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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable G.D. Morgan, Jr.

Case No. 2023-CP-23-02302
Appellate Case No. 2023-001957

BA Holdings, Inc.,

Appellant,

v.

Zay N Limo, LLC, Sharif Farhan, and Mohammad Farhan,

Respondents.

INITIAL BRIEF OF APPELLANT

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II. Documents in the record contradict the court's findings of fact and legal conclusions. Did the court err in concluding that there are no genuine issues of material fact and Zay was entitled to judgment as a matter of law?

III. BA Holdings and BA Greenville disclosed to Zay that a new Anderson County trampoline park would take business away from its Greenville location and that it needed to be compensated for this lost business. Zay agreed to pay for the ability to locate in Anderson. BA Greenville released the Anderson Territory to Zay, and Zay benefited financially. Did the lower court err in ruling that BA Greenville and BA Holdings could not have unjust enrichment claims against Zay as a matter of law?

IV. BA Holdings assigned its rights and duties in its contract with Zay to BA Greenville. Did the lower court err in concluding that as a matter of law this assignment was an impermissible amendment to the Zay contract?

INTRODUCTION AND STATEMENT OF THE CASE

Zay N Limo, LLC ("Zay") operates a Big Air Trampoline Park franchise in Anderson, South Carolina under a franchise agreement with Big Air Franchising, LLC ("Big Air"), a California company. Big Air allowed Zay to open a franchise in Anderson after BA Greenville, LLC released its exclusive rights to Anderson County zip codes (the "Anderson Territory") in exchange for recurring monthly payments from Zay, pursuant to an Assignment and Assumption Agreement (the "Contract"). Since opening on or about March 2023, Zay has refused to make any payments due under the Contract.

As a result of Zay's nonpayment, BA Holdings, Inc., as the counterparty to the Contract, filed this action on May 9, 2023, asserting causes of action for breach of contract, unjust enrichment, and breach of guaranty. (Compl. 3-5). Respondents filed an answer and counterclaims on June 8, 2023, asserting counterclaims for violation of the South Carolina Business Opportunity Act, unfair trade practices, breach of contract, breach of contract accompanied by fraudulent act, and declaratory judgment. (Answer & Counterclaims 17-21).

On August 14, 2023, Respondents moved for partial summary judgment as to all claims asserted by BA Holdings, contending that BA Holdings had no rights to assign to Zay under the Contract. (Mot. Partial Summary J.). On September 25, 2023, BA Holdings filed a motion to amend its complaint to add BA Greenville as a Plaintiff because BA Greenville should have been the counterparty to the Contract. (Mot. Amend Complaint).

On October 10, 2023, the circuit court heard argument on BA Holdings' motion to amend and Zay's motion for partial summary judgment. At the time of the hearing, discovery had barely begun, Respondents had not responded to BA Holdings' first set of written discovery, and no depositions had taken place. (Order at 16-17 (identifying limited written discovery exchange between the parties); Mot. Reconsider 3 (Oct. 26, 2023)). The court issued a Form 4 Order on

October 16, 2023, indicating its decision to grant Zay's motion for partial summary judgment, deny BA Holdings' motion to amend, and directing counsel for Zay to draft a formal order. (Form 4 (Oct. 16, 2023)). On October 26, 2023, BA Holdings filed a placeholder motion for reconsideration while awaiting entry of the formal order. (Mot. Reconsider (Oct. 26, 2023)). On November 7, 2023, the court entered its formal order denying BA Holdings' motion to amend and granting Zay's motion for partial summary judgment. (Order (Nov. 7, 2023)). BA Holdings filed a motion to reconsider on November 17, 2023, which was denied by Form 4 on November 21, 2023. (Mot. Reconsider (Nov. 17, 2023); Form 4 (Nov. 21, 2023)). BA Holdings filed its Notice of Appeal in this Court on December 20, 2023. (Notice Appeal).

STATEMENT OF THE FACTS

Big Air Franchising, LLC ("Big Air") sells franchises to operate Big Air Trampoline Parks throughout the United States. In 2017, BA Greenville, LLC ("BA Greenville") entered into a franchise agreement with Big Air for exclusive rights to operate Big Air Trampoline Parks in certain zip codes in the South Carolina Upstate, including Anderson County (hereinafter, the "Anderson Territory"), and BA Greenville opened a Big Air Trampoline Park in Greenville. (Big Air Franchise Agreement with BA Greenville at 1). BA Holdings, Inc. ("BA Holdings") is the sole member of BA Greenville and Dustin Pelletier ("Pelletier") is the sole shareholder of BA Holdings. (Dustin Pelletier Aff. ¶¶ 1-2 (Oct. 5, 2023)).

In 2018, BA Holdings became the Regional Developer for Big Air for the State of South Carolina. (Regional Developer Agreement at 1). In this role, BA Holdings is responsible for advertising, recruiting, screening, and reviewing prospects for Big Air franchises throughout South Carolina and it receives a commission on the franchise fees paid by new franchisees and a percentage of monthly royalties. (Reg. Developer Agreement at B-3, B-7).

