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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY

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 Roe; and Doe Corporation,.....Defendants,

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

and

Of which Harris Teeter, Inc. is the.....Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

W. Francis Marion, Jr., S.C. Bar. #3645
Bonnie A. Lynch, S.C. Bar #77399
HAYNSWORTH SINKLER BOYD, P.A.
Post Office Box 2048
Greenville, South Carolina 29602
Telephone: (864) 240-3200
Fax: (864) 240-3300

Attorneys for Respondent, Harris Teeter, Inc.

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QUESTIONS PRESENTED

I. Did the Court of Appeals' *Per Curiam* Order "overlook" evidence in affirming the Trial Court's finding that the Release was clear and unambiguous?

II. Was the Court of Appeals' decision consistent with prior decisions of this Court and the Court of Appeals?

STATEMENT OF THE CASE

In 1995, Roper Mt. Rd. Assoc., LLC, leased certain real property ("Property") to Respondent, Harris Teeter, Inc. ("Harris Teeter"), for a twenty (20) year term under a written lease agreement ("Lease"). (R. at 23, ¶ 6; R. at 47, ¶ 4.1). In 2001, Roper Mt. Rd. Assoc., LLC, sold the Property and the landlord's Lease rights to Defendant, Carolina & Georgia Immobilelienfonds I, L.P. ("CGI"), a subsidiary of Petitioner, Germania of America, Inc. ("Germania"). (R. at 81, ¶ 13; R. at 83-84, ¶19.)

In mid-2001, Harris Teeter and Bi-Lo, LLC ("Bi-Lo"), negotiated a transaction whereby Bi-Lo would take an assignment of Harris Teeter's (tenant's) Leasehold estate and assume its Lease liabilities. By signed letter agreement dated June 12, 2001, CGI and Harris Teeter agreed that, when the Bi-Lo assignment and assumption of Lease became effective, CGI, as landlord, would thereafter "look solely to Assignee [Bi-Lo] for performance of the 'Tenant's' [Harris Teeter's] responsibilities under the Lease . . . ." ("Release"). (R. at 22, ¶ 4; R. at 29-30). Relying on the Release, Harris Teeter assigned its interest in the Lease by entering into an "Assignment and Assumption of Lease" with Bi-Lo which became effective on July 9, 2001. (R. at 22, ¶ 5; R. at 31-34; R. at 109-10, ¶¶ 2-3). The same day, Harris Teeter notified CGI of the effective date of the Bi-Lo Assignment and Assumption of Lease by sending an executed copy thereof. (R. at 22, ¶ 5; R. at 35). From the effective date of the Bi-Lo Assignment and Assumption of Lease,

Harris Teeter had no further involvement or transactions with the Lease, Property, CGI or any other landlord of the Property. (R. at 109-10, ¶¶ 2-3.) Harris Teeter did not maintain any control over, or interest in the Property, relying on CGI's release of Harris Teeter once Bi-Lo assumed the Lease obligations. (R. at 110, ¶ 3.) CGI looked solely to Bi-Lo to fulfill the Lease obligations and, correspondingly, Bi-Lo fulfilled all Lease obligations from 2001 until 2009 when it filed for Bankruptcy.

In April 2007, CGI sold the Property and its landlord Lease rights to Plaintiff. (R. at 84-86, ¶¶ 20 & 24.) At that time, Plaintiff was aware of the Bi-Lo Assignment and Assumption of Lease, (R. at 85-86, ¶ 24), but failed to contact Harris Teeter prior to purchasing the Property to determine if Harris Teeter was still obligated under the Lease. (R. at 110, ¶ 5.) Plaintiff had no contact with Harris Teeter until approximately six (6) months after it purchased the Property from CGI. (R. at 110, ¶ 5.) In September 2007, Plaintiff's counsel sent a letter to Harris Teeter regarding Harris Teeter's purported obligations under the Lease. (R. at 110, ¶ 5; R. at 72-74). Harris Teeter immediately responded by advising Plaintiff's counsel that Harris Teeter was released from the Lease obligations in 2001. (R. at 75-76.) Plaintiff took no action in response to Harris Teeter's letter until almost three (3) years later with the institution of this lawsuit after Bi-Lo defaulted on its Lease obligations to Plaintiff and filed for Bankruptcy. In this action, Plaintiff seeks monetary damages against Harris Teeter equal to Bi-Lo's defaulted Lease obligations.

