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Mar 14 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
In the Court of Common Pleas for the First Judicial Circuit

The Honorable James E. Chellis, Master in Equity

Case No. 2019-CP-18-02217

Virgie C. Simmons Family, LLC.....Appellant

vs.

Limetrade, LLC and Limehouse Produce, LLC .....Respondents

FINAL REPLY BRIEF OF APPELLANT

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The Brief of Respondents Limetrade, LLC and Limehouse Produce, LLC (collectively "Respondents") is tellingly short on analysis or substantive response to Appellant Virgie C. Simmons Family, LLC's ("Simmons") arguments. Respondents' entire argument spans less than 4 pages and fails to address much of Simmons' Brief of Appellant. Simmons submits this Reply Brief to fully address the issues that Respondents did argue. For the following reasons, Respondents have not shown that the Court should affirm the trial judge's rulings in this matter.

A. Contrary to Respondents' Arguments, Paragraph 14 of the Business Lease Imposed Mandatory Obligations on Defendants to Bring the Leased Premises Back to Its Pre-Lease Condition.

Respondents argue that the trial judge properly ruled that there was no "meeting of the minds" because the language of paragraph 14 of the Business Lease is permissive, not mandatory:

> The language of Paragraph 14 of the Lease at issue is a request, not a requirement, that floor modifications must be remedied at the end of the Lease. . . . Despite the request in Paragraph 14 of the Business Lease, there was no "shall" or "must" or "will" language that the Plaintiff is relying on in its causes of action. The Plaintiff's take on the remedy is one result and the Defendants is quite another. (Order, p. 2) With such a difference, there is no mutual assent or meeting of the minds.

(*See* Resps.' Br., at 9). For the following reasons, the facts and the law do not support Respondents' arguments.

First, and foremost, Respondents mischaracterize the language of paragraph 14[1] of the Business Lease as a mere "request." While Simmons recognizes that the word "request" is obviously present in paragraph 14, it draws the Court's attention to the rest of that sentence: "Lessor request that floor modifications ***must be remedied*** at the termination of this Lease; normal wear and tear excepted." (*See* R. 48 ¶ 14 (emphasis added)). Respondent's assertion that paragraph 14 contains no mandatory "'shall' or 'must' or 'will' language" is flat out wrong. The word "must" appears only four words after "request" in paragraph 14. That word is most certainly

[1] The Business Lease contains two paragraphs numbered 14. When Simmons refers to paragraph 14 of the Business Lease, it is referring to the paragraph with the title "IMPROVEMENTS." The other paragraph 14 (LIENS) is not at issue in this appeal.

mandatory. *See Salmonsen v. CGD, Inc.*, 377 S.C. 442, 456, 661 S.E.2d 81, 89 (2008) (referring to "the mandatory term 'must.'"). Contrary to Respondent's assertions, paragraph 14 of the Business Lease plainly includes mandatory language creating an affirmative duty on the lessee to restore the Lease Premises to its original condition (particularly with regard to floor modifications).

Moreover, when read as a whole, paragraph 14 (and the entire Business Lease) unambiguously requires that the lessee restore the Leased Premises. "A contract must be read as a whole document such that litigants may not create an ambiguity by pointing to a single sentence or clause." *Maybank v. BB&T Corp.*, 416 S.C. 541, 576, 787 S.E.2d 498, 516 (2016); *accord Floyd v. Dross*, 442 S.C. 79, 89, 897 S.E.2d 191, 196 (Ct. App. 2024) ("'Whether the language of a contract is ambiguous is a question of law to be determined by the court from the terms of the contract as a whole. In making this determination, the court must examine the entire contract and not merely whether certain phrases taken in isolation could be interpreted in more than one way.'") (*quoting State Accident Fund v. South Carolina Second Inj. Fund*, 388 S.C. 67, 75, 693 S.E.2d 441, 445 (Ct. App. 2010)). "[T]he meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the contract as a whole and considering the context and subject matter of the contract)." *McGill v. Moore*, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009) (*citing Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)).

