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Aug 16 2024

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

APPELLANTS REPLY BRIEF

Michael W. Mogil
Mogil Law Firm
PO Box 5925
Hilton Head Island, SC 29938
(843)785-8110
mmogil@mogillaw.com
Attorney for Appellants

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ARGUMENT

Appellants herein re-assert their arguments and points of law asserted in their Initial Brief. In addition, replying to Respondent's Initial Brief, Appellants address the following points of law which Appellants assert are reversible error by the trial court. Respondent's Initial brief which argues that the trial court properly exercised its discretion in granting summary judgment and denying Appellant's Rule 59 Motion relies on the following arguments:

A. That the trial court property gave weight to the affidavit testimony by Respondent's witness Warren Hill, despite Mr. Hill testifying at deposition that he had no prior familiarity with the tenancy, history of the lease, or financial accounting for Appellant's compliance and default. 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. (Hill deposition at ____).

Appellant's re-assert that Mr. Hill was not credible fact witness and that the trial court erred in accepting his testimony regarding default and damages.

B. That Mr. Strange's admission during his deposition regarding what the terms of the lease stated, and further admission that he was unable to pay rent in January 2020 and thus

defaulted were the sum of his testimony which eliminate any fact issues regarding the Appellants' default under the lease. However, Respondent ignores that Mr. Strange's parallel deposition testimony that foot traffic was in fact slow or non-existent due to WD-1's delays in constructing the center, and that there were conversations and assurances between representatives of WD-1 and Strange regarding resolving the unanticipated slow start of the business. (Strange Deposition at ____). Further, Strange's uncontroverted affidavit stated 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' business purpose. (Strange Affidavit dated March 24, 2023) Mr. Strange also testified regarding the promotional materials and promises made by WD-1 regarding shopping center foot traffic and aesthetics.

Appellants assert that WD-1's conduct and omissions and maintenance of the center were and are fact issues which support a finding of a breach of the lease based on the landlord's breach of an implied covenant of good faith and fair dealing, which occurred prior to and was a direct cause of Appellants' alleged breach. There exists in every contract an implied covenant of good faith and fair dealing." *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). "Since its application in this state, South Carolina appellate courts have consistently given credence to the underlying purpose of the doctrine of good faith and fair dealing by using it to protect the intentions of the parties to the contract." *Williams v. Riedman*, 339 S.C. 251, 273, 529 S.E.2d 28, 39 (Ct. App. 2000). "[T]he implied covenant of good faith and fair dealing has been viewed as another contract term." *Id.* at 274, 529 S.E.2d at 40. "In the absence of an express

provision therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made." *Riedman*, 339 S.C. at 273, 529 S.E.2d at 39 (quoting *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966)). (Case law cited as string in *Quarter Pointe Ventures, LLC v. James Lineberger*, Appellate Case No. 2016-002060 , No. 2019-UP-206 Court of Appeals of South Carolina June 5, 2019, which the Court notes in its caption is not to be cited for precedent on the merits of the decision).

Appellants herein assert that the conduct of the landlord, WD-1, in not completing the center in a timely manner and defeating Appellant's ability to successfully operate its business during its initial years is a breach of the common law implied covenant of good faith and fair dealing as noted above, which supercedes the narrow and boilerplate language found in the underlying lease.

C. Respondents argue that the trial court properly declined to give Appellants financial credit for the moveable trade fixtures and equipment left at the restaurant premises, which accrued to landlord's benefit. Appellants re-assert that Mr. Strange's affidavit documented his valuation of the remaining fixtures and equipment, based on his costs to install the equipment. At a minimum, the walk in cooler and installation labor valued at \$22,648.00, the sinks valued at \$3450, and the bar and cabinetry valued at \$31,650 were movable equipment which was owned by the Appellants and which was converted by the Respondent and ultimately given to the successor tenant. (Strange Affidavit March 23,

2023 and Amended Affidavit dated April 17, 2023). These sums should be set off against the damages awarded to Respondent by the trial court. As noted in the Initial Brief, Appellants 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. Appellant's assert that the trial court erred in this ruling.

CONCLUSION

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

Dated: August 16, 2024

Respectfully Submitted,

MOGIL LAW FIRM

/s/ Michael W. Mogil

Michael W. Mogil, SC Bar #11933
2 Corpus Christie Place, Ste. 103
Hilton Head Island, SC 29928
Tel. 843-785-8110
Attorney for Appellants

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Appellants.

PROOF OF SERVICE

On this 16th day of August, 2024, the undersigned did serve Appellants' Reply Brief on counsel for the Respondent, by email to ekubec@ns-lawfirm.com

August 16, 2024

Respectfully Submitted,

Mogil Law Firm

/s Michael W. Mogil

Michael W. Mogil, SC Bar No. 11933
PO Box 5925
Hilton Head Island, SC 29938
(843) 785-8110
mmogil@mogillaw.com
Attorney for Appellants

MOGIL LAW FIRM

MICHAEL W. MOGIL
mmogil@mogillaw.com

2 Corpus Christie Place • Suite 303
Hilton Head Island, SC 29928
T 843-785-8110 F 843-380-5674
www.mogillaw.com

August 16, 2024

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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

Dear Mrs Harrison:

Attached please find Appellants' Reply Brief and Proof of Service by email. Mail service will be accomplished tomorrow with a second proof of service.

Very Truly Yours,

/s/ Michael W. Mogil;

Michael W. Mogil

cc: Ed Kubec, Esq.

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