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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

Appellate Case No. 2020-001387
Case No. 2017-CP-10-5493

Shem Creek Development Group, LLC,..... Respondent,

v.

The Town of Mount Pleasant, South Carolina,..... Appellant.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Respondent Shem Creek Development Group, LLC ("SCDG") has filed its return to the Appellant Town of Mount Pleasant's Petition for Rehearing. That return, and the positions taken by SCDG, are undergirded by multiple fallacies. SCDG's reliance on such fallacies demonstrates the need for a rehearing as well as the issuance of an opinion that provides a meaningful legal analysis of the issues presented for appeal -- which a case of this importance and significance merits.

As a threshold point, the Town is critical that the Court issued a *per curiam* memorandum opinion pursuant to Rule 220(b), SCACR, which does not even specify which provision of Rule 220(b)(1) that it found applicable to the issues raised on appeal. Remarkably, SCDG takes that a

step further and speculates – with no basis in this Court's opinion – that the issues that the Court overlooked and did not address even with a string citation are issues to which the Court applied Rule 220(b)(2), which allows the Court to refuse to address "a point which is manifestly without merit." Rule 220(b)(2), SCACR. This Court's opinion certainly does not cite Rule 220(b)(2) or use any language to suggest that any of the issues on appeal raised by the Town are "manifestly without merit." Obviously, in the application of basic notions of due process, when this Court does find Rule 220(b)(2) applicable, the Court undoubtedly identifies what those issues are. In short, there is no merit to SCDG's contention that issues that SCDG admits are not addressed in *per curiam* opinion are issues to which this Court *silently* applied Rule 220(b)(2). That did not happen.

According to SCDG, those issues include the meaning of the word "due" in Section 6.01 of the Parking License Agreement ("PLA"), which is the central issue at the heart of the controversy. Citing no case law, SCDG insists that "the term 'due' has consistently been interpreted or used by both the Court of Appeals and the Supreme Court to apply to future obligations." *See*, Return, p. 4. That is not true. In fact, in the most definitive case on the meaning of "due," the Supreme Court ruled that "[t]he word 'due' means 'owed or owing as a debt.'" *Mathis v. Brown & Brown of South Carolina, Inc.*, 389 S.C. 299, 698 S.E.2d 773, 783 (2010). Moreover, in *Bluffton Towne Center, LLC v. Gilleland-Prince*, 412 S.C. 554, 772 S.E.2d 882 (Ct. App. 2015), the operative language in the lease did not use the word "due," but in addressing the obligation to pay future indebtedness, this Court used the word "due" with the modifying language "during the full term of the lease" or "during the full term" in order to incorporate future indebtedness. 772 S.E.2d at 890, 893. That demonstrates the prevailing

construction of "due" means "owing" or "owed" and requires additional modifying language not present in Section 6.01 to incorporate future indebtedness not yet incurred.

In a similarly conclusory manner, SCDG states that "no reasonable explanation" was provided by the Town as to the meaning and purpose of Section 8.17, but instead the Town offers "an absurd interpretation that would render the clause meaningless." *See*, Return, p. 4. That is not true, and frankly, by stating its position in a single conclusory sentence, SCDG fails to substantiate its position. In truth, as the Town explained previously, Section 8.17 preserves an already incurred obligation once the PLA expires or is terminated. Thus, if at the time of termination, the Town owed some amount of incurred but unpaid rent, the termination of the lease does not extinguish that existing indebtedness. In effect, Section 8.17 is not "meaningless" based on the plain and ordinary meaning of the phrase "rent payments due." Notably, and as ignored by SCDG, this reading of Section 8.17 is also correct given the phrase "sum owing." Like the use of the word "due," as discussed above, the use of the phrase "sum owing" means the sum that was already incurred and is due and payable. That is also consistent with the definition of "due" in *Mathis* such that "[t]he word 'due' means 'owed or owing as a debt.'" *Mathis,* 698 S.E.2d at 783. "Due" and "owing" are synonyms.