In July 2020, Mohammad Farhan ("Farhan") contacted Big Air through its online inquiry process regarding a franchise opportunity in South Carolina. Big Air provided Farhan with sales and disclosure requirements for a franchise opportunity and disclosed that BA Holdings was the regional developer for Big Air, and Big Air introduced Farhan to Pelletier. (Pelletier Aff. ¶¶ 5-7). Through initial discussions, Pelletier learned that Farhan was interested in opening a Big Air Trampoline Park in the Anderson Territory. Pelletier disclosed to Farhan that BA Greenville held exclusive rights to the Anderson Territory and that it was not available, and instead recommended other territories in South Carolina that were not subject to an exclusivity agreement or other franchise agreement. Farhan declined these other territories in favor of pursuing the Anderson Territory. (Pelletier Aff. ¶¶ 11, 14). Because of BA Greenville's exclusivity, Big Air could not have sold a new franchise to Farhan in the Anderson Territory without the release of the Anderson Territory zip codes from BA Greenville back to Big Air. (Pelletier Aff. ¶¶ 12, 13); Email Kevin Odekirk to Dustin Pelletier and accompanying unsigned affidavit ¶ 9 (Aug. 29, 2023)). Pelletier decided to move forward with an agreement to release the Anderson Territory to Farhan in exchange for ongoing monthly payments. (Pelletier Aff. ¶ 16).

During negotiations, Pelletier disclosed to Farhan that his Greenville Big Air location drew customers from the Anderson Territory, and Pelletier estimated that a new Big Air location in Anderson would take away approximately 10% of annual revenues and 10% of net profits from BA Greenville. (Pelletier Aff. ¶ 15; Ex. 4 Pl's Mot Reconsider (Email Pelletier to Farhan (Sep. 23, 2020)); Ex. 6 Pl's Mot Reconsider (handwritten notes)). Farhan's own handwritten notes reflect BA Greenville losing an estimated 10% of revenues ($374,369) and 10% of net profits ($104,418) from the opening of a Big Air franchise in Anderson. (Ex. 6 Pl's Mot Reconsider (handwritten notes)). Pelletier told Farhan that BA Greenville would not release the Anderson

Territory without receiving payment for the same to make up for the loss of business and profit. (Ex. 4 Pl's Mot Reconsider (Email Pelletier to Farhan (Sep. 23, 2020)).

Ultimately, Pelletier and Farhan agreed that BA Greenville would release the Anderson Territory in exchange for monthly payments from Farhan's new entity Zay N Limo, LLC ("Zay") equal to: (a) one percent of its monthly gross sales; (b) five percent of its monthly net profits; and (c) a monthly management fee of five thousand and 00/100 Dollars ($5,000.00). (Ex. 4 Pl's Mot Reconsider (Email Pelletier to Farhan with draft term sheet (Nov. 27, 2020)). The draft term sheet correctly identified BA Greenville as the party that would release the Anderson Territory zip codes. (Ex. 4 Pl's Mot Reconsider (Email Pelletier to Farhan with draft term sheet (Nov. 27, 2020) ("Big Air Greenville will release exclusive zip code territory in and around Anderson for exclusive marketing access to Big Air Anderson.")).

On February 18, 2021, BA Holdings and Zay entered into an Assignment and Assumption Agreement (the "Contract") that purported to assign the Anderson Territory to Zay in conjunction with Zay's franchise agreement with Big Air. (Assignment Agreement §§ 1, 2, and Exhibit A). The Assignment Agreement was initially drafted by BA Holdings, but the parties exchanged multiple drafts and Respondents made changes to the Assignment Agreement before it was executed. Mohammad Farhan and his uncle Sharif Farhan each signed a personal guaranty stating that they were personally liable for payment and performance of the Contract. (Compl. Exhibit 2).

The parties inadvertently listed BA Holdings as Zay's counterparty to the Contract instead of BA Greenville. (Pelletier Aff. ¶ 21). This oversight was only made in the introductory paragraph and signature line, as the rest of the document used "Assigning Party" and "Assuming Party." (Contract). In addition, the Contract should have provided for the release of the Anderson Territory back to Big Air and not for direct assignment to Zay. (Pelletier Aff. ¶ 21). To address

these oversights, BA Holdings assigned its interest in the Contract to BA Greenville, making BA Greenville the effective counterparty releasing the Anderson Territory and receiving the benefit of doing so. (Assignment of Contract §§ 1-2 (Aug. 14, 2023)).

After the payment dispute arose and this lawsuit began, in an email to Pelletier, Big Air President Kevin Odekirk indicated his willingness to sign an affidavit, in exchange for a release, stating that BA Greenville had exclusivity to the Anderson Territory and could have pursued another location in Anderson, Big Air could not have granted territory to Zay overlapping BA Greenville without BA Greenville's consent and release of zip codes back to Big Air, and that Big Air knew the parties had reached an agreement related to the Anderson Territory. (Email Kevin Odekirk to Dustin Pelletier and accompanying unsigned affidavit (Aug. 29, 2023)). Pelletier chose not to sign Big Air's overbroad release, so Odekirk never executed the affidavit.

