

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Appellate Case No.: 2011-194147
Civil Action No.: 2010-CP-23-7266

Roper, LLC,Respondent,

vs.

Harris Teeter, Inc., Carolina & Georgia Immobilelienfonds I, L.P.,
GOA Realty Management, LLC, Germania of America, Inc.,
Miller & Martin, PLLC, New Spring Community Church,
John Doe, Richard Roe, and Doe Corporation,

of which Germania of America, Inc. is theAppellant.

PETITION FOR REHEARING

Appellant Germania of America, Inc. ("Germania") hereby petitions this Court for rehearing, pursuant to Rules 219, 221, and 240 of the South Carolina Appellate Court Rules, of its unpublished Opinion No. 2013-UP-327, filed July 17, 2013. That order affirmed the trial court's entry of summary judgment in favor of co-defendant, Harris Teeter, on the plaintiff Roper LLC's breach of contract claim. Germania's petition seeks rehearing and reconsideration of the Court's order on the issue of whether the June 2001 letter constituted a valid release of Harris Teeter's payment obligations under the Lease.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Roper LLC commenced this lawsuit against Appellant Germania of America, Inc., and others, including Harris Teeter, Inc., alleging fraud, negligent misrepresentation, and breach of contract in connection with the sale and lease of a parcel of commercial property located in Greenville, South Carolina. The Property at issue contains 8.353 acres, including a 60,217 square foot building and adjacent land for parking. The Property was initially occupied by Harris Teeter as the Tenant pursuant to a certain "Lease Agreement Between Roper Mt. Rd. Assoc., LLC and Harris Teeter, Inc." (the "Lease"). On or about July 9, 2001, Harris Teeter assigned its interests in the Property to Bi-Lo, Inc. pursuant to an Assignment and Assumption of Lease.

Prior to the assignment, Harris Teeter sent a letter to co-defendant, Carolina & Georgia Immobilelienfonds I, LP ("CGI"), which at the time was the landlord under the Lease. The letter, dated June 12, 2001, notified CGI of a "proposed" assignment of the Lease to Bi-Lo, which Harris Teeter indicated "may or may not close." (R. pp. 29-30). Among other things, Harris Teeter asked CGI to countersign the letter to confirm receipt of the letter and [to confirm] that CGI would look solely to Bi-Lo for performance of the Tenant's responsibilities under the Lease.

Plaintiff acquired the Property in April 2007, and thereafter, sought to enforce Harris Teeter's payment obligations under the Lease. Harris Teeter refused to pay any rent due under the Lease, claiming that CGI had released it of all of its obligations, including payment obligations, pursuant to the June 12, 2001 letter agreement between Harris Teeter and CGI.

On a Motion for Summary Judgment filed by Harris Teeter, the circuit court ruled that the June 2001 letter was a clear and unambiguous release of Harris Teeter's payment obligations under the Lease. The circuit court denied Plaintiff's and Appellant Germania's Motions to Alter or Amend Judgment Pursuant to Rule 59(e). Appellant filed an appeal with this Court, which affirmed the circuit court's entry of summary judgment in favor of Harris Teeter on the Plaintiff's breach of contract claim.

ARGUMENT

I. THE COURT OVERLOOKED A MATERIAL PROVISION IN THE LEASE IN DETERMINING WHETHER THE JUNE 2001 LETTER CONSTITUTES A VALID RELEASE OF HARRIS TEETER.

The Court's decision holds that the June 2011 letter constitutes a valid and effective release of Harris Teeter's payment obligations under the Lease. "The term 'release' has been defined as the 'relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced.' A release is an agreement providing that a duty owed to the maker of the release is discharged immediately." Ecclesiastes Production Ministries v. Outparcel Assoc., 374 S.C. 483, 492, 649 S.E.2d 494, 498 (Ct. App. 2007). "Whether a particular agreement constitutes a release is to be determined from the intent of the parties." Id.

The intent of the parties must be ascertained not just by looking at the June 2001 letter itself, but to the Lease terms in their entirety. "In South Carolina, two contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole." Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485, 492 (Ct. App. 2004). Thus, where one instrument

explains, amplifies, or limits the other, the documents will be construed together in order to give effect to the entire agreement. See Ellie, Inc., 594 S.E. 2d at 492-93, supra, and cases cited therein. “In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties.” Ellie, Inc., 594 S.E.2d at 493. Therefore, intent is determined by looking at the contents of the entire agreement, and not from any particular phrase or provision. Id.