In the Trial Court Harris Teeter moved for Summary Judgment ("Motion") on the basis that the June 12, 2001 letter agreement acted as a release of its obligations under the Lease. Germania's first opposition to the Motion was at the March 1, 2011 hearing *after*

the Trial Court orally granted the Motion and requested Harris Teeter's counsel to submit a proposed order. (R. at 190, 42:1-25.) Germania submitted no affidavits or other evidence to the Trial Court to support it opposition to the Motion.

Germania appealed the Trial Court's order granting Harris Teeter's Motion on the basis that the Release was ambiguous and lacked consideration. Here, before this Court on its Petition for Cert, Germania, once again, raises the exact same arguments it raised to the Trial Court and the Court of Appeals.

ARGUMENT

A Writ of Certiorari "is not a matter of right," and will only be granted where there are "special and important reasons." Rule 242, SCACR. Here, there are no special and important reasons in Germania's Petition supporting a grant of certiorari. Germania exclusively relies on Rule 242(b)(3) – that the Court of Appeals' decision is in conflict with prior decisional law – to support its "Argument II" for why this Court should grant review. Regarding its "Argument I," Germania fails to cite *any* provision of Rule 242(b) that would justify review by this Court. Neither argument fits within Rule 242(b)'s criteria, therefore, the Petition should be denied.

1. DID THE COURT OF APPEALS' *PER CURIAM* ORDER "OVERLOOK" EVIDENCE IN AFFIRMING THE TRIAL COURT'S FINDING THAT THE RELEASE WAS CLEAR AND UNAMBIGUOUS?

A. The Court of Appeals Considered Section 15.4 of the Lease and Properly Found That No Ambiguity Was Created.

Petitioner first contends that this Court should grant certiorari because the Court of Appeals allegedly "overlooked" certain evidence which purportedly created an ambiguity in the Release. Petitioner's argument does not constitute a "special" or "important reason" necessitating review by this Court. Petitioner fails to cite how Rule

242(b) applies to its argument, which is understandable considering that it simply repeats the arguments made to, and rejected by, the Court of Appeals. Petitioner's position is essentially that the Court of Appeals was wrong. There is simply no basis to support such a contention and certainly not one on which a Petition of Certiorari should rest.

Germania relies on a single piece of evidence to support its position that the Court of Appeals overlooked evidence – Section 15.4 of the Lease. While the Court of Appeals' Order does not specifically reference Section 15.4, it necessarily considered its impact when the Court found that the Release met the requirements for a valid modification of the Lease and, as such, released Harris Teeter from any further obligation under the Lease. Without consideration of Section 15.4, the Court's finding that the Release was a valid modification of the Lease would have been unnecessary and plainly shows Section 15.4 was considered in reaching its decision. Furthermore, both Harris Teeter and Germania addressed the impact of Section 15.4 in their respective briefs to the Court of Appeals. (Resp't Final Brief, p. 10; Appellant Final Brief, p. 9). Considering both Parties directly addressed Section 15.4 in their prior briefing and the Court of Appeals necessarily considered the Release's impact on the Lease, Germania's assertion to the contrary is without merit.

Germania's contention that Section 15.4 of the Lease, when read with the Release, creates an ambiguity is also without merit. The Court of Appeals correctly found that the Release constituted a valid modification of the Lease. As noted by the Court of Appeals' Order, the Lease provides that any modification, release, discharge or waiver to any provision of the Lease must be "in writing and signed by the Landlord or the duly authorized agent of Landlord." (R. at 68, ¶ 18.7.) Since the Release is in writing and

was signed by the Landlord, CGI, the Court of Appeals properly found that the Release met the modification requirements of the Lease.