Yet, SCDG's fallacies are most prominently demonstrated in its discussion of the applicable standard of review, and most notably, the extremes SCDG goes to in trying to convert a question of law into a question of fact in an attempt to avoid the applicable *de novo* standard of review. As a position taken for the first time on rehearing, SCDG now insists that the trial court's interpretation of two contract provisions – Sections 6.01 and 8.17 – presented a question of fact *and indeed was treated by the trial court as a question of fact*. SCDG then goes to great lengths to try to show that to be the case – again despite not taking that position in its appellate

filings until now – now when SCDG recognizes that it cannot prevail under a *de novo* standard and needs this Court to apply the more lenient standard of review.

To recap, the Supreme Court has clearly held that "[i]t is a question of law for the court whether the language of a contract is ambiguous." *Callawassie Island Members Club v. Dennis*, 425 S.C. 193, 821 S.E.2d 667, 669 (2018). Likewise, "[t]he construction of a clear and unambiguous contract presents a question of law for the court." *South Carolina Department of Transportation v. M&T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 667 S.E.2d 7, 13 (Ct. App. 2008). And, of course, the standard of review for questions of law is *de novo*.

Thus, Sections 6.01 and 8.17 present a question of fact ***only if the trial court found those contract provisions to be ambiguous.*** The trial court did not do so. The trial court never ruled that Sections 6.01 and 8.17 of the PLA are ambiguous. In fact, SCDG conceded this very point when it stated: "the trial court did not express whether it found the relevant provisions ambiguous." *See*, Respondent's Brief, p. 34. Now, for the first time on rehearing, SCDG argues that "the trial court ***implicitly*** found Section 6.01 of the PLA ambiguous as revealed by its admission of and reliance upon parole [sic] evidence regarding the parties' intent underlying that provision." *See*, Return, p. 7. (Emphasis added). Remarkably, SCDG now insists that the most critical ruling in the case was made "implicitly" in a 42-page order which incidentally was submitted as a proposed order actually drafted by SCDG's counsel.

The fallacy of that argument is easily disproved for numerous reasons. First, in its 42-page order, the trial court made no findings of fact as to the intentions of the parties in the drafting of Sections 6.01 and 8.17. None. SCDG has pointed to no such findings. Second, SCDG claims that the trial court "admitted" and "relied" on parol evidence. SCDG disregards the actual language of the order its own counsel drafted. In explaining that it "admitted" parol

evidence over objection but then did not consider such evidence, the trial court states in footnote #5 as follows:

> Because the case was tried non-jury, the Court permitted SCDG to present this evidence subject to the objections of the Town. *See Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001) ("A trial judge's role in a bench trial is to admit all evidence and then evaluate in a nonjury setting.") As explained below, it is not necessary for the Court to determine whether the parking license agreement required SCDG to design the parking garage with no less than 276 total and 132 public spaces; therefore, the Court did not rely on such evidence in its findings of fact and conclusions of law stated herein.

(R. 56). Thus, based on *Brown v. Allstate*, the trial court admitted all evidence, but there is no indication that the trial court relied on any parol evidence that was admitted. Importantly, none of the parol evidence related to Section 6.01 was ever cited in the trial court's 42-page order, and there was no parol evidence even presented as to Section 8.17. There was only a single reference to "parol evidence" in the order, and that was on page 29 and did not address Section 6.01 or Section 8.17. (R. 55).[1] Lastly, if there is any question as to whether the trial court considered parol evidence to determine the parties' intent, the Court should refer to paragraph 102 of the "Conclusions of Law" section of the order. After quoting verbatim the language of Sections 6.01 and 8.17, the trial court writes: "When considered together, as they must, these two provisions evidence the parties' clear intention that the Town's obligation to pay rent for the entirety of the rental term survives the termination of the parking license agreement." (R. 67). Unquestionably, the trial court derived the parties' purported "clear intention" from the trial court's own construction of Sections 6.01 and 8.17 alone and without any consideration of parol evidence. The reason is obvious – the trial court found that Sections 6.01 and 8.17 are unambiguous, and as