Despite the errors in the mutually drafted Contract, it is clear that Respondents: (a) knew BA Greenville had exclusive rights to the Anderson Territory; (b) knew BA Greenville would not give up those rights without payment; (c) knew a Big Air franchise operating in the Anderson Territory would result in at least $100,000 in losses to BA Greenville per year; (d) knew that Big Air would not, and could not, sell a franchise location in Anderson County without the consent and release from BA Greenville; and (e) agreed to pay for the right to operate in the Anderson Territory. Zay opened its Anderson Big Air Trampoline Park and has never made any payments required by the Contract.

STANDARD OF REVIEW

Rule 15, SCRCP - Motion to Amend

The denial of a motion to amend is reviewed for an abuse of discretion. *Skydive Myrtle Beach v. Horry Cty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 588 (2019). Leave to amend a pleading shall be freely given when justice so requires, and the grant of such leave does not prejudice the

other party. Rule 15, SCRCP. The party opposing amendment has the burden of establishing that the motion should not be granted. *Stanley v. Kirkpatrick*, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2004). There are limited reasons to deny a motion to amend, including "bad faith, undue delay, or prejudice," or in rare cases "if the amendment would be clearly futile." *Skydive*, 426 S.C. at 182, 826 S.E.2d at 588 (quoting *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988) (internal quotation marks omitted)).

Rule 56, SCRCP - Summary Judgment

"An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment." *Spence v. Wingate*, 395 S.C. 148, 156, 716 S.E.2d 920, 925 (2011).

Summary judgment is only appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "A fact is deemed 'material' if proof of its existence or nonexistence would affect the disposition of the case under the applicable law." *Knight v. Am. Nat. Fire Ins. Co.*, 831 F.Supp. 1284, 1285 (D.S.C. 1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "An issue of material fact is 'genuine' if the evidence offered is such that a reasonable jury might return a verdict for the non-movant." *Id.*

"Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002) (citing *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991)). When deciding whether a genuine issue of material fact exists, the court must view "the evidence and all inferences which can be

reasonably drawn therefrom . . . in the light most favorable to the nonmoving party." *Id.* at 361-62, 563 S.E.2d at 333 (citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997)).

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* at 363, 563 S.E.2d at 334 (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000)). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Id.* at 362, 563 S.E.2d at 333 (citing *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000)). "Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Id.* at 363, 563 S.E.2d at 334 (citing *Baughman,* 306 S.C. 101, 410 S.E.2d 537). "This means . . . that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Id.*

ARGUMENT

I. BA Greenville's Claims Against Zay in the Proposed Amended Complaint Were Not "Clearly Futile."

The lower court abused its discretion in denying BA Holdings the ability to amend its complaint based on futility. BA Holdings moved to amend its complaint to correct the result of what essentially amounts to a scrivener's error in the Contract with Zay, naming BA Holdings when it should have been BA Greenville. The amended complaint sought to add BA Greenville's claims against Zay. In opposing BA Holdings' amended complaint, Respondents did not argue that BA Holdings' proposed Amended Complaint was made in bad faith, untimely, or prejudicial, and the Order did not deny BA Holdings' motion to amend on any of these grounds.[1] Instead,

[1] Respondents would not be prejudiced in any way by the addition of BA Greenville as a party. All of Respondents' defenses and counterclaims are preserved, they are put at no disadvantage, and discovery has barely begun.

Respondents opposed amendment solely on the grounds that such an amendment would be futile, meaning it was impossible for BA Greenville to have any viable claims against Zay. This is the sole basis upon which the lower court denied BA Holdings' motion to amend. (Order at 2, 22). This was error.

The South Carolina Supreme Court has cautioned that "[a] court's decision to deny a motion to amend should not be based on the court's perception of the merits of an amended complaint," and only in "rare cases" may a court deny a motion to amend "if the amendment would be clearly futile." *Skydive Myrtle Beach*, 426 S.C. at 182, 826 S.E.2d 589. The only appellate case examples of such "rare cases" all include situations where a party is determined to be statutorily immune from suit. *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 632, 636, 743 S.E.2d 808, 813, 814 (2013) (affirming denial of motion to amend where a related case between the same parties had been ongoing for seven years and the court determined the defendant was immune from suit under the plaintiff's theory of liability); *Jennings v. Jennings*, 389 S.C. 190, 208-09, 697 S.E.2d 671, 680-81 (Ct. App. 2010) (denying motion to amend to add party where statutory basis for liability only extends to persons who committed statutorily prohibited acts and there were no allegations of such acts by the new party), *rev'd on other grounds, Jennings v. Jennings*, 401 S.C. 1, 736 S.E.2d 242 (2012); *Higgins v. Medical Univ.*, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (affirming summary judgment in favor of defendant and observing that any amendment would be futile where doctor defendant had statutory immunity from suit).

