

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Court of Common Pleas
For Charleston County
The Honorable J.C. Nicholson, Jr.
Trial Court Case No.: 2008-CP-10-06947
Appellate Case No. 2013-000450

Pinepoint Associates, LP,

Plaintiff-Respondent,

v.

Vanevery Enterprises, Inc., Sandy Vanevery,
GTH Enterprises, Inc., and Timothy R. Sebold,

Defendants,

Of whom Vanevery Enterprises, Inc. and
Sandy Vanevery are the

Appellants.

FINAL BRIEF OF RESPONDENT

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FACTS

This is a commercial landlord-tenant matter. Pinepoint Associates, LP, as the Landlord, and Vanevery Enterprises, Inc., as the Tenant, entered into a lease dated June 1, 2005, for commercial retail space located in the Pine Point Plaza shopping center in Charleston County, South Carolina. (R. p. 21) Sandy Vanevery (“Vanevery”) is the sole owner and manager of Vanevery Enterprises, Inc. At that time Sandy Vanevery was in his early twenties and he intended to open and operate a “Lifequest” health club franchise in the leased premises. (R. p. 261, line 20-p. 262, line 8)

Timothy R. Sebold (“Sebold”) and/or or his company, GTH Enterprises, Inc., was the owner of the Lifequest name and brand. In connection with the execution of the lease, Sandy Vanevery, Tim Sebold, and GTH Enterprises signed personal guarantees in which they jointly and severally guaranteed the full performance of all of the Vanevery Enterprises’ obligations under the lease. (R. pp. 53-55)

Sandy Vanevery and Vanevery Enterprises are hereinafter collectively referred to as “Vanevery” for ease of reference.

The Landlord and Vanevery subsequently entered into a First and Second Amendment to the Lease, the pertinent portions of which changed the lease commencement date to October 17, 2005, and the rent start date to March 15, 2006. (R. pp. 59-63) Vanevery took possession of the leased premises on or around the amended lease commencement date (i.e., October 17, 2005) and began construction of the upfits to open a health club facility in the space.

In a fax from his attorney dated December 16, 2005, Vanevery informed the Landlord that he desired to “rescind” his lease. (R. p. 273) The Landlord responded in a letter dated December 19, 2005, and indicated that the lease did not provide Vanevery with a right to rescind

the lease. (R. p, 274) In that same letter the Landlord also indicated that, under the term of the lease, Vanevery could assign the lease, subject to the Landlord's consent and subject to all three of the guarantors consenting to the assignment.

The Landlord sent a proposed agreement for Vanevery to assign the lease. Vanevery and the other guarantors did not sign it and Vanevery never followed up with the Landlord regarding any assignment. (R. p. 31, line 11-p.32, line 11) Vanevery remained in possession of the premises under the lease, and work continued on the tenant upfits to the space.

The monthly rent payments owed under the lease commenced on March 15, 2006. Around that same time the Landlord learned that a lawsuit had been filed between Sebold and Vanevery. Therefore, in a letter dated March 17, 2006, the Landlord's counsel notified Vanevery and Sebold that the rent payment that due on March 15, 2006, had not been received, and the Landlord requested adequate assurances from Vanevery and Sebold concerning performance of the obligations owed under the lease, including payment of rent. (R. p. 275)

Thereafter, in a letter dated April 5, 2006, the Landlord, through counsel, notified Vanevery and Sebold that the tenant was in default under the lease based on failure to deliver the rent payment, and the letter requested a meeting between the parties and counsel to discuss a resolution of the situation. (R. p. 280)

Following a meeting between the parties and their counsel, on May 9, 2006, the Landlord's counsel sent Vanevery and Sebold's counsel a "Surrender of Tenant's Leasehold Interest Agreement" under which Vanevery would voluntarily surrender possession of the premises to the Landlord so that the Landlord could attempt to re-lease the premises. (R. p.283) That letter requested that Vanevery and Sebold return the signed surrender agreement to the Landlord by May 12, 2012. Receiving no response, on May 12, 2006, the Landlord filed an

action in the Magistrate's Court to evict the tenant from the premises. (R. p. 118). Following the eviction action, the Landlord took possession of the premises and eventually leased the premises to another tenant.

