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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.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The lower court denied Appellant's motion to amend the complaint and instead granted Respondents' motion for summary judgment when the parties had barely begun discovery, no one had been deposed, Respondents had not produced any documents, and the case was only three months old. This was error and the lower court's order should be set aside in its entirety and the parties allowed to pursue the merits of this case through discovery.

Appellant identified numerous errors in the lower court's Order, and Respondents have not directly addressed any of them. Instead, Respondents principally rely on an argument of issue preservation. This argument is without merit. Every issue raised by Appellant in this appeal was presented to the lower court and ruled on.

When the merits of this appeal are considered, it is clear the lower court's order should be entirely set aside. This controversy arose because Zay N Limo, LLC ("Zay") insisted on opening a Big Air Trampoline Park franchise in Anderson, South Carolina, in a territory that was within BA Greenville, LLC's exclusivity. To induce BA Greenville to release exclusivity over Anderson, Zay agreed to make periodic monthly payments after its park opened. Big Air Franchising, LLC ("Big Air") only agreed to allow Zay to open a franchise in BA Greenville's exclusive territory after BA Greenville released the territory. BA Greenville agreed to release exclusivity, Big Air and Zay entered into a franchise agreement, the park opened, but Zay has never made a single payment.

If the circuit court's order is allowed to stand, Zay will get a windfall, having obtained a valuable benefit from BA Greenville without paying for it. Zay's attempt to get something for nothing should be rejected.

I. All Issues Presented to this Court Are Preserved.

Respondents' primary argument on issue preservation appears to be that Appellant's Rule 59(e) motion to reconsider provided the lower court with emails and other documents that were not provided ahead of the hearing on the motion to amend and the motion for summary judgment and, therefore, these are not preserved for appellate review. This argument is without merit.

As an initial matter, Respondents filed a basic one-page motion for summary judgment without any supporting documents. (Mot. Partial Summary J.). It wasn't until October 9, 2023, at 8:12 PM, the night before the October 10th morning hearing, that Respondents finally filed its twenty-seven-page memorandum with 109 pages of supporting documents. (Mem. Supp. Summary J. (filing stamp of "2023 Oct 09 8:12 PM")).[1] It is disingenuous for Respondents to argue that documents they provided less than twenty-four hours prior to the hearing should be considered by the lower court but competing documents provided by Appellant in reconsideration should not.

A Rule 59(e) motion is an appropriate vehicle to fully present a party's argument to a court for reconsideration, even if the argument has been previously argued:

> [I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.

[1] Also note, Judge Morgan's preferences indicate all supporting memorandums are due 72 hours prior to the hearing. (https://www.greenvillecounty.org/CourtSupport/MemPolicies.aspx, last visited June 27, 2024).

Elam v. S.C. DOT, 361 S.C. 9, 21, 602 S.E.2d 772, 778-79 (2004) (internal citations omitted); *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) ("The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" (citation omitted)).

Here, it was only after the lower court issued its final Order that Appellant was able to understand the full extent of the court's ruling. Appellant chose to provide additional documentation to aid the court in its reconsideration of specific issues. If parties had no ability to call the court's attention to additional documentation submitted in reconsideration, it would undercut the well-established purpose of the rule.

Appellant raised each of the current issues to the lower court in its motion for reconsideration. All the documents Appellant relies on in this appeal were presented to the lower court for consideration. Accordingly, there are no issue preservation concerns in this appeal.

II. Respondents Fail to Show that the Amended Complaint Was "Clearly Futile."

Respondents do not deny that the facts viewed in a light most favorable to BA Greenville show that: (1) BA Greenville held exclusive rights to the Anderson Territory when Respondents began looking for a South Carolina city in which to open a trampoline park, (Big Air Franchise Agreement with BA Greenville § 4, Attachment A; Pelletier Aff. ¶ 11); (2) Farhan and Pelletier engaged in extensive negotiations during which it was explicitly discussed that BA Greenville had plans to eventually open an Anderson location and that approximately 10% of BA Greenville's total sales came from the Anderson market, (Email Pelletier to Farhan (Sep. 23, 2020); Ex. 6 Pl's Mot Reconsider (handwritten notes reflecting loss of 10% of sale and net profits)); (3) Zay attributed value to BA Greenville's exclusivity and agreed to pay for this right, (Contract); (4) Big Air acknowledged it could not have granted Zay a franchise without BA Greenville's agreement to release exclusivity, (Email Kevin Odekirk to Dustin Pelletier and accompanying unsigned

affidavit ¶ 9 (Aug. 29, 2023)); (5) the Zay-BA Holdings contract was the basis for Big Air's agreement with Zay, (Email Kevin Odekirk to Dustin Pelletier and accompanying unsigned affidavit ¶¶ 12-14 (Aug. 29, 2023)); and (6) Zay has never made any payments for the rights it acquired from BA Greenville. Viewing these facts in the record in a light most favorable to BA Greenville, the lower court erred in ruling that BA Greenville's claims against Zay would be clearly futile.

