THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Opinion No. 2013-UP-327 (S.C. Ct. App. Filed July 17, 2013)

Roper, LLC, ...Respondent,

v.

Harris Teeter, Inc., Carolina & Georgia Immobilelienfonds I, L.P., GOA Realty Management I, LLC, Germania of America, Inc., Miller & Martin, PLLC, New Spring Community Church, John Doe, Richard Doe, and Doe Corporation, Defendants,

Of whom, Germania of America, Inc., is the .....Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on August 22, 2013.

QUESTIONS PRESENTED

Pursuant to Rule 226 of the South Carolina Rules of Appellate Procedure, Petitioner Germania of America, Inc. ("Petitioner") hereby petitions this Court for a writ of certiorari to the court of appeals to review that court's decision in this matter. In making this petition, Petitioner respectfully asserts that the court of appeals erred in its Opinion No. 2013-UP-327, filed July 17, 2013, and that this Court should review the following issues:

1. Did the court of appeals err in overlooking the substantial record evidence regarding terms of the contract and the ambiguity raised by the purported release?

2. Does the court of appeals' decision conflict with prior decisions of this Court and the court of appeals, thereby making this case appropriate for review by this Court?

STATEMENT OF THE CASE

This appeal involves the interpretation of a June 12, 2001 letter that purportedly released Harris Teeter, Inc., as the original tenant, from its payment obligations under a long-term commercial real estate lease.

Plaintiff Roper LLC commenced this lawsuit against Appellant Germania of America, Inc., and others, including Harris Teeter, Inc., alleging fraud, negligent misrepresentation, and breach of contract in connection with the sale and lease of a parcel of commercial property located in Greenville, South Carolina. The Property at issue

contains 8.353 acres, including a 60,217 square foot building and adjacent land for parking. The Property was initially occupied by Harris Teeter as the Tenant pursuant to a certain "Lease Agreement Between Roper Mt. Rd. Assoc., LLC and Harris Teeter, Inc." (the "Lease"). On or about July 9, 2001, Harris Teeter assigned its interests in the Property to Bi-Lo, Inc. pursuant to an Assignment and Assumption of Lease.

Prior to the assignment, Harris Teeter sent a letter to co-defendant, Carolina & Georgia Immobilelienfonds I, LP ("CGI"), which at the time was the landlord under the Lease. The letter, dated June 12, 2001, notified CGI of a "proposed" assignment of the Lease to Bi-Lo, Inc., which Harris Teeter indicated "may or may not close." (R. pp. 30-31). Among other things, Harris Teeter asked CGI to countersign the letter to confirm receipt of the letter and that CGI would look solely to Bi-Lo for performance of the Tenant's responsibilities under the Lease.

Plaintiff acquired the Property in April 2007, and thereafter, sought to enforce Harris Teeter's payment obligations under the Lease. Harris Teeter refused to pay any rent due under the Lease, claiming that CGI had released it of all of its obligations, including payment obligations, pursuant to the June 12, 2001 letter agreement between Harris Teeter and CGI.

On a Motion for Summary Judgment filed by Harris Teeter, the circuit court ruled that the June 2001 letter was a clear and unambiguous release of Harris Teeter's payment obligations under the Lease. The circuit court denied Plaintiff's and Appellant Germania's Motions to Alter or Amend Judgment Pursuant to Rule 59(e). Appellant filed an appeal with this Court, which affirmed the circuit court's entry of summary judgment in favor of Harris Teeter on the Plaintiff's breach of contract claim.

ARGUMENT

In affirming the order of the lower court, the court of appeals overlooked substantial evidence in the record concerning the terms of the Lease, and the ambiguities raised by the June 12, 2001 letter. The court of appeals' decision is also inconsistent with prior decisions of this Court and the court of appeals, in which the courts have held that summary judgment should not be granted on a contract that is ambiguous as a matter of law because the intention of the parties is not clearly stated, or because the contract is reasonably susceptible to more than one interpretation. Because controlling precedent dictates that the June 12, 2001 letter – as a purported release of Harris Teeter's payment obligations under the lease - is ambiguous as a matter of law, the court of appeals' decision should be reversed.

I. The court of appeals overlooked substantial evidence in the record concerning the terms of the contract and the ambiguity raised by the purported release.

The Court's decision holds that the June 2001 letter constitutes a valid and effective release of Harris Teeter's payment obligations under the Lease. "The term 'release' has been defined as the 'relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced.' A release is an agreement providing that a duty owed to the maker of the release is discharged immediately." Ecclesiastes Production Ministries v. Outparcel Assoc., 374 S.C. 483, 492, 649 S.E.2d 494, 498 (Ct. App. 2007). "Whether a particular agreement constitutes a release is to be determined from the intent of the parties." Id.