The Landlord filed this action on December 8, 2008, seeking to collect the unpaid rent and other sums owed under the lease and under the personal guarantees of the lease. (R. p. 17) The Landlord's counsel then began attempting to locate Vanevery in order to serve the Summons and Complaint upon him.

The tax records for Charleston County indicated that Vanevery owned a condominium in Mount Pleasant, South Carolina. The tax records also listed that address as the mailing address for the tax bills for the property. (R. p. 69 ¶ 3, and p. 71 Ex. A) The Landlord's counsel attempted to serve a filed copy of the Summons and Complaint on Vanevery at his condominium via Certified Mail/Return Receipt Requested. The service letter the letter was returned by the Post Office as "unclaimed". (R. p. 69 ¶ 43, and pp. 72-73 Ex. B) The Landlord's attorney then hired a private process server to attempt personal service on Vanevery at his condominium. The process server attempted service numerous times at that address but he was never able to locate Vanevery or anybody else at home. (R. p. 69 ¶¶ 4-5)

The Landlord's process server also attempted service upon Vanevery at 1303 Eaglet Lane in Hanahan, South Carolina, which is the address listed for him as the registered agent of Vanevery Enterprises, LLC, in the records of the South Carolina Secretary of State. Upon attempting service there, the process server learned that is the address of Vanevery's mother. His mother informed the process server that Vanevery did not live there and was in North Carolina, but she refused to provide his current address. (R. p. 69 ¶ 6)

The Landlord then attempted to locate and serve Vanevery in North Carolina. Searches of tax records, property records, and other databases indicated two possible addresses for Vanevery in North Carolina; however, a process server was unable to locate Vanevery at either address, and the process server could not locate a current address for Vanevery in North Carolina. (R. p. 70 ¶7)

While the Landlord's attorney was attempting to locate and serve Vanevery in North Carolina, Vanevery changed the mailing address for the tax bills on his Mount Pleasant condominium to reflect a post office box in Charlotte, North Carolina. (R. p. 70 ¶ 8, and p. 80 Ex. F) At that point the Landlord's attorney sent the process server back to Vanevery's condominium in Mount Pleasant with instructions to attempt to locate and talk to the occupants of the property in an effort to obtain Vanevery's current address or telephone number in North Carolina. After repeated attempts to contact an occupant in the condominium, the process server left a note on the door asking whoever lived there to call the Landlord's attorney. (R. p. 70 ¶ 8)

On July 2, 2009, a renter in Vanevery's Mount Pleasant condominium called the Landlord's attorney's paralegal and gave her Vanevery's cell phone number. The paralegal then called Vanevery on his cell phone, he answered the phone, and she obtained his address in North Carolina. At that point the Landlord immediately served Mr. Vanevery at his current home address in Charlotte, North Carolina, with the service being effective as of July 14, 2009. (R. p. 70 ¶ 9)

By consent of the parties this case was transferred to the non-jury trial docket for a non-jury trial.

On August 4, 2009, Vanevery filed a Motion to Dismiss For Lack of Personal Jurisdiction and/or Summary Judgment contending the summons and complaint was not served

upon him within the three-year statute of limitations. (R. p. 67) Following a hearing on the motion, the trial judge denied the motion in an order filed on March 30, 2010. (R. p. 1) Vanevery then filed a Motion to Alter or Amend the Judgment,¹ in which Vanevery contended that the summons and complaint was not served within 120 days of the filing of the Summons and Complaint as required under Rule 3(a), SCRCPP. (R. p. 83) Following a hearing on that second motion, the trial judge denied the motion in an order filed on March 22, 2011. (R. p. 3)

Thereafter, the Landlord and Vanevery filed cross-motions for summary judgment. (R. p. 86, and R. p. 87) In his motion for summary judgment Vanevery again for the third time contended that the complaint was barred by the statute of limitations. At the hearing on the cross-motions Vanevery repeated the statute of limitations/service of process argument that had been previously rejected by the trial judge on two different separate occasions. At the summary judgment hearing Vanevery also for the first time asserted that he had no liability under the lease because he had “orally assigned” it to Tim Sebold. The trial judge denied Vanevery’s motion and granted summary judgment in favor of the Landlord on its breach of lease claims in a final Order and Judgment filed on May 2, 2012. (R. p. 8)