Respondents focus exclusively on the word "request" in paragraph 14 and ignore the remaining language of that provision. Their reliance on this isolated word gives paragraph 14 an absurd construction that is inconsistent with its unambiguous language. Paragraph 14 of the Business Lease imposes numerous obligations on the parties with regard to the maintenance and condition of the Leased Premises. It is not a "wish list" or suggestions as to what the lessee should do at the end of the lease term. The obvious import of that provision is that it imposes a contractual duty on the lessee (and Respondents as assignees) to restore the Leased Premises.

Consistent with this reading of paragraph 14 of the Lease Agreement, paragraph 15 thereof (Maintenance) makes clear that Respondents were obligated to maintain the Leased Premises in the same condition in which Easy Tray accepted such premises:

> Lessee hereby accepts the Premises as per Schedule B and agrees to maintain the same in the same condition, order and repair as they are at the commencement of the Term, excepting only reasonable wear and tear arising from the use thereof under this Lease, and to make good to Lessor immediately upon demand, any damage to water apparatus, or electric lights or any fixtures, appliances or appurtenances of the Premises, or of any person or persons in the employ or under the control of the Lessee. Lessee agrees to keep the Demised Property trash-free and to pay the cost of trash and debris as related to Lessee's operation. Lessee agrees to use a trash removal service and Lessee shall be billed directly for such service.

(*See* R. p. 489 ¶ 15). The overall language of the Business Lease makes clear that Lessee undertook mandatory obligations with regard to the Leased Premises.

Additionally, Respondents' current argument is inconsistent with their prior actions, which have evidenced a belief that they were required to restore the Leased Premises. For example, a July 14, 2017 email from Andrea Limehouse to Simmons reflects Respondents' understanding that they owed Simmons contractual duties with regard to the condition of the Leased Premises (including rectifying floor modifications):

From: Andrea Limehouse <andrea@limehouseproduce.com>
Date: Friday, July 14, 2017 3:35 PM
To: David <dsimmons@simmonsrealtyco.com>
Cc: "david@southeasternconstructionco.com" <david@southeasternconstructionco.com>
Subject: Re: Trade Street

David,
I spoke to SCEG and they said they will bridge the coverage so there will not be a period without power.
I wish you had been more specific when we met with David Willis and complied when we asked for a written list of your requests. I understand you were going out of town but if you remember I had asked you repeatedly to meet before we vacated and we left the building 6/3/2017 so you have had plenty of time. I believe the drains were filled the week of 6/25/2017 almost three weeks ago so if you were dissatisfied I would have expected a more timely response.
I am copying David Willis as he was responsible for installing rebar and filling the drains.
Andrea

(*See* R. p. 533).

Even more tellingly, in a subsequent email in that chain, dated July 25, 2017, Respondents' attorney—from the same firm representing them in this appeal—construed paragraph 14 of the Business lease as requiring that floor modifications be returned to their original condition (emphasis in original):

> Section 14 of the Lease, entitled "Improvements", deals with improvements and modifications which the Tenant was authorized to make to the Premises, and specifically authorized the Tenant to make "modifications to the floors and special electrical and lighting requirements". Section 14 further authorized the Tenant to make certain floor modifications. Of these authorized improvements, **only the floor modifications are required to be returned to their prior condition at lease termination**. Specifically, Section 14 states that "Lessor request[s] that floor modifications must be remedied at the termination of this Lease; normal wear and tear excepted".
>
> It is my understanding that Limetrade, LLC has installed lighting superior to the original installation, filled in the floor drains, cleaned the floors and removed any ducting suspended from the roof rafters. Limetrade, LLC has not (and will not) repair concrete damage due to subsidence from engineering issues with the Premises, or make any of the wish list of repairs detailed in your emails below.

(*See* R. p. 531). The words and actions of Respondents' attorneys bind them in this regard. *See Koutsogiannis v. BB&T*, 365 S.C. 145, 149, 616 S.E.2d 425, 429 (2005) ("Attorney was an agent for BB&T because the work and acts he engaged in, such as the settlement negotiations and the submission of a proposed summary judgment order to the trial court, were within the scope of his representation."); *Crim v. E.F. Hutton, Inc.*, 298 S.C. 448, 450, 381 S.E.2d 492, 493 (1989) ("The authorized acts of an agent are binding on the principal."); *Motley v. Williams*, 374 S.C. 107, 112, 647 S.E.2d 244, 247 (Ct. App. 2007) ("Acts of an attorney are directly attributable to and binding upon the client.") (citation omitted). It is disingenuous for Respondents to now take the contrary position on this appeal because it suits their current argument.