The *Skydive* Court characterized futility as akin to impossibility, that is, would it be impossible for BA Greenville to succeed on an amended complaint against Zay. *See Skydive Myrtle Beach*, 426 S.C. at 192, 826 S.E.2d 594 ("[W]e cannot definitively say it would be impossible for [plaintiff] to succeed with an amended pleading. Allowing leave to amend the

complaint, therefore, was not clearly futile."). In denying BA Holdings' motion to amend as futile, the lower court effectively determined that it would be impossible for BA Greenville to succeed on its claims against Zay. The court's conclusion was based on its perception of the merits BA Greenville's claims:

> Notwithstanding, even assuming *arguendo* that none of the above contract law applies here, Plaintiff's new assignee, BA Greenville, LLC, would not have had the right to enter into the Contract with Defendants to begin with, either. *Nor does it have any equitable right to restitution*. In sum, the two agreements with the franchisor produced by Plaintiff establish that neither Plaintiff, nor its new assignee, BA Greenville, LLC, *were in the position to double sell and charge extra fees to Defendants* for the rights and duties to open a new Big Air franchise business in Anderson. Attempting *to do so was wrong and inequitable*.

(Order at 20-21 (first emphasis in original, subsequent added)). In this section of the Order, the court concludes, before the amended complaint is on file, before anyone is deposed, and when discovery has barely begun, that BA Greenville would not have had the right to enter into the Contract with Zay, and that BA Greenville tried to "double sell and charge extra fees" to Zay, which "was wrong and inequitable," and for which BA Greenville has no "equitable right to restitution." (Order 20-21). A quick review of the record shows just the opposite. BA Greenville was entitled to enter an agreement with Zay to release the Anderson Territory, and it was *wrong and inequitable* for Zay to agree to pay BA Greenville to release the Anderson Territory, enter a franchise agreement with Big Air on this basis, open a franchise in Anderson that takes away revenue and profit from BA Greenville, and then refuse to pay BA Greenville for this benefit.

BA Greenville's Claims Against Respondents

Pursuant to its franchise agreement with Big Air, BA Greenville held exclusive rights to the Big Air Trampoline Park franchise across certain South Carolina Upstate zip codes. (BA Greenville Franchise Agreement § 4.1, Attachment A). This list of zip codes encompasses those in the Anderson Territory transferred to Zay under the Contract. (*Compare* BA Greenville

Franchise Attachment A, *with* Contract Exhibit A, and Zay Franchise Agreement, Exhibit A to Pelletier Aff.). Zay could not have opened a Big Air franchise in Anderson County without these zip codes being released by BA Greenville, which Big Air President Kevin Odekirk acknowledged in an email to Pelletier stating that he would sign the attached affidavit to that effect. (Email Kevin Odekirk to Dustin Pelletier and accompanying unsigned affidavit ¶ 9 (Aug. 29, 2023)).

In his email to Pelletier, Big Air President Kevin Odekirk attached a draft affidavit that he understood "to incorporate all the items we spoke about yesterday," and directing Pelletier to "simply execute and return the release, and I will execute and send [the affidavit] for your use." (Email Kevin Odekirk to Dustin Pelletier and accompanying unsigned affidavit (Aug. 29, 2023)). Mr. Odekirk was willing to make the following relevant affirmations in the draft affidavit stating that: (1) BA Greenville had exclusive rights to the Anderson Territory; (2) BA Greenville had the option to pursue a new location in Anderson; (3) Big Air could not have granted Zay the Anderson Territory without BA Greenville's release; and, (4) BA Greenville's released zip codes were the basis for Zay's franchise agreement with Big Air. (Email Kevin Odekirk to Dustin Pelletier and accompanying unsigned affidavit ¶¶ 8-10, 12-14 (Aug. 29, 2023)).

Pelletier explained these same restrictions on the Anderson Territory to Farhan during negotiations:

> As you know, the Anderson territory is *already owned by the Greenville Big Air* location. You and I discussed this. To keep things easy, I brought up other geographic territories that are completely available without having to carve our Anderson from the Greenville territory. After much discussion, you and your uncle made it clear that the Anderson territory is your preference and that other territories would not work for you. I completely understand.
>
> If we are to divide the Greenville territory into a Greenville and an Anderson territory, *this would have a sales impact on the Greenville location. Based on our sales data, the Anderson market consists of 10% of our total sales*. Having a Big Air in Anderson would be fantastic for the Anderson area but *it would reduce at least 10% of Greenville's sales*. Because of this, *I have always intended to build an Anderson location for myself* because the loss of revenue would still be mine, just

> at a different location. Nevertheless, I am willing to work out an agreement with you so that you can open a Big Air location in Anderson and have that territory carded out of the Greenville existing territory.

(Email Pelletier to Farhan (Sep. 23, 2020) (emphasis added)). Farhan's own handwritten notes reflect Pelletier's estimate of the negative impact opening an Anderson location would have on BA Greenville. (Ex. 6 Pl's Mot Reconsider (handwritten notes reflecting loss of 10% of sale and net profits)).