Vanevery filed a Motion to Alter or Amendment and/or For a New Trial seeking to alter the Order and Judgment based on his statute of limitations and “assignment” arguments. (R. p. 117). Following a hearing on that motion, the trial judge denied that motion. (R. p. 16) Vanevery then filed a Notice of Appeal.²

¹ Vanevery filed his motion to alter or amend the trial judge’s order before the trial judge’s order was filed on March 30, 2010.

² Tim Sebold filed a *pro se* answer on behalf of himself and his company, GTH Enterprises, Inc., but he subsequently did not appear or participate in the case. Sebold and GTH are not parties to this appeal.

ARGUMENT

Vanevery presents two arguments on appeal, one based on the statute of limitations and the other based on his purported oral “assignment” of the lease. The trial judge thoroughly analyzed and properly rejected those arguments.

I. THE TRIAL JUDGE CAREFULLY CONSIDERED AND PROPERLY REJECTED VANEVERY’S ARGUMENTS REGARDING THE TIMELINESS AND MEANS BY WHICH THE LANDLORD OBTAINED SERVICE OF PROCESS ON VANEVERY.

As to Vanevery’s statute of limitations arguments, this action is governed by the three-year statute of limitations applicable to contract actions. S.C. Code Ann. § 15-3-530(1); accord Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E.2d 548 (Ct. Ap. 2005) (holding the three-year statute of limitations for contract actions applies to action based on breach of a commercial lease).

A. The summons and complaint was filed within the statute of limitations.

The Landlord’s summons and complaint was filed on December 8, 2008, which was: (a) less than three-years before Vanevery notified the Landlord on December 16, 2005, that he wanted to rescind the lease; (b) was less than three-years from the tenant’s failure to deliver the first rent payment that became due on March 15, 2006; and (c) was less than three-years from the date the Landlord obtained possession of the premises by way of the eviction action the Landlord filed on May 12, 2006. The Landlord timely filed the summons and complaint within the three-year statute of limitations under any analysis of the issue.

B. The statute of limitations was tolled when Vanevery moved out of state.

Vanevery argues that the Landlord was required to serve Vanevery within 120-days of filing under Rule 3(a)(2), SCRCP, and, according to Vanevery, the Landlord’s failure to locate

and serve Vanevery within that time period acts bars the Landlord's claim under the statute of limitations. That argument misconstrues the clear and unambiguous language of Rule 3(a), which states:

RULE 3. COMMENCEMENT OF ACTION

(a) Commencement of Civil Action. A civil action is commenced when the summons and complaint are filed with the clerk of court if:

(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; **OR** [emphasis added]

(2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

Vanevery's argument is based on Rule 3(a)(2) but ignores Rule 3(a)(1).

Vanevery moved out of South Carolina and lives in North Carolina while he is attending school. During the multiple hearings at which Vanevery repeatedly raised this issue, it was unrefuted that the Landlord undertook extensive efforts to locate and serve Vanevery. Vanevery did not claim the certified mail sent to his last known address, he did not leave a forwarding address, his mother refused to reveal his location to the Landlord's process server, and process servers could not locate him at any of his addresses of record in South Carolina. The Landlord exercised due diligence in order to locate and serve Vanevery at his new residence in North Carolina.

Vanevery moved out of state, which acted to toll the statute of limitations. S.C. Code Ann. § 15-3-30 (stating the statute of limitations is tolled if a defendant "shall depart from and reside out of this State."); see also Tiralango vs. Balfry, 355 S.C. 359, 517 S.E.2d 430 (1999) (holding the statute of limitations is not tolled under Section 15-3-30 unless the defendant lives out-of-state and Plaintiff did not know, and could not reasonably have known, the whereabouts

of the defendant). Moreover, as the registered agent for Vanevery Enterprises, Inc., Vanevery's failure to list his proper and current address with the South Carolina Secretary of State equitably tolled the statute of limitations. See Hooper vs. Ebenezer Senior Services and Rehabilitation Center, 386 S.C. 108, 687 S.E.2d 29 (2009) (holding nursing home's failure to properly list its registered agent for service with the Secretary of State's Office equitably tolled the statute of limitations).