Prior to the filing of this lawsuit, Respondents never took the position that paragraph 14 did not impose a duty on them to return the property to its prelease condition. They never suggested that paragraph 14 was merely a voluntary wish-list that they could ignore. To the contrary, at all times Respondents behaved consistent with Simmons' contention in this appeal, *i.e.,* that paragraph 14 of the Business Lease required them to restore the Leased Premises to its prior condition. Judge Chellis' Final Order even recognizes that—consistent with Simmons' application of the plain language of paragraph 14—Respondents undertook efforts to bring the Leased Premises back to its original condition:

> [Respondents,] in an effort to remedy the slab deficiencies hired Southeastern Construction Corp., a reputable local commercial general contractor, to fill in the trench drains. Southeastern Construction Corp came in and filled in the trench drains after the refrigeration units were removed. T V-2 Page 98, line 25. Mrs. Limehouse, Defendants' representative, stated she asked Mr. Willis5 to "Do whatever he thought he needed to do, to put the floors in -- as -- back to as good a condition as he could, including filling all of the areas of subsidence."

(*See* R. p. 15).

In light of the foregoing, the Court should reject Respondents' argument that the language of paragraph 14 does not clearly require them to restore the Leased Premises. As set forth above, both the language of paragraph 14 and Respondents' actions clearly show that Respondents were obligated to bring the Leased Premises (including the floor) back to their pre-lease condition.

B. Respondents Have Not Refuted That the Undisputed Evidence Establishes the Pre-Lease Condition of the Leased Premises.

In their Brief, Respondents argue that the Court should affirm because "[t]here was no documentary or pictural (sic) evidence presented of the condition of the concrete flooring prior to Easy Tray's tenancy." (*See* Br. of Resps., at 10).

Initially, Respondents do not cite any authority supporting that the pre-Business Lease could only be proved via photographs or written documents. "[I]ntroducing testimony is the functional equivalent of introducing evidence." *In re Care & Treatment of Campbell*, 427 S.C. 183, 192 n.2, 830 S.E.2d 14, 19 n.2 (2019) (*citing State v. Starnes*, 388 S.C. 590, 599, 698 S.E.2d 604, 609 (2010) (stating testimony is evidence)); *accord Custom Performance Eng'g, Inc. v. Am. Indus. Grp., LLC*, No. 2024-UP-275, 2024 S.C. App. Unpub. LEXIS 271, at *7 (Ct. App. July 24, 2024) ("Adams's testimony that Custom Performance spent $8,694 for tooling the Original Machine supports this award.") (*citing Campbell*). As such, Mr. Simmons' uncontradicted testimony proved the pre-lease condition of the Leased Premises.

Respondents have not directed the Court to any authority or cited to anything in the record that would have made Mr. Simmons' testimony incompetent on this issue. To the contrary, given his involvement with the entity owning the Leased Premises, he certainly was competent to testify about its condition (and any change in its condition). "It is the well-settled law of this state that an owner may testify as to the value of damaged real and personal property." *Waites v. South Carolina Windstorm & Hail Underwriting Ass'n.*, 279 S.C. 362, 366, 307 S.E.2d 223, 225 (1983). There was no reason for the trial court to conclude that Mr. Simmons was not competent to testify about the condition of the Leased Premises, and it did not reach such a conclusion.

Simmons reminds the Court that the trial judge did not conclude that Mr. Simmons' testimony should be disregarded as not credible. To the contrary, Judge Chellis' Final Order expressly finds that "Plaintiff produced ***no evidence*** of the condition of the concrete slab of the demised property immediately prior to these modifications." (*See* R. pp. 14-15 (emphasis added)). He did not decide to disbelieve or reject Mr. Simmons' undisputed testimony. Rather, he

concluded that Simmons had presented ***no*** evidence of the pre-lease condition of the Leased Premises. As set forth herein and in Simmons' Brief of Appellant, this is simply wrong. To the contrary, there is no dispute that the ***only evidence presented at trial*** showed that the Lease Premises were in pristine condition when occupied under the Business Lease.

