THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2010-CP-39-405

John Walton — Respondent

v.

Mitchell L. Bagwell — Appellant,

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This matter came to Court by way of a Complaint for alleged Breach of a lease agreement between Plaintiff/lessor John Walton and Defendant/lessee Mitchell Bagwell. Plaintiff was represented by Larry C. Brandt of Walhalla and Defendant was represented by Jacqueline Patterson of Greenville.

Significant discovery was exchanged by the parties. The parties never went through arbitration, although the General Provisions of the lease called for the same.

At trial the Appellant was represented by Kraig Alan Pringle, continuing representation in this appeal, of Greenville. The Respondent was represented at trial by Larry C. Brandt, of Walhalla.

After each party presented its case, the Court found for Plaintiff in the amount of Fifty-one Thousand Six Hundred Sixty Dollars ($51,660.00).

The Appellant timely appealed from said Order and this brief follows.

ARGUMENT

I. THE COURT ERRED BY DISREGARDING PAROL EVIDENCE WITH REGARD TO THE LEASE.

The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument. Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 471, 581 S.E.2d 496, 502 (Ct. App. 2003). "**The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties** (emphasis added) and, in determining that intention, the court looks to the language of the contract." Friarsgate, Inc. v. First Federal Sav. And Loan Ass'n of South Carolina, 317 S.C. 452, 457, 454 S.E.2d 901, 905 (Ct. App. 1995). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense." Id.

Conversely, **where a contract is ambiguous, the fact finder must ascertain the parties' intentions from the evidence**

presented. Charles v. B & B Theatres, Inc., 34 S.C. 15, 18, 106 S.E.2d 455, 456 (1959) (" **[W]hen the written contract is ambiguous in its terms ...parol and other extrinsic evidence will be admitted to determine the intent of the parties.**")(emphasis added). "

Clearly, the intention of the parties is the primary concern in interpreting the "four corners" of the document. If the terms contained in the document, taken in their plain meaning, leave no room for interpretation, evidence of other terms will not be considered, as the intention of the parties is clear. However, when those terms are vague, confusing, or incomplete, the Court must ascertain the intention of the parties through available evidence and/or testimony of the parties.

In this case, there was clear ambiguity in the terms of the "Restrictions Clause" in the purported lease, as evidenced by the plain language of the same, as well as among the witnesses who were the players in the negotiations leading up to the purported lease.

A. By finding the Use Restrictions Clause in the lease was unambiguous.

Respondent called one witness at trial, the plaintiff, John Walton. The Appellant called three witnesses; Nelson Garrison, the real estate agent representing Walton, Mitchell Bagwell, proposed tenant, and Harriett Bauknight, the real estate agent representing Bagwell. Each party submitted excerpts from the deposition of Wes Nalley, the property manager of said location, who was unavailable at trial.

There was considerable testimony from each of the witnesses about the concept proposed by Bagwell for the use of the property. Bagwell intended to operate a restaurant/wine bar, similar in concept to North Hampton Wines, an upscale establishment in Greenville with a full menu and a bar specializing in wines, cheeses, cold cuts, and the like.

The testimony of each of Appellant's witnesses made it clear that the terms "wine bar," "wine bar/restaurant," "restaurant/wine bar," "restaurant," and "white tablecloth restaurant" were used interchangeably to describe the concept throughout the negotiation process prior to the execution of the purported lease. T.76-81; .

The Use Restrictions clause states, in pertinent part:

"(a) During the term of this Agreement, no portion of the Combined Properties may be used for any of the following purposes...

(i) A tavern, bar, nightclub, discotheque, or any other establishment selling alcoholic beverages for on-premises consumption; **provided, however, the foregoing shall not prohibit the operation of a restaurant and the sale of alcoholic beverages therein incidental to the service of food; provided that such restaurant is primarily a restaurant with a complete line of food sales and not a bar with only incidental food sales** (emphasis added)."

Nelson Garrison, proposed lessor Walton's agent, stated of the highlighted language above: "It seems to leave a good bit of actual interpretation of a specific use. If (it) is a wine bar, but serves soups, salads, sandwiches, and desserts, it may pass."