For this reason, a determination that the June 2001 letter constitutes a valid release of Harris Teeter’s payment obligations, (and therefore a valid amendment to the Lease), necessarily requires that the intent of the parties (and CGI) to release Harris Teeter be expressed clearly, unequivocally, and without ambiguity, in the context of the entire Lease agreement. The Court must “ascertain and give effect to” the intention of the parties. Wallace v. Day, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct. App. 2010). As the Court noted in its decision, a contract is ambiguous “where the terms of the contract are inconsistent on their face or are reasonably susceptible of more than one interpretation.” Opinion No. 2013-UP-327, citing Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997).

In determining that the June 2001 letter clearly and unambiguously releases Harris Teeter from the Lease, the Court overlooked the importance of Section 15.4 of the Lease, which provides:

15.4 Continuing Liability of Tenant. In the event of an assignment or sublease, Tenant agrees that Tenant will remain jointly and severally liable, with the assignee or subtenant, for the payment of the rent reserved under this Lease and for performance of all of the other terms, conditions, and provisions of this Lease which are required to be performed by Tenant, notwithstanding any acceptance of rent or performance by Landlord directly from the assignee or subtenant.

This provision cannot be reconciled with the June 2001 letter, which states that CGI would “look solely” to Bi-Lo for performance of the Tenant’s “responsibilities” under the Lease. Section 15.4 of the Lease clearly states otherwise. (R. p. 63).

Section 15.4 expressly provides that – notwithstanding any agreement by the landlord to accept performance or payment of rent by the subtenant – the Tenant, i.e., Harris Teeter, would remain jointly and severally liable for payment of the rent.¹ Therefore, when read together as one agreement, the terms of the Lease and June 2001 are patently inconsistent. Because the June 2001 letter is an obvious contradiction to Section 15.4 of the Lease, the agreement is ambiguous as a matter of law and the order granting summary judgment to Harris Teeter should be reversed.

II. THE COURT ERRED BY READING WORDS INTO THE CONTRACT.

Furthermore, “[a] contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.” Southern Glass & Plastics Co. v. Kemper, 399 S.C. 483, 732 S.E.2d 205, 209 (Ct. App. 2012), quoting Hansen ex rel. Hansen v. United Servs. Auto. Ass’n, 350 S.C. 62, 68, 565 S.E.2d 114, 116 (Ct. App. 2002).

The June 2001 letter was written in the context of a long-term commercial lease arrangement, under which Harris Teeter was the tenant and responsible for payment of

¹ The author of the June 2001 letter also wrote: “If the Lease is not assigned by Harris Teeter to Assignee, Harris Teeter will continue to be solely responsible for the “Tenant’s” obligations under the Lease. (emphasis added). This statement is an implicit acknowledgement by Harris Teeter that, once the Lease was assigned, it would remain jointly and severally liable for payment of rent.

rent. It is simply not reasonable to conclude that CGI intended to amend material and essential terms of the Lease in such an informal fashion.² Generally understood business practices suggest that sophisticated parties would not typically amend a 20-year commercial real estate lease with an informal document that fails to use key words, such as “amendment”, “release”, “payment”, “rent”, or other similar language that would typically be used to reflect the parties’ intentions. The fact that none of these words are expressed in the June 2001 leaves serious doubt as to the intention of the parties.³

To determine, as this Court has, that the June 2001 letter is a clear and unambiguous release of Harris Teeter, necessitates a reading of terms into the agreement that were not clearly stated or intended by the parties. “The intention of the parties and the meaning[, which] are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.” Park Regency, LLC v. R&D Development of the Carolinas, LLC, 402 S.C. 401, 412, 741 S.E.2d 528, 534 (Ct. App. 2012) (quoting McPherson v. J.E. Serrine & Co., 206 S.C. 183,

² The June 2001 letter, which was authored and sent by a representative of Harris Teeter, never stated that it was intended to be an amendment to the Lease. To the contrary, the letter expressed rather casually that the purpose of the letter was to “notify” CGI of the proposed assignment and to “inform” CGI of “certain details concerning the transaction.” It is not at all clear from the June 2001 letter agreement that CGI understood and/or intended the letter to constitute an amendment to the Lease and/or a release of Harris Teeter’s joint and several liability for payment of rent.

³ Similarly, the term “responsibilities” is not defined in the June 2001, but could reasonably be interpreted to refer to the tenant’s multiple non-payment obligations under the Lease. (See, e.g., Lease §§ 6.2(b), 6.4, 12.5, 12.6, 10.1, and 11.1) (R. pp. 49-50, 56-58, and 60).