Respondents offer no explanation as to why this is one of those "rare cases" where futility applies and where it would be impossible for BA Greenville to succeed on the merits of its claims against Zay. *Skydive Myrtle Beach v. Horry Cty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019) ("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.").

Moreover, Respondents do not dispute that the lower court's conclusions were based on the court's view of the merits of non-party BA Greenville's claims, wherein the court concluded:

- BA Greenville had no right to enter a contract with Respondents to begin with;
- BA Greenville has no equitable right to any restitution;
- BA Greenville was trying to double sell Zay;
- BA Greenville was trying to charge extra fees to Zay;
- BA Greenville acted in a "wrong and inequitable" manner toward Zay.

(Order at 20-21). These are merits conclusions and have no place in a ruling on a motion to amend a complaint. *Id.*

The court's ruling went too far when it decided to rule on the merits of non-party BA Greenville's claims. Such merits conclusions are prohibited on a motion to amend and amount to an impermissible advisory opinion. *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 577 n.6,

703 S.E.2d 197, 204 n.6 (2010) (quoting *Friedberg v. Goudeau*, 279 S.C. 561, 562, 309 S.E.2d 758, 759 (1983 ("It is an error of law for a court to decide a case on a ground not before it.")).

Accordingly, the lower court abused its discretion. The Order should be set aside, and BA Holdings permitted to amend its complaint to add BA Greenville as a party.

III. Genuine Issues of Material Fact Preclude Summary Judgment.

There are a number of genuine issues of material fact that preclude summary judgment. Appellant explored these in detail in its opening brief, and Respondents' brief does not explain how these factual issues, when viewed in a light most favorable to Appellant, still support the lower court's grant of summary judgment.

One Franchise

The court ruled that BA Greenville had no right to operate a Big Air location in Anderson and could not sell or assign such a right. (Order at 21). However, Big Air is not a party to this litigation, and the lower court did not have the benefit of any discovery or deposition testimony from Big Air that would support its conclusions on these issues. What the record *does* show is 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). Additionally, the limited record shows that Big Air President, Kevin Odekirk, was willing to sign a draft affidavit, in contradiction to the court's findings, stating 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. (Email Kevin Odekirk to Dustin Pelletier and accompanying unsigned affidavit ¶¶ 8, 10, 12-14 (Aug. 29, 2023)).

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

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 the Anderson Territory. (BA Greenville Franchise Agreement § 4 and Attachment A). In Big Air President 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. (Email Kevin Odekirk to Dustin Pelletier and accompanying unsigned affidavit ¶ 9 (Aug. 29, 2023)). Pelletier explained this same restriction to Farhan during negotiations and it was the genesis for the entire Contract. (Email Pelletier to Farhan (Sep. 23, 2020)).

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). There is no legal or factual 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.

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

When viewing the facts in a light most favorable to BA Holdings/BA Greenville, the pleadings support claims for unjust enrichment. Respondents have offered no basis to uphold the lower court's grant of summary judgment on this cause of action.

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)).

These facts support a claim for unjust enrichment and certainly should survive summary judgment at this stage of the litigation when very little discovery has occurred.

V. BA Holdings' Assignment to BA Greenville Was Proper.

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). 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.

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 Greenville's agreement to release its exclusivity. Zay opened its trampoline park and has never made a payment for the rights it acquired from BA Greenville to operate in Anderson.

The lower court erred when it ruled that allowing BA Greenville to pursue claims against Zay would be futile and when it granted summary judgment on Appellant's claims. Zay should not be permitted to get something for nothing.

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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PROOF OF SERVICE

I certify that the Reply Brief of Appellant has been served on Jason S. Smith., counsel for Respondents Zay N Limo, LLC, Sharif Farhan, and Mohammad Farhan, by email sent to his primary e-mail address listed in the Attorney Information System, js@hellmanyates.com, on July 3, 2024. See attached email.

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July 3, 2024

Re: BA Holdings, Inc. v. Zay N Limo, LLC, et al (2023-001957) Re Reply Brief of Appellent

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Wed 7/3/2024 10:14 AM

To:Jason Smith <js@hellmanyates.com>
Cc:David Paavola <paavola@conlaw.com>;Brian Autry <autry@conlaw.com>

1 attachments (207 KB)
20240703_BA Holdings Reply Brief_FINAL.pdf;

See attached Reply Brief and email below.

From: Angelia Shaw
Sent: Wednesday, July 3, 2024 10:14 AM
To: Jason Smith <js@hellmanyates.com>
Cc: David Paavola <paavola@conlaw.com>; Brian Autry <autry@conlaw.com>
Subject: BA Holdings, Inc. v. Zay N Limo, LLC, et al (2023-001957) Re Reply Brief of Appellent

Dear Counsel:

Attached please find the Reply Brief of Appellant as it relates to BA Holdings, Inc. v. Zay N Limo, LLC, et al (Appellate Case No.: 2023-001957). This will be filed, along with a Proof of Service, with the Court of Appeals momentarily.

Sincerely,

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