In agreeing to release the Anderson Territory, BA Greenville gave up its rights to exclusivity and potential expansion into Anderson. Zay agreed to pay for these rights but has never done so. (Email Pelletier to Farhan (Nov. 27, 2020) (draft terms of release); Assignment Agreement § 2 (listing consideration for this release)). BA Greenville has suffered financial harm from Zay's actions and has viable claims against Zay.

The lower court abused its discretion in ruling that allowing BA Holdings to amend its complaint would be clearly futile and in issuing an advisory opinion on the merits of BA Greenville's claims.[2] Accordingly, the Order should be reversed, and BA Holdings permitted to amend its complaint to add BA Greenville as a party.

II. In Granting Summary Judgment, the Lower Court Weighed the Facts in the Movant's (Zay's) Favor and Ignored Genuine Issues of Material Fact.

When granting summary judgment, the lower court did not properly weigh the evidence in a light most favorable to the non-moving party (BA Holdings, BA Greenville), and it ignored numerous genuine issues of material fact. In its findings of fact, the lower court made a number of factual findings concerning the scope of BA Greenville's rights under its franchise agreement

[2] Such a determination on BA Greenville's claims effectively amounted to an advisory opinion, which courts are prohibited from issuing. *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 577 n.6, 703 S.E.2d 197, 204 n.6 (2010) (noting that it was an advisory opinion and error for the lower court to discuss the manner and mode of class certification in an order on motion to strike class allegations).

with Big Air and whether those rights could have given rise to causes of action against Zay, ultimately concluding that they could not. (Order at 12-15, 20-21). Assuming the lower court could reach such conclusions about a non-party's (BA Greenville) claims in a proposed Amended Complaint, which Appellants deny[3], the court erred in concluding that there were no genuine issues of material fact concerning BA Greenville's claims against Respondents.

In moving for summary judgment, Respondents had the burden of demonstrating the absence of a genuine issue of material fact when viewing all evidence and inferences in the light most favorable to BA Holdings and BA Greenville. *Lanham*, 349 S.C. at 361-62, 563 S.E.2d at 333. Respondents also carried the burden of showing that such a drastic remedy should be granted before a trial on the merits, and especially where discovery had barely begun, and the parties did not have the "full and fair opportunity to complete discovery." *Id.* at 363, 563 S.E.2d at 334.

One Franchise

In reviewing BA Greenville's Franchise Agreement with Big Air, the court concludes that the franchise agreement only gave BA Greenville the right to operate one franchise in a defined territory. (Order at 12). That one franchise was already located in Greenville and, as such, BA Greenville "had no right to operate a second one in Anderson . . . and could not sell such a right that it did not own." (Order at 13). This led the court to conclude that as a matter of law:

> Plaintiff's new assignee of the Contract, BA Greenville, LLC, only had the right, license, and duty to operate the "one," already existing franchise business in Greenville; and numerous conditions and restrictions prohibited and *rendered "void" any attempted assignment* of the same without the franchisor's *"prior written approval" (which it admittedly did not receive)*. Because neither Plaintiff, nor BA Greenville, LLC, had the rights they purported to sell Defendants and *made representations and warranties about that were indisputably false*, neither has a valid claim under the Contract or the alternative theory of unjust enrichment asserted in the Complaint and the proposed amended pleading.

[3] *Id.* (impermissible advisory opinion).

(Order at 21 (emphasis added)). However, the court failed to acknowledge that Big Air is not a party to this action, Big Air has not been deposed, and Big Air has not produced any documents from which the lower court could determine what Big Air understood about the agreements it has with BA Holdings and BA Greenville. Of critical importance is the fact that Big Air and BA Greenville could modify or amend their Franchise Agreement at any time by mutual consent. (BA Greenville Franchise Agreement § 21.11).

Section 15.4 of the BA Greenville Franchise Agreement with Big Air contains this "prior written approval" language. (BA Greenville Franchise Agreement § 15.4). It is Big Air's contractual right to enforce or not enforce. Big Air has not brought any legal action against BA Greenville or BA Holdings for breaching their agreements with Big Air in entering into the Assignment Agreement with Zay, and in fact Big Air consented to the agreement and used it as the basis for Zay's Franchise Agreement. (Odekirk email to Pelletier with affidavit ¶¶ 13-14 (Aug 29, 2023)). Even though the franchise agreement between BA Greenville and Big Air requires amendment in writing, South Carolina law has long recognized that an oral amendment can be made to written agreements. *See, e.g., Koontz v. Thomas*, 333 S.C. 702, 710, 511 S.E.2d 407, 411 (S.C. Ct. App. 1999) ("A written contract may be modified by oral agreement even if the contract expressly states that all changes must be in writing.").