The court of appeals, in determining that the June 2001 constitutes a release of Harris Teeter's payment obligations, and thereby affirming the lower court's entry of summary judgment, failed to consider Section 15.4 of the Lease, which states:

> 15.4 Continuing Liability of Tenant. In the event of an assignment or sublease, Tenant agrees that Tenant will remain jointly and severally liable, with the assignee or subtenant, for the payment of the rent reserved under this Lease and for performance of all of the other terms, conditions, and provisions of this Lease which are required to be performed by Tenant, notwithstanding any acceptance of rent or performance by Landlord directly from the assignee or subtenant.

This provision cannot be reconciled with the June 2001 letter and creates a blatant ambiguity. Contrary to the June 2001 letter, which states that CGI would "look solely" to Bi-Lo for performance of the Tenant's "responsibilities" under the Lease, Section 15.4 of the Lease clearly states otherwise. The Lease expressly provides that – *notwithstanding any agreement by the landlord to accept performance or payment of rent by the subtenant* – the Tenant, i.e., Harris Teeter, would remain *jointly and severally liable* for payment of the rent.[1] When read together as one agreement, the terms of the Lease and June 2001 are patently inconsistent as to a material term of the Lease. Because the June 2001 letter creates an ambiguity as to the terms of the Lease, the agreement is ambiguous as a matter of law and the court of appeals' decision should be reversed.

Furthermore, "[a] contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs,

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[1] The author of the June 2001 letter also wrote: "If the Lease is not assigned by Harris Teeter to Assignee, Harris Teeter *will continue to be solely responsible for the "Tenant's" obligations under the Lease.* (emphasis added). This statement is an implicit acknowledgement by Harris Teeter that, once the Lease was assigned, it would remain jointly and severally liable for payment of rent.

practices, usages and terminology as generally understood in the particular trade or business." Southern Glass & Plastics Co. v. Kemper, 399 S.C. 483, 732 S.E.2d 205, 209 (Ct. App. 2012), quoting Hansen ex rel. Hansen v. United Servs. Auto. Ass'n, 350 S.C. 62, 68, 565 S.E.2d 114, 116 (Ct. App. 2002).

The court of appeals further erred because the intent of the parties cannot be gleaned from the June 2001 letter, which was written in the context of a long-term commercial lease arrangement, under which Harris Teeter was the tenant and responsible for payment of rent. Customary business practices would suggest that it is highly unlikely that CGI intended to amend material and essential terms of the Lease in such an informal fashion.[2] Notably, the June 2001 letter fails to mention core terminology, such as "amendment" or "release," or other language that would clearly reflect the parties' intentions. Similarly, the June 2001 letter does not define "responsibilities" and fails to mention critical words, such as "payment" or "rent."

Because the intention of the parties to the Lease cannot be gleaned from the June 2001 letter, the decisions of the lower court and the court of appeals erroneously involved a reading of terms into the contract that were not clearly stated or intended by the parties. "The intention of the parties and the meaning[, which] are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be

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[2] The June 2001 letter, which was authored and sent by a representative of Harris Teeter, never stated that it was intended to be an amendment to the Lease. To the contrary, the letter expressed rather casually that the purpose of the letter was to "notify" CGI of the proposed assignment and to "inform" CGI of "certain details concerning the transaction." It is not at all clear from the June 2001 letter agreement that CGI understood and/or intended the letter to constitute an amendment to the Lease and/or a release of Harris Teeter's joint and several liability for payment of rent.

determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed." Park Regency, LLC v. R&D Development of the Carolinas, LLC, 402 S.C. 401, 412, 741 S.E.2d 528, 534 (Ct. App. 2012) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). Similarly, "[t]he court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). Because the intent of the parties is not clearly expressed in the June 2001 letter, the entry of summary judgment by the lower court was improper and the court of appeals' decision should be reversed.

II. The court of appeals' decision is contrary to precedent set by this Court and the court of appeals regarding the interpretation of ambiguous contracts.

