agreement existed between the parties and then enforcing the same when it had previously been found by Judge Hayes that no contract was formed. However, Judge Phillips's order makes it perfectly plain that she did *not* make such a finding.

In his order of June 5, 2020, Judge Hayes found that no contract existed between the parties. Judge Hayes wrote: "while the parties clearly were negotiating potential terms of the contract, no contract was ever signed, thus there was no meeting of the minds for purposes of an analysis under a breach of contract or promissory estoppel theory." See Order of Hayes, p.2. Appellant seems to argue that Judge Phillips nonetheless found that a contract did exist, but her order is clear that this was not her finding and Appellant does not and cannot cite to such a finding within the order.

Instead, Judge Phillips simply utilized those terms that *both parties* testified they had agreed upon in valuing damages under the Respondents' Unjust Enrichment cause of action. See Order, p.7; Transcript, p.58, ll. 4 – 10; Plaintiff's Answers to Interrogatories No. 9. In attempting to arrive at a value for damages on this cause of action, Judge Phillips wrote as follows:

> To determine the amount owed for the nine months that [Appellant] was in possession of the Property, *I find that the best valuation* is the rental figure that the parties had agreed upon in attempting to negotiate the lease. Rent restitution is therefore calculated at $800/month for the total of $7,200.

Id. (emphasis added). Appellant even acknowledges this fact in her brief, writing: "The Trial Court . . . erred by overturning the breach of contract in ruling that an agreement of terms did exist between the parties *and granted restitution* based on terms that did not exist." See Appellant's Brief, p.11 (emphasis added). Of course, if Judge Phillips was truly overturning Judge Hayes's order and enforcing an agreement between the parties, it would not be restitution, it would simply be damages.

To award damages under an Unjust Enrichment cause of action, Judge Phillips was – of course – required to determine the amount of the damages. In doing so with regard to the value of rent, taxes, utilities, and the like, she quite naturally looked to the parties' own agreement on the value of those items. Judge Phillips's determination in this regard was proper and logical and did not contradict the prior ruling of Judge Hayes.

B. This Argument Is Not Preserved for Appeal

As noted, Judge Phillips's analysis on this issue is proper. However, it must also be noted that the Appellant is raising this issue for the very first time in this appeal. As such, this issue is not preserved for appeal.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." Wilder Corp. v. Wilkie, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Preserving issues for appellate review is a fundamental component of appellate practice. See Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 564 S.E.2d 322 (2001).

Appellant did not argue at the trial that the parties' agreement on rent, utilities, and property tax could not be used in the valuation of damages on Respondents' Unjust Enrichment counterclaim. And, following the issuance of Judge Phillips's order, Appellant did not file a Motion to Reconsider, but simply proceeded with this appeal. As the argument was not presented to Judge Phillips for her consideration, it is not preserved for review by this Court.

II. THE TRIAL COURT ERRED IN FINDING THAT CATHY BIGGERSTAFF AND B&B AMUSEMENT WERE UNJUSTLY ENRICHED BY THE PLAINTIFF AND THAT THE PLAINTIFF OWED RESTITUTION TO DEFENDANT.

A. Appellant Repeats Her Initial Argument

Appellant argues in brief that the Court erred in finding that Respondent had proven a claim for Unjust Enrichment. First, Appellant again argues – incorrectly – that the trial court enforced a contractual agreement between the parties. As explained above, this is not what the trial court did. Moreover, this argument was not preserved for appellate review.

B. Appellant's Argument Consists of Mere Conclusory Statements

Appellant further presents broad factual arguments that are simply without basis and are unsupported by citations to the Record. For example, Appellant argues that "the Trial Court is just wrong in stating that Petty was enriched in any way by the Defendants." Appellant's Brief at p.15. This is a conclusory statement that is at odds with the testimony in the case. As noted, Appellant was in possession of the Property for nine months without paying a dime in rent, utilities, or taxes. See Order at p.3. Appellant held events at the Property during this time. See id. at p.4. *Respondent* paid the utility bills for the Property during this time. See id. at p.7.