Vanevery's reliance on the 120-day provision in Rule 3(a)(2) ignores the fact that Rule 3(a) provides that service may be accomplished in accordance with Rule 3(a)(1) "OR" in accordance with Rule 3(a)(2). Vanevery's attempt to combine the 120-day requirement in Rule 3(a)(2) with Rule 3(a)(1) ignores the "OR" language separating these provisions, and the effect of combining those two provisions would impermissibly create an ambiguity in the Rule. See State v. Patterson, 220 S.C. 269, 66 S.E.2d 875 (1951) (when construing a statute, it is proper for the court to look to the effects and consequences of the interpretation urged); Davis v. School District of Greenville County, 374 S.C. 39, 647 S.E.2d 219 (2007) (refusing to recognize a proposed interpretation that would create a significant conflict between two statutes). As recently noted by the South Carolina Supreme Court, "The 120-day period only has relevance if service is accomplished outside of the statute of limitations. When service occurs outside of the statute of limitations it must occur within 120-days of filing the complaint." Mims ex rel. Mims v. Babcock Center, Inc., 399 S.C. 341, 347, 732 S.E.2d 395, 398 (2012). Here, the Landlord's summons and complaint was filed within the statute of limitations and the statute of limitations was tolled while the Landlord diligently worked to locate and serve Vanevery in North Carolina.

C. Service by publication was not a required or appropriate manner of service given that the Landlord located and personally served Vanevery.

Vanevery cites Meyer v. Paschal, 330 S.C. 175, 498 S.E.2d 635 (S.C. 1998), and Tiralango v. Balfry, 335 S.C. 359, 517 S.E.2d 430 (1990), for the proposition that the Landlord was required to serve Vanevery by publication under S.C. Code Ann. § 15-9-710. In Meyer the location of the defendant was at all times known to the plaintiff. The limitation of the holding in Meyer was subsequently recognized in Tiralango v. Balfry, which adopted the following rule regarding tolling of the statute of limitations for service on non-resident defendants under Section 15-3-30:

In accordance with the above authority, we construe the language in Meyer as requiring an objective test of knowledge, i.e., the statute is tolled when the plaintiff did not, and could not reasonably have known the whereabouts of the defendant.

Tiralango, at 361, 517 S.E.2d at 431 (emphasis added). Tiralango did not adopt a requirement, as urged by Vanevery, that service by publication must be made on an out-of-state defendant. Here the Landlord made a diligent and good faith effort to timely serve Vanevery in person, which effort resulted in Vanevery receiving personal service of notice of the lawsuit and an opportunity to defend the claim, as opposed to the entry of a default judgment against him that would have surely followed service upon him by publication. This case does present the situation that was of concern to the Court in Meyer, “whereby a plaintiff would allow suits to be postponed indefinitely, for no good purpose, and to be brought in some cases at the virtually unlimited pleasure of the plaintiff.” Id. at 183, 498 S.E.2d at 639. To the contrary, the record in the case indicates that the Landlord filed this action within the statute of limitations and thereafter promptly and diligently worked to locate and serve Vanevery in person.

Further, under S.C. Code Ann. § 15-9-710, service by publication is permitted only when service cannot be made “after due diligence.” Section 15-9-710 does not provide a time limit for the “due diligence” period, and Vanevery’s attempt to add a time limit to that statute impermissibly adds an additional requirement and changes the meaning of what is a plain and unambiguous statute. See Williams v. Smalls, 390 S.C. 375, 378, 701 S.E.2d 772, 773 (Ct. App. 2010) (“[If] the statute's language is plain and unambiguous, and conveys a definite meaning, the rules of statutory construction are not needed and the court has no right to impose another meaning.”). Here, in the course of attempting to locate and serve Vanevery, the Landlord learned that he may have moved to North Carolina. Service by publication was not a required or appropriate manner of service given that the Landlord was able to locate and personally serve Vanevery.