Additionally, the court's conclusions are directly contradicted by the documents in the limited discovery record. In Kevin Odekirk's draft affidavit, the Big Air President was willing to state, in contradiction to the court's findings, that: (1) BA Greenville had exclusivity over Anderson County; (2) BA Greenville had the option to pursue another franchise in Anderson; (3) BA Greenville had the option to assign zip codes back to Big Air; (4) Big Air was aware that BA Greenville and Zay reached an agreement over the zip code release and Big Air used this agreement as the basis for Zay's Franchise Agreement:

> 8. Mohammad was interested in opening a Big Air franchise in Anderson, South Carolina. At the time of the initial inquiry, BA Greenville, LLC ("BA Greenville") had exclusive rights to own and operate a Big Air franchise within its assigned territory, which included certain zip codes in Anderson, South Carolina ("Anderson Territory"). BA Greenville had the option to pursue an additional location within the existing BA Greenville assigned territory, provided BA Greenville entered into a new franchise agreement for the new location within the BA Greenville assigned territory and Big Air consented to such new franchised location.
>
> 10. BA Greenville has the option to assign certain zip codes back to Big Air, and those zip codes are then available for Big Air to assign to a different franchisee under a new franchise agreement. The franchise agreement for BA Greenville does not prohibit the assignment of any zip codes back to Big Air.
>
> 12. Big Air knew that BAH and/or BA Greenville reached an arrangement with Mohammad and/or Zay N Limo relating to the zip codes constituting the Anderson Territory being returned to BAF. However, neither Big Air nor I was ever aware of the terms or details of such arrangement or involved in any way with negotiating the terms or approving the terms of such arrangement.
>
> 13. BA Greenville consented to the release of the Anderson Territory back to Big Air and consented to the issuance of the Anderson Territory to Mohammad and/or Zay N Limo pursuant to a franchise agreement between Zay N Limo and Big Air.
>
> 14. Mohammad was provided with a list of the zip codes for the Anderson Territory prior to Zay N Limo executing a franchise agreement with Big Air. The list of zip codes for the Anderson Territory was created by Dustin Pelletier and was used by Big Air in the creation of the franchise agreement between Zay N Limo and Big Air.

(Email Kevin Odekirk to Dustin Pelletier and accompanying unsigned affidavit ¶¶ 8, 10, 12-14 (Aug. 29, 2023)). In fact, this is the same procedure Pelletier went through to open the Greenville location. BA Spartanburg, LLC has a Bir Air location in Spartanburg and originally held exclusivity over Greenville. BA Spartanburg released the Greenville-area zip codes to allow BA Greenville to open. Pelletier had the same option with Anderson. (Pelletier Aff. ¶ 11; Email Pelletier to Farhan (Sep. 23, 2020) ("I have always intended to build an Anderson location for myself . . .").

Contrary to the court's conclusion that a prior written agreement with Bir Air was the exclusive means for BA Greenville to have the authority to transfer zip codes to Zay, (Order at

15), Big Air explicitly acknowledges that it was aware of the Contract and the Contract was the basis for Zay's Franchise Agreement. Big Air was originally contacted by Farhan and knew that Farhan and Pelletier were negotiating over the Anderson Territory zip codes to allow Farhan to open a franchise. Big Air had to, and did, give its approval of this arrangement to allow Zay to open a franchise in Anderson.

Given these facts, it cannot be said as a matter of law that BA Holdings/BA Greenville did not have the right to pursue opening another location in Anderson and that this right could not have been sold/released to Zay to allow Zay to open its franchise in Anderson. This is a genuine issue of material fact that precludes summary judgment, and an issue the parties should be allowed to fully explore through discovery.

Exclusive Territory

Apart from whether BA Greenville had the right to open a new franchise in Anderson pursuant to its existing franchise agreement, it clearly had the right to exclude anyone else from doing so. The court wrongly concluded that "neither [BA Holdings] nor BA Greenville, LLC had the rights they purported to sell to Defendants." (Order at 21). BA Greenville had a right to exclusivity that it could, and did, sell/release to Zay.

The BA Greenville Franchise Agreement gave BA Greenville exclusivity over Anderson Territory. (BA Greenville Franchise Agreement § 4 and Attachment A). The court cites this provision in its Order but gives it no weight in its decision, commenting only that it does not "expand[] the franchisee's right, license, and duty to operate only 'one' franchise business in the defined territory . . . ." (Order at 13). The court glosses over this provision and fails to recognize that this exclusivity clause is the entire basis of this dispute. If BA Greenville's franchise agreement prohibited Big Air from granting Zay a franchise in the Anderson Territory without a territory release, and Zay agreed to pay for a territory release, then Zay must fulfill its payment

obligation, to whomever it is due. Under the court's analysis, Zay is entitled to keep a benefit that it did not pay for. In Kevin Odekirk's draft affidavit, he was willing to state affirmatively that Zay could not have opened a franchise in the Anderson Territory without BA Greenville's consent and release:

> 9. Big Air could not have granted a territory to Mohammad or Zay N Limo that overlapped with the territory granted to BA Greenville, LLC, which included the Anderson Territory, without BA Greenville's consent and release of the applicable territory zip codes back to Big Air.