Given this, there is ample evidence to support the trial court's ruling. Further, the conclusory statements of Appellant are of no appellate value. See Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) ("When an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal.").

III. THE TRIAL COURT ERRED IN NOT DECLARING CATHY BIGGERSTAFF PERSONALLY LIABLE

Appellant finally argues that the trial court erred in finding that Cathy Biggerstaff was not personally liable for damages in this matter. This argument fails for two reasons: First, the issue is moot and merely academic as the trial court's ruling resulted in no payment being owed by Respondents, but instead payment of damages being owed by Appellant. Second, the trial court's ruling was correct, as Appellant failed to present evidence to establish personal liability for Ms. Biggerstaff.

A. The Issue Raised by Appellant is Moot

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing

[c]ourt to grant effectual relief." Mathis v. S.C. State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). An appellate court will not decide moot or academic questions where there remains no actual controversy. See id.

As no damages were awarded to Respondent as a result of the trial, any questions regarding personal liability of Ms. Biggerstaff, as opposed to B&B, are simply moot. Therefore, this Court need not address the issue.

B. The Trial Court Correctly Concluded That Appellant Failed to Meet Her Burden

While Appellant filed suit against Cathy Biggerstaff in her individual capacity, Appellant failed to produce evidence at trial to support such a claim. As noted by the trial court:

> Defendants presented documents and testimony to establish that the Property was owned by B&B, sold by B&B, proceeds of the sale were received by B&B, all utilities were paid by B&B, checks were written from a B&B account, and the proposed lease was to be entered into between Plaintiff and B&B. Plaintiff presented no evidence to establish liability on behalf of Cathy Biggerstaff, the sole shareholder B&B. Plaintiff cites to no law or theory by which a shareholder of a corporation is liable for the alleged liability or obligations of the corporation, and such a position is contrary to South Carolina law. See, e.g., S.C. Code Ann. § 33-6-220(b) ("[A] shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct."); see also 16 Jade Street, LLC v. R. Design Constr. Co., 405 S.C. 384, 747 S.E.2d 770 (2013) (finding builder who was a member of the LLC did not have an independent duty to the plaintiff by virtue of holding a residential builder's license). Given this, I find that there is no genuine issue of material fact as to the liability of Cathy Biggerstaff and I grant her Motion for Summary Judgment on this point and find for her on the Defendants' remaining claim for Unjust Enrichment. See Tupper v. Dorchester County, 326 S.C. 318, 325, 487, 187, 191 (1997).

Order at p.8. Again, it must be noted that Appellant did not file a Motion to Reconsider, which would have been the proper vehicle for noting and presenting the evidence, law, or theory which the trial court found lacking. Given that, this issue too is not preserved.

Moreover, in her brief, Appellant provides analysis regarding piercing the corporate veil. Yet there is no reference to piercing the corporate veil in the Complaint. Instead, the allegations

against the company and the individual are simply melded together, without explanation. Moreover, even if the court were to consider the theory of piercing the corporate veil, Appellant acknowledges that the burden of proving the doctrine rests with Appellant. See Appellant's Brief, p.17. Yet, Appellant made no effort in discovery to acquire evidence on this matter, presented none at trial, and presents none even in the brief to this Court. In fact, in reciting the elements, Appellant acknowledges that there is "no mention that B&B was undercapitalized." Appellant's Brief at p.17.

The lack of evidence presented by Appellant on this issue stands in stark contrast to the detailed recitation of facts presented by the trial court. The court's ruling on this point is therefore well-supported and accurate.

CONCLUSION

After hearing the witnesses and considering the evidence, the trial court provided a well-reasoned opinion, awarding damages for Unjust Enrichment to both parties. Appellant has assailed this decision with un-preserved legal arguments and conclusory statements. Respondents therefore respectfully ask that the lower court's ruling be affirmed.

Respectfully Submitted,

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