The court of appeals' decision cannot be reconciled with, and is patently inconsistent with, prior precedent from this Court and the court of appeals. See, e.g. Southern Atlantic Financial Servs., Inc. v. Middleton, 356 S.C. 444, 448, 590 S.E.2d 27, 30 (S.C. 2003) (finding that provisions in a promissory note were "patently ambiguous" where the note stated that the lender "may" give written notice of default, but that the date of acceleration on the note "must" be at least 30 days after such notice); S.C. Langston v. Niles, 265 S.C. 445, 454, 219 S.E.2d 829, 832 (S.C. 1975) (holding "unhesitatingly" that lease assignment was ambiguous because it did not "spell out" certain details relating to payment of rent and interest on a loan); Crystal Pines Homeowners Assoc. v. Phillips, 394 S.C. 527, 534, 716 S.E.2d 682, 686 (Ct. App. 2011) (finding deed of real estate was ambiguous with respect to the parties' road maintenance

obligations); Wallace v. Day, 390 S.C. 69, 76-77, 700 S.E.2d 446, 450 (Ct. App. 2010) (finding that terms of real estate contract's default provisions were reasonably susceptible to more than one interpretation and that summary judgment should not have been granted); Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 240, 672 S.E.2d 799, 803 (Ct. App. 2009) (finding that a settlement agreement was ambiguous, and therefore summary judgment was not appropriate, because the term "landlord/tenant claims" was reasonably susceptible to more than one interpretation); HK New Plan Exchange Property Owner I, LLC v. Coker, 375 S.C. 18, 23-24, 649 S.E.2d 181, 183-84 (Ct. App. 2007) (finding that a lease amendment which did not expressly release one of the co-tenants from the original lease was ambiguous, and therefore, the lower court's entry of summary judgment was reversed); Bishop v. Benson, 297 S.C. 14, 17-18, 374 S.E.2d 517, 519 (Ct. App. 1988) (having "little difficulty in finding ambiguity in the contract regarding the intent of the parties" as to when certain conditions were to be performed).[3]

For example, in HK New Plan Exchange Property Owner I, LLC v. Coker, 375 S.C. 18, 649 S.E.2d 181 (Ct. App. 2007), the court of appeals addressed a very similar issue, under very similar facts, but reached a contrary conclusion. The issue before the court was whether one of the original co-tenants under a commercial lease had been released by a lease amendment, which stated in part:

> This agreement is entered into by the Landlord and Tenant, as set forth above, and is intended to be an amendment of the Lease described above. Any provision of this amendment which is inconsistent with any provision(s) of the Lease shall supersede the provision(s) in the Lease. Also, any ambiguities and conflicts between this Amendment and the Lease shall be read in favor of the Amendment. Except as amended

[3] The Court further noted in Pee Dee Stores that the settlement agreement at issue did not contain a definition of "landlord/tenant claims" and noted that reasonable minds could "certainly differ" as to the meaning of "landlord/tenant claims." Id., at 803-04.

> hereby, all other terms and conditions of the Lease shall remain in full force and effect, and the terms of this Amendment shall be fully incorporated into, and apply in addition to the terms of, the Lease.

HK New Plan, 649 S.E.2d at 182-83.

The court of appeals found that the amendment created ambiguities in the contract. The amendment referred to and was executed by only one of the co-tenants as the tenant, but "did not specifically state" that the other co-tenant was released from the original lease. Id. at 184. Therefore, the Court found that "a question is raised regarding the parties' intent, and the matter should be determined by a jury." Id. Because the court of appeals decision in this case is contrary to existing law and precedent regarding ambiguities in contracts, the court of appeals' decision should be reversed.

The court of appeals further failed to consider precedent from this Court regarding consideration that is wholly past. "Consideration that is wholly past is not valuable consideration." Future Group, II v. Nationsbank, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (S.C. 1996). By ruling as it did in this case, the court of appeals failed to consider that the purported consideration for the purported release was nothing more than an obligation of Harris Teeter that already existed.

As the promisor, CGI should have obtained a benefit from giving the purported release. The problem with the June 2001 letter is that it fails to reflect or recite a benefit flowing to CGI, in exchange for providing a release to Harris Teeter. According to the court of appeals' decision, CGI received the benefit of having Bi-Lo liable for the Tenant's responsibilities under the Lease. However, that analysis is flawed because Bi-Lo was *already* liable for those obligations under the terms of the Lease as previously agreed to between the parties. The terms of the Lease specifically provided that any

subtenant or assignee would be jointly and severally liable, along with Harris Teeter, for payment of rent. (Lease, ¶ 15.4) (R. p. 63). Therefore, there was no consideration to support the purported release because CGI gained no benefit by signing the June 2001 letter.

CONCLUSION

For the reasons stated, Petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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September 23, 2013

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of which Germania of America, Inc. is the.....Petitioner.

PROOF OF SERVICE

I certify this 23rd day of September 2013 that I have served a copy of the PETITION FOR A WRIT OF CERTIORARI upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

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