Respondents retort that "Mr. Simmons' unsubstantiated statements that the slab was 'pristine' and in 'great shape' are just those: unsubstantiated statements." (*See* Br. of Resps., at 10). Mr. Simmons' sworn testimony was not "unsubstantiated statements." Rather, his testimony is relevant evidence presented under oath that was probative as to the pre-lease condition of the Leased Premises. There is nothing to suggest that Mr. Simmons did not perceive the condition of the Leased Premises or that he was speculating about the condition. There is no evidence Mr. Simmons' testimony is the product of hearsay or inadmissible evidence. To the contrary, the only competent evidence at trial was first-hand testimony that the Leased Premises were in "great" or "pristine" condition when Easy Tray occupied them.

Respondents take the curious position that Mr. Simmons' testimony "was all the evidence of the condition of the slab, which is not a preponderance of evidence, as required." (*See* Br. of Resps., at 10). Respondents admit that the ***only evidence*** at trial was that the Leased Premises was in pristine condition when Easy Trade took possession. Respondents provide no citation or explanation for their conclusion that Mr. Simmons' undisputed testimony was insufficient to prove the pre-lease condition of the property.

C. Respondents' Argument That the Assignment Released Limehouse from Its Contractual Obligations Is Contrary to the Law.

Respondents argue that Limehouse "had no more obligations under the Business Lease excepting those obligations that arose prior to the closing date of March 24, 2007." ." (*See* Br. of Resps., at 11-12). They base this argument on Section 3 of the Assignment from Limehouse to Limetrade, which states:

> Assignee hereby assumes all obligations of Assignor arising or accursing on or after the date hereof under the Business Lease, and shall make all payments and keep

> and perform all conditions and covenants of the Business Lease in the same manner as if Assignee were the original lessee thereunder.

(*See* R. p. 500 ¶ 3). In essence, they contend that Limetrade took the place of Limehouse under that Assignment and that the Assignment excused Limehouse from all obligations under the Business Lease after the date of the Assignment. This argument is contrary to the law.

First, contrary to Respondents' assertions, paragraph 3 of the Assignment does not absolve Limehouse (as assignor) of its contractual promises. It merely states that Limetrade (as assignee) agrees to undertake those obligations for itself. Respondents do not, and cannot, direct the Court to any language of the Assignment clearly terminating Limehouse's contractual obligations under the Business Lease. It merely adds Limetrade as an additional party responsible for those duties.

Simmons' Brief of Appellant argues that an assignment does not absolve the assignor of its contractual duties and cites authority in support of that argument. Respondents' Brief does not address those cases or the substance of Simmons' argument. They do not refute that "[u]nder settled contract law, a person may not simply delegate a duty to another and thereby extinguish his own liability to fully perform that duty." *See Baker v. Weaver*, 279 S.C. 479, 482, 309 S.E.2d 770, 772 (Ct. App. 1983). Quoting Simpson's hornbook on Contracts, the *Baker* court further stated "[f]or the assignee's defective performance ***the assignor remains liable to the obligor just as he would be for his own defective performance*** or that of his agent or servant." *See id.* (emphasis added) (citation and quotation marks omitted). The law is clear that an assignment does not release the assignor from its contractual duties. It merely makes the assignee *also* liable to the other party.

While they claim that Simmons has engaged in a red herring in making this argument, they importantly cite no authority to support their position. Specifically, they do not cite any authority absolving the assignor of its contractual duties in the absence of a complete novation of the contract. As a result, Plaintiffs have not refuted that Limehouse remains liable under the Business Lease notwithstanding its assignment to Limetrade.

CONCLUSION

For the foregoing reasons (and for those in the Brief of Appellant), the Court should reverse the trial judge's Final Order and his denial of Simmons' motion to alter, amend, or reconsider.

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RULE 211(b) CERTIFICATE

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE OF FINAL REPLY BRIEF OF APPELLANT

I certify that I have served the Final Reply Brief of Appellant on the above-referenced Respondents by email in accordance with the South Carolina Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022) on March 14, 2025, addressed to their attorneys of record:

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