(Email Kevin Odekirk to Dustin Pelletier and accompanying unsigned affidavit ¶ 9 (Aug. 29, 2023)). Pelletier explained this same restriction to Farhan during negotiations:

> As you know, the Anderson territory is *already owned by the Greenville Big Air* location. You and I discussed this.
> . . . .
>
> If we are to divide the Greenville territory into a Greenville and an Anderson territory, *this would have a sales impact on the Greenville location. Based on our sales data, the Anderson market consists of 10% of our total sales*. Having a Big Air in Anderson would be fantastic for the Anderson area but *it would reduce at least 10% of Greenville's sales*. Because of this, *I have always intended to build an Anderson location for myself* because the loss of revenue would still be mine, just at a different location. Nevertheless, I am willing to work out an agreement with you so that you can open a Big Air location in Anderson and have that territory carded out of the Greenville existing territory.

(Email Pelletier to Farhan (Sep. 23, 2020) (emphasis added)).

Viewing these facts in a light most favorable to the non-moving party, it cannot be said as a matter of law that BA Greenville's exclusivity over the Anderson Territory was not a right that BA Greenville could sell/release to Zay for consideration.

Double Sale

The court also erroneously concludes that BA Holdings and BA Greenville double sold and charged extra fees to Respondents for the transfer of exclusivity. (Order at 21). BA Greenville did not "double sell" anything. BA Holdings' rights and benefits created in the Regional Director

Agreement with Big Air are entirely separate and unrelated to BA Greenville's rights and privileges created in its franchise agreement with Big Air. The two have no practical bearing on each other.

BA Holdings is entitled to a portion of franchise fees paid by any franchisee in the State of South Carolina, regardless of whether that franchisee wants to operate in territory that is under an exclusivity provision or not. (BA Holdings Regional Director Agreement § 5). BA Holdings would have been entitled to a portion of the franchise fee paid by Zay, regardless of any agreements or deals involving BA Greenville. Just because BA Holdings received compensation under its agreement with Big Air related to another franchisee does not mean BA Greenville is precluded from receiving compensation from that same franchisee.

There is no legal basis stated for the lower court's finding in this regard. The Order does not explain why, as a matter of law, BA Greenville would not be allowed to charge Zay for its consent to release the Anderson Territory, but simply states, without allowing discovery and a trial on the merits, that it was "wrong and inequitable." (Order at 21). The documents clearly show that there is, at minimum, a genuine issue of material fact as to whether BA Holdings could earn a portion of the franchise fee under its agreement with Big Air, which Respondents do not dispute, and separately BA Greenville could be compensated for releasing its exclusivity on the Anderson Territory. BA Holdings provided evidence to the lower court tending to show that Respondents knew the additional payments being sought by BA Greenville were for the release of the Anderson Territory, no matter how the agreement ultimately got drafted. (Pelletier email to Farhan (Sep 23, 2020)).

The record in this case shows numerous genuine issues of material that must be resolved by a fact finder after full discovery is completed. As such, the lower court erred in granting summary judgment.

III. BA Holdings and BA Greenville Have Viable Claims for Unjust Enrichment.

The lower court erred in determining that as a matter of law BA Holdings and BA Greenville do not have valid claims for unjust enrichment. (Order at 21). It is undisputed that Zay's ability to open its Big Air franchise in Anderson was conditioned on BA Greenville's release of this exclusive territory. (BA Greenville Franchise Agreement § 4.1 and Attachment A; Odekirk email to Pelletier (Aug. 29, 2023); Pelletier Aff. ¶¶ 11-12). It is also undisputed that BA Greenville and Zay in their negotiations and in entering the Contract fully intended for BA Greenville to be compensated for this territory release. (Email Pelletier to Farhan (Nov. 27, 2020); Assignment Agreement § 2). BA Greenville is sustaining a tangible and quantifiable loss as a result. In fact, Respondents knew BA Greenville would sustain such a loss when it entered the Assignment Agreement. (Mohammad Farhan handwritten notes (Nov 23, 2020)).

Despite Respondents never making a specific argument in their filings or in oral argument related to BA Holdings' unjust enrichment claim, the Order inexplicably dismisses the claim outright and even goes so far as to say BA Greenville could never have a claim for unjust enrichment. (Order at 21). The Order sets forth no legal basis for this conclusion. Even if the lower court could have made a ruling on the non-party BA Greenville's equitable claims (which it cannot because it would be an advisory opinion), there is certainly not enough evidence in the record to make this determination as a matter of law.

To recover for unjust enrichment, "the plaintiff must show (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value." *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003). A non-gratuitous benefit is a benefit conferred either "(1) at the defendant's request or (2) in circumstances where the plaintiff reasonably relies on the defendant to pay for the benefit and

the defendants understands or ought to understand that the plaintiff expects compensation and looks to him for payment." *Niggel Assocs., Inc. v. Polo's of N. Myrtle Beach, Inc.*, 296 S.C. 530, 532-33, 374 S.E.2d 507, 509 (Ct. App. 1988).

