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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of
Appeals

Appellate Case No. 2023-001147

APPEAL FROM BEAUFORT
COUNTY
Court of Common Pleas

Marvin H. Dukes III,
Master in Equity and Special
Circuit Court Judge
Case No. 2020-CP-07- 00977

BOKF Real Estate Holding, LLC

Respondent,

v.

T & S Management, Inc. and Turan Strange

Appellants

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S RULE 59 MOTION?

STATEMENT OF THE CASE

This matter is before the Court on Appellant's appeal of the trial court's denial of its Rule 59 Motion to Alter and Amend an Order of Summary Judgment entered in favor of the Respondent on May 8, 2023. This is an admittedly unusual procedural stance caused by counsel's error that an Appeal of the Rule 59 Motion automatically encompassed an appeal of the underlying Rule 56 Order of Summary Judgment and thus counsel's error in not addressing the Order of Summary Judgment itself in the Notice of Appeal. Counsel attempted to cure this issue with a Motion to Amend filed with the Honorable Court, which was denied.

STATEMENT OF THE FACTS

The underlying lawsuit which is the subject of this matter arose from a restaurant lease between Appellant T & S Management, Inc. as tenant, and WD-1 Associates, LLC("WD-1"), as landlord for restaurant space at the Sea Turtle Center on Hilton Head Island, South Carolina. Appellant Turan Strange is the principal of T & S Management and a guarantor of the lease contract between WD-1 and T & S. For historical reference, the center was formerly known as Pineland Station, and the restaurant was known as Another Broken Egg. T & S Management, Inc. purchased the franchise rights to Another Broken Egg locations on Hilton Head Island, and also in Pooler, Georgia. The Hilton Head Island location closed in January, 2020. The Pooler location remains open. As of the date of

hearing on the Motion for Summary Judgment, Respondent BOKF no longer owned the subject premises or shopping center, having sold the property in or around October, 2022. BOKF actually acquired the subject premises and center, allegedly, through a bankruptcy sale process in the WD-1 2019 bankruptcy, in or around March, 2020, after Respondent T & S closed its business. BOKF was not the actual landlord for T & S at any time during its operation.

Subsequent its acquiring the shopping center, BOKF filed the underlying suit herein against T & S and its principal, seeking damages due to alleged breach of lease. Thereafter, BOKF leased the subject premises to another restaurant, approximately sixteen months after T & S closed. The new restaurant, whose trade name is “Gusto” acquired the premises with the the personal property owned by T & S.

ARGUMENT

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRPC. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Id. In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). The standard for review of a Rule 59 Motion is limited to determining whether there was an abuse of discretion." Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004). "An abuse of discretion arises where the trial judge was controlled

by an error of law or where his order is based on factual conclusions that are without evidentiary support." Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, [399 S.E.2d 779](#), 782 (1990).

Appellant avers that based on the record before the trial court, the trial judge ruled on a number of matters which constitute reversible error.

Appellant's Rule 59 Motion alleged that the trial court should reconsider its Order based on six alleged errors which are copied below.

1. Mr. Turan Strange's uncontroverted affidavit states that the conduct of Plaintiff's predecessor in interest, WD-1, delayed T & S from opening its business for more than one year according to Mr. Strange, and ultimately defeated Appellants's business purpose. Mr. Strange also testified regarding the promotional materials and promises made by WD-1 regarding shopping center foot traffic and aesthetics. Appellants argue that WD-1's conduct and omissions and maintenance of the center were and are a breach of the lease which occurred prior to and was a direct cause of Appellants alleged breach. The Order granting summary judgment does not recognize that WD-1's conduct as a breach or that such conduct excused Appellants performance or caused Appellants alleged breach.

2. The Order does not give Appellants financial credit for fixtures and equipment left at the restaurant premises, which accrued to landlord's benefit. Appellants submitted an affidavit from Turan Strange documenting his valuation of the remaining fixtures and equipment. At the Rule 59 Motion Appellants requested leave from the Court to include in the record Mr. Strange's amended affidavit, which updates his damages calculations, but which was not yet executed as of the date of the final hearing in the matter. The Court denied Appellant's request by not adjusting the damages in the final Order to

reflect Mr. Strange's calculations.

3. The Order stated that the Landlord under the lease did not have a duty to mitigate its damages. Appellants disputed this interpretation and request that the Court consider that no evidence was introduced that demonstrates that Respondent exercised any effort to mitigate damages or locate a new tenant. Rather, Respondent referred the matter to Sperry Van Ness, whom Respondent asked the court to presume exercised proper efforts based on its standing and reputation. Sperry did in fact produce a new tenant, which tenant was and is paying considerably less than Respondent for the same space, despite a much higher commercial market in 2021 and not factoring in the significant improvements that Appellants made to the property prior to vacating.