Vanevery’s argument that the Landlord was required to serve Vanevery by publication under Section 15-9-710 ignores the “due diligence” requirement stated in that statute, creates a conflict with or nullifies the tolling provisions in Section 15-3-30, and is contrary to the rule stated in Tiralango governing tolling of the statute of limitations on out-of-state defendants. On four separate occasions the same trial judge carefully considered and properly rejected Vanevery’s argument regarding the timeliness and means by which the Landlord obtained service of process on Vanevery, and the trial judge’s orders should be affirmed on appeal.

II. THE TRIAL JUDGE PROPERLY HELD THAT THERE WAS NO VALID ASSIGNMENT OF THE LEASE THAT RELIEVED VANEVERY OF HIS OBLIGATIONS UNDER THE LEASE.

Vanevery improperly contends that he “orally assigned” the lease to Tim Sebold, thereby relieving his company (Vanevery Enterprises) of its obligations to the Landlord under the lease and thereby relieving himself of his obligations to the Landlord under his personal guarantee of the lease.

Leases are contracts and are construed under rules of contract interpretation. South Carolina Dept. of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 12 (Ct. App. 2008). Once a bargain is formed and the obligations set, a contract may only be altered by mutual agreement and for further consideration. Layman v. State, 368 S.C. 631, 640, 630 S.E.2d 265, 269-270 (2006). In order to modify a contract, the parties must manifest their mutual assent to all essential terms in order for an enforceable obligation to exist. See Florence City-County Airport Commission v. Air Terminal Parking Co., 283 S.C. 337, 341, 322 S.E.2d 471, 473 (Ct. App. 1984) (citing Edens v. Laurel Hill, Inc., 271 S.C. 360, 247 S.E.2d 434 (1978)). If one of the parties has not agreed, then a prerequisite to modifying the contract is lacking. Id. (citing Shealy v. Fowler, 182 S.C. 81, 188 S.E. 499 (1936)).

In the present matter, none of the requirements to modify the lease so as to relieve Vanevery from his obligations under the lease occurred. The lease prohibits assignment without the express written consent of the Landlord following the tenant’s execution and delivery of an assignment agreement “in a form and substance satisfactory to Landlord[.]” (R. p. 34 ¶ 17.2) The lease also requires that any amendments must be in writing and signed by all parties. (Id.)

Upon learning that Vanevery desired to assign his obligation under the lease, the Landlord indicated that it would be willing to allow Vanevery to assign the lease only if all three

guarantors (i.e., Vanevery, Sebold, and GTH) consented to the assignment. In his Appellate Brief **3** Vanevery acknowledges that he and the other guarantors never signed or delivered an assignment agreement to the Landlord, and the lease and personal guarantees of the lease do not contain any provision allowing Vanevery to unilaterally and orally assign his obligations. (R. p. 274) Accordingly, there was never a meeting of the minds and there was never an agreement or acceptance by the Landlord of Vanevery's alleged unilateral oral assignment of the lease.

Moreover, the Landlord never received any rent payment or other consideration, and the Landlord ultimately had to file an action to evict Vanevery from the premises after he refused to surrender possession of the premises. The Landlord never received any bargain or benefit in consideration for Vanevery's alleged oral assignment of the lease.

In short, Vanevery refused to provide the Landlord with a signed assignment agreement on the terms required by the Landlord, the lease and personal guarantees do not contain any provisions allowing him to unilaterally assign the lease or rescind those obligations, and Vanevery has not identified any exchange of consideration or any other benefit or value received by the Landlord in consideration of his purported oral assignment. The trial judge properly held that Vanevery's alleged unilateral oral assignment of the lease did not relieve him from his obligations to the Landlord under the lease and under his personal guarantee of the lease.

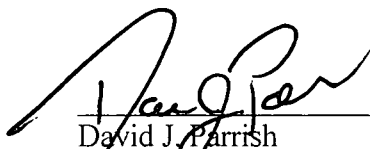
CONCLUSION

For the reasons stated, Respondents respectfully submit that this Court should affirm the orders and judgment of the trial judge.

3 Appellant's Brief at p. 9.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.



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