[1] Notably, there is no recitation of any parol evidence in the "Findings of Fact" section of the 42-page order.

such, the construction of those provisions presented purely a question of law that the trial court answered – albeit in error. In sum, it is a total fallacy to now claim at the rehearing stage that the trial court "implicitly" found Sections 6.01 and 8.17 to be ambiguous and relied on parol evidence which was never mentioned in its order to interpret the meaning of those contract provisions. This Court is urged to reject that obvious fallacy and this improper attempt to convert a question of law into a question of fact so as to convince this Court to apply a more advantageous standard of review – a standard that clearly does not apply. Quite simply, there is no indication whatsoever – explicitly or implicitly – that the trial court treated Sections 6.01 and 8.17 as being ambiguous and as presenting a question of fact rather than a question of law. To now suggest otherwise is entirely disingenuous on the part of SCDG and amplifies the Town's case that a rehearing is indeed warranted.

Finally, as a last-ditch effort, SCDG resorts back to its additional sustaining ground which this Court correctly did not address or adopt in its *per curiam* opinion. SCDG argues that the Town's interpretation of Sections 6.01 and 8.17 is "abhorrent to notions of common sense and fairness" and would allow the Town to terminate the PLA "with no consequence." *See*, Return, p. 11. However, "[i]t is not the function of the court to rewrite contracts for the parties." *Low County Open Land Trust v. Charleston Southern Univ.*, 376 S.C. 399, 656 S.E.2d 775, 781 (Ct. App. 2008). "Courts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or to make new contracts for the parties." *Id*. Moreover, the construction of the PLA required by the actual language of Sections 6.01 and 8.17 does not permit the contract to be terminated "with no consequence," as SCDG suggests, given that the Town would be liable for rent payments that accrued at the time

the PLA was terminated. In this case, it was SCDG which terminated the PLA, and it did so ***before any rent payments became due and payable***. That is undisputed.

Importantly, there is no valid basis for excusing SCDG from its burden of proving all three elements of its breach of contract claim, including "the existence of a contract, its breach, and damages caused by such breach." *Johnson v. Little*, 426 S.C. 423, 827 S.E.2d 207, 210 (Ct. App. 2019). Here, the failure to prove recoverable damages is fatal to SCDG's claim. Yet, SCDG asks this Court to excuse that failure by urging this Court to rewrite the PLA to provide more favorable terms for SCDG. Quite obviously, that is not the role of this Court.

For the reasons stated, the Appellant Town respectfully requests that the Court rehear its decision in this case and reverse the judgment entered in SCDG's favor, including the award of attorney's fees and costs, and remand for entry of judgment in favor of the Town.

Respectfully submitted,

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Shem Creek Development Group, LLC,..... Respondent,

v.

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court' s Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Appellant Town of Mount Pleasant, does hereby certify that service of the **Reply Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by email only this the 26th day of February 2024 as follows:

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Via Email Only
The Honorable Jenny Abbott Kitchings
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RE: Shem Creek Development Group, LLC v. The Town of Mount Pleasant, South Carolina
Appellate Case Number: 2020-001387
Civil Action Number: 2017-CP-10-5493
Our File Number: 79.20381

Dear Ms. Kitchings:

Pursuant to Section (b)(2)the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (as amended May 6, 2022), please find enclosed for filing the **Reply Memorandum in Support of Petition for Rehearing** with regard to the above referenced appeal. By copy of this letter, I am serving copies on all counsel of record by email only pursuant to Section (d)(1) of the same Supreme Court Order.

If you have any questions, please advise. Thank you for your assistance.

Sincerely,

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosure

cc: E. Brandon Gaskins, Esquire *(w/ Enclosure, Via Email Only)*
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