In this case, BA Greenville conferred a non-gratuitous benefit on the Zay. BA Greenville gave up its right to the Anderson Territory and repeatedly told Respondents that it expected to be compensated for it. Respondents understood this condition and went through extensive negotiations to reach an agreement on payment terms. Respondents have realized value for this benefit. They are operating and profiting from a business in the Anderson Territory, which by admission and in Farhan's own handwriting, is taking business away from BA Greenville.

The facts are very much in dispute as to whether Respondents can retain the right to operate in the Anderson Territory without paying BA Greenville for it, because they could never have obtained that right without BA Greenville's consent. BA Greenville was unwilling to give its consent without payment. The disputed facts in the record were more than enough to preclude the court from making a legal determination that BA Greenville and BA Holdings have no claims for unjust enrichment. As such, the lower court's ruling on unjust enrichment should be reversed.

IV. BA Holdings Properly Assigned Its Contract with Zay to BA Greenville, Which Provided Another Basis for BA Greenville's Participation as a Party.

The court incorrectly concludes that the assignment of the Contract from BA Holdings to BA Greenville (the "Assignment") is an amendment to the Contract. (Order at 19). The case law and legal principles cited by the lower court refer to contract formation and amendment, not assignment. An assignment is not an amendment, and there are no South Carolina cases finding that an assignment of a contract amends the contract as between the assigning party and the other party to the assigned contract. No language in the Assignment states that it is intended to amend the Contract. In fact, the opposite is true. The Assignment provides that BA Greenville is obligated

to perform the Contract in all respects and is entitled to the benefits of the same. (Assignment ¶¶ 5-6, §§ 2-3). BA Holdings and BA Greenville have made no attempt to unilaterally amend the Contract. An assignment is generally permissible under the law unless there is an express prohibition against assignment in the underlying contract. The Contract does not contain a provision prohibiting assignment (a fact admitted by Respondents). There is no South Carolina law prohibiting assignment of a contract in this context, and Respondents have not attempted to cite to any.

Three elements constitute a valid assignment: (1) an assignor; (2) an assignee; and (3) transfer of control of the thing assigned from the assignor to the assignee. An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance. The principle is well settled that a valid assignment operates to pass the whole right of the assignor, and that thereafter the assignee stands in the place of the assignor, possessing all rights or remedies available to the assignor. *Sanders v. Savannah Highway Automotive Co.*, 432 S.C. 328, 852 S.E.2d 744 (Ct. App. 2020).

Pelletier's affidavit and the contemporaneous communications between Pelletier and Farhan show that the parties intended for BA Greenville to be the counterparty to the Contract, not BA Holdings. The Assignment comports with the intent of the parties as demonstrated by the evidence and substitutes BA Greenville for BA Holdings. This is more than enough for the lower court to have granted BA Holdings' motion to amend and allow BA Greenville to be added as a party. BA Greenville's presence is necessary for a full and complete resolution of the matters in controversy among the parties. Accordingly, it was error for the court to conclude that BA Holdings improperly assigned its rights and duties under the Contract to BA Greenville.

CONCLUSION

It is undisputed that BA Greenville had exclusive rights to Anderson Territory zip codes for opening Big Air Trampoline Park franchises. Zay knew that BA Greenville had exclusivity over Anderson but decided to pursue Anderson over other locations without exclusivity. BA Greenville informed Zay that its Greenville location drew customers from Anderson and, as such, it would need to be compensated for the loss of business. Zay agreed and signed a contract to this effect. Big Air entered into a franchise agreement with Zay based on BA Grenville's agreement to release certain territory to Zay. Zay opened its trampoline park and has never made a payment for the rights it acquired to operate in Anderson.

The lower court erred when it concluded that allowing BA Holdings to amend its complaint to join BA Greenville's claims against Zay would be futile. Futility is akin to impossibility, which has only been found in cases with statutory immunity. BA Greenville certainly has colorable claims against Zay that it should be allowed to pursue.

Summary judgment was likewise inappropriate and premature. When summary judgment was filed, the parties had barely begun discovery, no one had been deposed, Zay had not produced any documents, and the case was only three months old. At such an early stage of litigation, it is no surprise that there are numerous genuine issues of material fact. The documents that are in the record squarely contradict the court's findings and conclusions. The court erred in granting summary judgment at this early stage of the litigation.

The court went too far in concluding that neither BA Holdings nor BA Greenville have viable claims for unjust enrichment. Zay is only able to operate in Anderson because BA Greenville released territory. BA Greenville expected to be compensated and Zay agreed. This was a valuable benefit that Zay received, and it would be inequitable to allow Zay to retain this benefit without payment.

Finally, the court erred in concluding that BA Holdings could not assign its rights and duties under the Contract to BA Greenville. An assignment is not a contractual amendment. This assignment was effective to place BA Greenville in the shoes of BA Holdings and was enough to permit adding BA Greenville as a party to this suit.

For these reasons, the lower court's order denying BA Holdings' motion to amend its complaint and granting Zay's motion for partial summary judgment should be reversed and the parties permitted to proceed through discovery and a trial on the merits.

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