4. The Order granting summary judgment appears to assign credibility to Respondent's affiant witness, Warren Hill. At deposition approximately ten days before the subject hearing, Mr. Hill acknowledged that he did not prepare the financial damages calculations and that he did not have specific knowledge of how to calculate such damages. Further, Mr. Hill admitted at deposition that he did not have direct contact with the Appellants nor knowledge of the dealings between the prior landlord WD-1 and the Appellants prior to Respondent acquiring the leasehold interest. Mr. Hill admitted he had no knowledge regarding the history of the property site before BOKF took over in March, 2020, which was after Appellants closed.

5. Appellants contend that Plaintiff's damages, if any, should not include damages for the period prior to March 1, 2020, which is on or about the date that Plaintiff acquired the subject shopping center. The bankruptcy sale documents introduced by Plaintiff document that Plaintiff acquired the subject property—upon information and belief the sale

documents do not assign past due rents, late fees, additional rent or any other Defendant obligations which accrued prior to the acquisition. In sum, Defendants contend that Plaintiff's damages, if any, only accrued during the period between March 1, 2021 and October, 2022, when the property was allegedly sold to an unrelated third party.

6. Defendants argue that any damages awarded to Plaintiff should not include damages for late fees, penalty fees, or the differential between the lower rent that the new tenant, Gusto, is paying and the contract rent that T & S Management was paying pursuant to its lease.

[Items copied from Appellant's Rule 59 Motion for Reconsideration with updated references to Appellant and Respondent].

In sum, in their Rule 59 motion Appellants established there were a number of unresolved fact issues, the resolution of which were and are necessary to find summary judgment in favor of Respondent as a matter of law. Appellants also argued that the damages awarded should be reduced for the factors stated.

Appellants aver that all their arguments made in the Rule 59 motion would be reviewable in an Appeal of the Rule 56 Order granting summary judgment. However, under the limited standard of review applied to the appeal of the Rule 59 Order herein, Appellants must narrow the scope of review to areas where the trial court committed reversible error. Specifically, Appellants argue that Sections 2, 4 and 5 of its motion state issues where the trial court had limited discretion to rule as it did.

In Section 2 of their motion, Appellants argued that by denying the introduction of Mr. Strange's amended affidavit which fully described the value of the restaurant property left in the premises, for the benefit of the landlord and new tenant, the damages awarded far

exceeded the actual damages suffered. Appellants argue that the trial court further erred by not giving Appellants full credit for the property value stated in Mr. Strange's original affidavit filed in opposition to the motion for summary judgment.

In Section 4 of their motion, Appellants argued the trial court improperly permitted the damages testimony, by affidavit, of Respondent's witness, who previously admitted at deposition that he had no actual knowledge of the tenant's lease and circumstances nor did he compile and prepare the damages calculations introduced by Respondent and accepted by the Court. Appellants argued that these damages calculations were incomplete and erroneous and should have been prepared by a person with actual knowledge, and not a witness employed by the Respondent who assumed his role after Appellants restaurant closed and who no longer had responsibility for the shopping center as of the date of the Rule 55 hearing, because the subject shopping center property had been sold by Respondent to a third party.

In Section 5 of their motion. Appellants argued that any damages in the nature of rent differential, late fees and penalties which accrued before BOKF purchased the premises from the prior owner WD-1, in bankruptcy court, in March 2020. Further, alleged damages in the nature of rent differential, late fees and penalties which accrued after Respondent BOKF sold the premises in October, 2022 should not accrue to BOKF, but rather to its successor in interest.

CONCLUSION

For the reasons stated, Appellant's request that the Honorable Court reverse the trial court's order denying Appellants Rule 59 motion, and remit this matter for further trial on the merits.

Dated: February 13, 2024

Respectfully Submitted,

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February 12, 2023

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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Columbia, SC 29201

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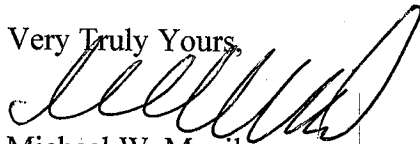
Re: BOKF Real Estate Holding, LLC v T & S Management, Inc. and Turan Strange
Appellate Case No. 2023-001147

Dear Mrs./Ms. Kitchings and Mrs./Ms. Harrison:

Attached/enclosed please find Appellant's Initial Brief.

Responsive to the Court's letter dated January 31, 2024, I missed the filing deadline because the matter was not correctly calendared by myself or my staff—our regular procedures for notices by mail have been altered due to the medical absence of a long time staff member, and this matter slipped past me. I did receive the January 31 letter by email. Please let me know if a formal Motion to File out of Time is suggested or required or if this letter suffices.

Very Truly Yours,


Michael W. Mogil

cc: Ed Kubec, Esq.