The testimony of Appellant's witnesses revealed there were a number of meetings between Bagwell, the proposed lessee, Bauknight, his agent, and Garrison. Throughout this process, Bagwell maintained he intended a full-service restaurant, and was assured that his concept for the property was acceptable to all parties concerned. Garrison, as Walton's agent, repeatedly told Bagwell that "everything's fine...don't worry about it...just move forward...no one's going to bother you." T.106.

Testimony further showed there was a "final meeting"

composed of the aforementioned, as well as Wes Nalley, at Nalley's office. The meeting was to ensure everyone had a complete understanding of the proposed concept within the use restrictions. Nalley, as property manager charged with enforcing the restrictions, stated he had checked on the proposed concept and further stated "I love it...I'll be one of your best customers...I wish you the best of luck." T.107.

Bagwell continued to move forward with preparing the site. On May 29, 2009, Nalley emailed Bagwell through his attorney that a "Wine Bar" would violate the Use Restrictions and that the property could not be used for such a purpose. Further, if Bagwell chose to move forward with the concept, Nalley would pursue any remedy in law or equity to stop him. P.3B.

Bauknight, Bagwell's agent, testified that she was "shocked" by Nalley's email, as she had been present when the particulars of the proposed concept were discussed. She further stated Bagwell had been "hoodwinked" into going forward with the deal. T.131-133. When asked as a realtor with thirteen years of experience how she interpreted Nalley's email, within the context of the recent meeting,

she testified that the email was essentially telling Bagwell to "get out," and that Nalley had terminated the agreement. T.135-136.

As clearly shown by the testimony, there was confusion among the parties about the language in the Use Restrictions. Several terms were used interchangeably throughout the negotiations and dealings between the parties to describe, or label, Bagwell's proposed concept. There was overwhelming evidence that Bagwell's proposed concept was acceptable to all concerned, right up to Nalley's 180-degree turnaround email.

Further, S.C. Code sec. 36-2A-202(b), states:

§ 36-2A-202. Final written expression: parol or extrinsic evidence

Terms with respect to which the confirmatory memoranda of the parties agree or which are set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

With the inherently vague terms in the pertinent Use Restrictions, the Court erred in disregarding the abundance of parol evidence presented regarding the actual understanding and intent of

the parties. Further, the Court erred by refusing to supplement the Use Restrictions per sec 36-2A-202(b) with additional terms as shown by the evidence.

B. By disregarding Appellant's arguments for estoppel, misrepresentation, unclean hands, frustration of purpose, impracticality, and/or impossibility regarding the lease.

As discussed above, and shown by the testimony and evidence, the Court erred by disregarding Appellant's arguments clearly showing a foundation for the above contract and equitable defenses. T.141-146.

The testimony and evidence presented proved that Nalley's communication was a complete reversal and contradiction of the understanding and intent of the parties. Bagwell, under advice from counsel, reasonably interpreted Nalley's communication as a breach, or at minimum, a cancellation of the contract.

Bagwell's arguments for estoppel, misrepresentation, unclean hands, frustration of purpose, impracticality, and/or impossibility of performance of the lease as intended were disregarded by the Court, contrary to overwhelming evidence. The Court erred in disregarding this testimony and these defenses.

II. THE COURT ERRED IN FINDING THAT APPELLANT UNILATERALLY BREACHED THE LEASE.

Wes Nalley's email to Bagwell through his attorney on May 29, two days before Bagwell was to begin the purported lease, was a complete reversal from the understanding and intent of the parties as shown through the testimony and evidence. Bagwell further testified that Nalley indicated that no matter how much food he served, if there was "one bottle of wine" he would be evicted "on the first day." T.108-109.

The testimony and evidence presented proved this was a complete reversal and contradiction of the understanding and intent of the parties. Bagwell, under advice from counsel, reasonably interpreted Nalley's communication as a breach, or at minimum, a cancellation of the contract.

S.C. Code sec 36-2A-505(1) and (2), states in pertinent part:

§ 36-2A-505. Cancellation and termination and effect of cancellation, termination, rescission, or fraud on rights and remedies.

> (1) On cancellation of the lease contract, **all obligations that are still executory on both sides are discharged**, but any right based on prior default or performance survives, and the canceling party also retains any remedy for default of the whole lease contract or any unperformed balance.

(2) On termination of the lease contract, **all obligations that are still executory on both sides are discharged** but any right based on prior default or performance survives (emphasis added).