204, 33 S.E.2d 501, 509 (1945)). Similarly, “[t]he court is without authority to consider parties’ secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed.” Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). It is improper for a court to declare the intentions of the parties when those intentions have not been clearly expressed in the written agreement. Because the intent of CGI to release Harris Teeter from the Lease is not clearly stated or even implied, the Court should reconsider its decision affirming the lower court’s grant of summary judgment.

III. THE COURT’S DECISION IS CONTRARY TO PRECEDENT SET BY THIS COURT AND THE SUPREME COURT.

This Court and the South Carolina Supreme Court have found that contract terms that would appear to be much clearer than the ones at issue here to be ambiguous as a matter of law. See, e.g. Southern Atlantic Financial Servs., Inc. v. Middleton, 356 S.C. 444, 448, 590 S.E.2d 27, 30 (S.C. 2003) (finding that provisions in a promissory note were “patently ambiguous” where the note stated that the lender “may” give written notice of default, but that the date of acceleration on the note “must” be at least 30 days after such notice); S.C. Langston v. Niles, 265 S.C. 445, 454, 219 S.E.2d 829, 832 (S.C. 1975) (holding “unhesitatingly” that lease assignment was ambiguous because it did not “spell out” certain details relating to payment of rent and interest on a loan); Crystal Pines Homeowners Assoc. v. Phillips, 394 S.C. 527, 534, 716 S.E.2d 682, 686 (Ct. App. 2011) (finding deed of real estate was ambiguous with respect to the parties’ road maintenance obligations); Wallace v. Day, 390 S.C. 69, 76-77, 700 S.E.2d 446, 450 (Ct. App. 2010) (finding that terms of real estate contract’s default provisions were reasonably susceptible to more than one interpretation and that summary judgment

should not have been granted); Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 240, 672 S.E.2d 799, 803 (Ct. App. 2009) (finding that a settlement agreement was ambiguous, and therefore summary judgment was not appropriate, because the term “landlord/tenant claims” was reasonably susceptible to more than one interpretation); HK New Plan Exchange Property Owner I, LLC v. Coker, 375 S.C. 18, 23-24, 649 S.E.2d 181, 183-84 (Ct. App. 2007) (finding that a lease amendment which did not expressly release one of the co-tenants from the original lease was ambiguous, and therefore, the lower court’s entry of summary judgment was reversed); Bishop v. Benson, 297 S.C. 14, 17-18, 374 S.E.2d 517, 519 (Ct. App. 1988) (having “little difficulty in finding ambiguity in the contract regarding the intent of the parties” as to when certain conditions were to be performed).⁴

By way of further example, in the case of Wallace v. Day, *supra*, this Court found that the following language in a real estate contract was reasonably susceptible to more than one interpretation:

If Buyer or Seller fails to perform any covenant of this Agreement, the other may elect to seek any remedy provided by law, including but not limited to attorney fees and actual costs incurred (as defined in paragraph 17), or terminate this Agreement with a five day written notice.

Wallace, 700 S.E.2d at 450. The buyer had failed to close by the deadline under the contract, and the seller then treated the contract as abandoned by the buyer. The buyer sought specific performance, and argued that the default provision above provided for two options: “(1) elect to seek any remedy provided by law; or (2) terminate the agreement with a five day written notice.” *Id.* They argued that the seller had opted to

⁴ The Court further noted in Pee Dee Stores that the settlement agreement at issue did not contain a definition of “landlord/tenant claims” and noted that reasonable minds could “certainly differ” as to the meaning of “landlord/tenant claims.” *Id.*, at 803-04.

invoke the second alternative, but that she had failed to give the requisite notice. On the other hand, the seller argued that the contract allowed her to seek any remedy at law, and that she had no further obligation to the buyer. Id.

This Court found that the contract terms were ambiguous, and therefore, the parties' intent at the time of entering into the contract was an issue of fact that should not have been decided on summary judgment. Accordingly, the Court reversed the master's entry of summary judgment in favor of the buyer. Id.

This Court reached a similar conclusion in HK New Plan Exchange Property Owner I, LLC v. Coker, 375 S.C. 18, 649 S.E.2d 181 (Ct. App. 2007). There, the contract at issue was a commercial real estate lease that had been amended. The question was whether one of the original co-tenants had been released by the lease amendment, which stated in part:

This agreement is entered into by the Landlord and Tenant, as set forth above, and is intended to be an amendment of the Lease described above. Any provision of this amendment which is inconsistent with any provision(s) of the Lease shall supersede the provision(s) in the Lease. Also, any ambiguities and conflicts between this Amendment and the Lease shall be read in favor of the Amendment. Except as amended hereby, all other terms and conditions of the Lease shall remain in full force and effect, and the terms of this Amendment shall be fully incorporated into, and apply in addition to the terms of, the Lease.