Bagwell's reliance upon Nalley's communication that he was in effect breaching, terminating, or canceling the lease was reasonable. Further, the actual term of the lease had not begun. There had been no substantial steps or performance by either party, other than Bagwell's previous efforts at upfitting, repairing, and preparing the site for use.

Further, for Bagwell to proceed with the purported lease after Nalley's communication would be unreasonable. Bagwell had already invested in the site, and to continue under this change of circumstances would require him to continue to pour time and money into an untenable situation. He had every reason to expect to be evicted with no recourse if he continued. As such, he acted reasonably when reacting to Nalley's revelation by stopping payment on the check.

As such, the Court erred in finding Bagwell unilaterally breached the lease contract.

III. THE COURT ERRED IN FAILING TO COMPEL ARBITRATION AS REQUIRED IN THE PURPORTED LEASE CONTRACT

Appellant put forth the defense of Failure of Condition

Precedent to the Dispute Resolution Process. As put forth in the lease contract, section 23, "Any dispute...will be referred to arbitration through only one arbitrator...under authority of the South Carolina Uniform Arbitration Act...to the exclusion of the courts." P.1.

The Court improperly found that the parties had waived arbitration. The testimony and evidence showed that Respondent, through counsel, sent a demand letter to Appellant that also suggested arbitration. P.5. Appellant through counsel reiterated Appellant's position and stated that she would respond appropriately if Respondent filed a complaint. P.6.

At no time did Appellant waive or forego arbitration. In fact, in his answer to the complaint, he pled the defense of Failure of Condition Precedent to the Dispute Resolution Process. Further, as indicated above, arbitration was required under the lease contract, "to the exclusion of the courts." Further, the Appellant raised this issue at trial. The Court erred in failing to compel arbitration in following with the requirements of the purported lease contract.

IV. THE COURT ERRED IN COMPUTING DAMAGES.

After each party presented its case, the Court found for

Respondent in the amount of Fifty-one Thousand Six Hundred Sixty Dollars ($51,660.00). This calculation was based essentially upon eighteen (18) months unpaid rents per the lease contract. No attorney's fees were awarded, as said contract had no provision for the same.

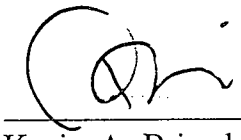
The testimony showed that the property site subject to the lease had a number of problems. There were leaks in the roof, with water running through the dropped ceiling. The rooftop package unit, the air conditioning unit, was nonfunctioning, with a leak in the evaporator coil and no Freon. Appellant testified that he spent approximately One Thousand Five Hundred Dollars ($1,500.00) out of his pocket for parts and labor, not including his own time and efforts to prepare the site for use. T.114-116. This testimony was uncontroverted.

As such, assuming the finding for Respondent at trial, the calculation of damages should have included an offset of the expenses Appellant endured in preparing the site. Thus, the Court erred in its computation of damages.

WHEREFORE, Appellant prays this Court grant his Appeal and

REVERSE the decision of the trial Court in this matter, and for all further and proper remedies due in the premises.

Respectfully Submitted,



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DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant designates the following matter be included in the record on appeal:

Transcript pages: 1- 150, February 20, 2013
Exhibits: D. 1-10; P. 1-11; C. 1
Order, Hon. Edward Miller

I certify that the designated matter is relevant to the appeal and that no irrelevant matter has been designated.

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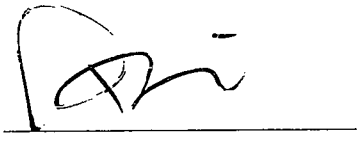
CERTIFICATE OF SERVICE

I certify that on the FOURTH (4th) day of OCTOBER, 2013, I served the *Initial Brief of the Appellant* and the Appellant's *Designation of Matter to be Included in the Record on Appeal* on the Respondent by delivering a copy into the U.S. Mail, postage prepaid, addressed to the Respondent's counsel of record as follows:

Larry C. Brandt
P.O. Box 738
Walhalla, SC 29691



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October 4, 2013

Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29221

RE.: John Walton vs. Mitchell L. Bagwell
Case No.: 2010-CP-39-405

Dear Clerk:

Enclosed please find Appellant Initial Brief and Designation of Matter. Please file the same.

Thanks for your consideration.

Respectfully submitted,

Kraig A. Pringle

KAP/id

cc.: Larry C. Brandt