HK New Plan, 649 S.E.2d at 182-83.

The Court found that the amendment created ambiguities in the contract. The amendment referred to and was executed by only one of the co-tenants as the tenant, but "did not specifically state" that the other co-tenant was released from the original lease. Id. at 184. Therefore, the Court found that "a question is raised regarding the parties' intent, and the matter should be determined by a jury." Id.

The June 2001 letter at issue in this case is even less clear than the lease amendment that was reviewed in HK New Plan, as the June 2001 failed to say anything about a purported amendment to the Lease terms. Based on the precedent set forth in HK New Plan and the other precedents cited above, the Court should reconsider its decision.

IV. THE COURT ERRED IN FINDING THAT THE JUNE 2001 LETTER AGREEMENT WAS SUPPORTED BY CONSIDERATION.

“An age-old definition of consideration is, ‘a benefit to the party promising, or a loss or detriment to the party to whom the promise is made.’” Shayne of Miami, Inc. v. Greybow, Inc., 232 S.C. 161, 167, 101 S.E.2d 486, 489 (S.C. 1957). “A valid offer ‘identifies the bargained for exchange and creates a power of acceptance in the offeree.’” Sauner v. Public Service Authority of South Carolina, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (S.C. 2003), quoting Carolina Amusement Co. v. Connecticut Nat’l Life Ins. Co., 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993).

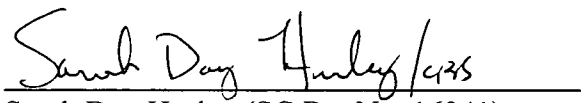
As the promisor, CGI should have obtained a benefit from giving the purported release. The problem with the June 2001 letter is that it fails to reflect or recite a benefit flowing to CGI, in exchange for providing a release to Harris Teeter. According to the Court’s decision, CGI received the benefit of having Bi-Lo liable for the Tenant’s responsibilities under the Lease. However, that analysis is flawed because Bi-Lo was already liable for those obligations under the terms of the Lease as previously agreed to between the parties. The terms of the Lease specifically provided that any subtenant or assignee would be jointly and severally liable, along with Harris Teeter, for payment of rent. (Lease, ¶ 15.4) (R. p. 63). Therefore, CGI gained no benefit by giving a purported release to Harris Teeter. “Consideration that is wholly past is not valuable consideration.” Future Group, II v. Nationsbank, 324 S.C. 89, 97, 478 S.E.2d 45, 49

(S.C. 1996). For this reason, the June 2001 letter does not constitute a valid release of Harris Teeter's payment obligations, as the purported release was not supported by consideration.

CONCLUSION

For all the reasons stated herein, the Court's Order and Decision dated July 17, 2013 is subject to further review and reformation.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sarah Day Hurley/crs". The signature is written in black ink and is positioned above a horizontal line.

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August 1, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
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D. Garrison Hill, Circuit Court Judge

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John Doe, Richard Roe, and Doe Corporation,

of which Germania of America, Inc. is theAppellant.

PROOF OF SERVICE

I certify this 1st day of August 2013 that I have served a copy of the PETITION
FOR REHEARING upon other counsel of record, by mailing same, postage prepaid in
the United States mail, addressed to the following:

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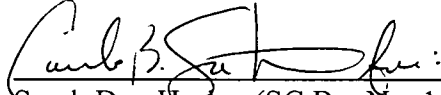
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August 1, 2013

VIA HAND DELIVERY:

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1015 Sumter Street
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Re: Roper, LLC v. Harris Teeter, Inc., et al.
Appellate Case No.: 2011-194147
File No.: 987.440

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of a Petition For Rehearing regarding the above-referenced matter. Also enclosed are the original and one copy of the Proof of Service and our check for the filing fee. Please file the original documents and return clocked copies to me via our officer courier. Thank you for your assistance with this matter, and please contact me if you have any questions.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

Sarah Day Hurley

SDH/tj

Enclosures

cc: John A. Hagins, Jr., Esquire
Stephen R. H. Lewis, Esquire
E. Benton Leinster, III, Esquire
W. Francis Marion, Jr., Esquire
Bonnie A. Lynch, Esquire
(w/enc.)