Besides meeting the requirements of a modification under the Lease, the Release wholly and completely modifies Section 15.4 of the Lease. As a result, no ambiguity exists – the Release, as a modification of the Lease, overrides Section 15.4. Section 15.4 of the Lease provides that, in the event of assignment, "Tenant" (Harris Teeter) would remain jointly and severally liable for the payment of rent ***and*** for the performance of all of the "other terms, conditions, and provisions of this Lease which are required to be performed by Tenant." (R. at 63, ¶ 15.4.) The Release directly modifies this provision of the Lease. It expressly and unambiguously states that "[p]ursuant to the Assignment and Assumption Agreement, Assignee [Bi-Lo] will be responsible for ***all of Harris Teeter's obligations*** under the ***Lease*** . . . ." and CGI "will look ***solely*** to Assignee [Bi-Lo] for performance of the ***'Tenant's'*** responsibilities under the ***Lease*** . . . ." (R. at 29-30) (emphasis added). Using the word "all" shows the parties' intent that CGI look to Bi-Lo to fulfill *all* of Harris Teeter's responsibilities under the Lease, including both its payment obligations and all other "Tenant" obligations under the Lease. The fact that the Release identifies the Lease with a capital "L" and places quotation marks around and capitalizes "Tenant," (R. at 29-30), a term defined in the Lease as Harris Teeter, (R. at 40), emphasizes that CGI clearly intended to, and did, look to Bi-Lo to fulfill the "Tenant's" responsibilities.

Since the Court of Appeals considered the impact of Section 15.4 and correctly found that no ambiguity was created, Germania's essential contention that the Court of

Appeals was wrong has no basis and is not one on which a Petition of Certiorari should rest.

B. The Language of the Release is Plain, Clear and Unambiguous, and it Need Not State Something More.

With its argument that the Court of Appeals "overlooked" evidence, Germania also makes the *same* arguments concerning the Release's purported ambiguity that it made to the Court of Appeals – namely, that to constitute a release, the Release should have said something more than it did. Specifically, the Release should have used terms such as "amendment," "release," "payment" or "rent." Germania's arguments in this fashion are nothing more than a request for this Court to reconsider factual arguments that were considered, and rejected, by the Court of Appeals, and do not constitute a "special and important reason" necessitating review by this Court.

South Carolina law is clear that the term "release" is unnecessary to form a release. A release "is the relinquishment of a right or claim by the person in whom the right exists to the person against whom it might have been enforced." Wilson Group v. Quorum Health Res., 880 F.Supp. 416, 425 (D.S.C. 1995) (citing 18 S.C. Juris. Release § 2). Of particular importance is that "[n]o set form of words is necessary to constitute a release," Gardner v. Columbia Police Dep't, 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950), and no "magic words" are required. Wilson Group, 880 F.Supp. at 425. Courts look to the instrument itself to determine the nature of the release. Campbell v. Bi-Lo, Inc., 301 S.C. 448, 451, 392 S.E.2d 477, 479 (Ct. App. 1990). "[P]articular words and expressions in releases are given their ordinary meanings, unless the context indicates their use in a different sense." Gardner, 216 S.C. at 223, 57 S.E.2d at 309.

The Court of Appeals properly found that the language of the Release was clear, unambiguous and met the requirements of a valid release. The Release stated that CGI "will look ***solely*** to Assignee [Bi-Lo] for performance of the "***'Tenant's' responsibilities under the Lease*** . . . ." (R. at 29-30) (emphasis added). The plain and ordinary meaning of this language clearly shows that CGI intended to and did relinquish its right to look to Harris Teeter for performance under the Lease – a right which CGI could have enforced against Harris Teeter – and instead chose to look "solely" to Bi-Lo. In turn, Harris Teeter gave up control of the Property and its rights under the Lease. (R. at 110, ¶ 3.)

Germania's assertion that the Release must state that it is an amendment to avoid the threat of ambiguity also fails. Germania fails to cite any authority for the proposition that an amendment must state that it is an "amendment" to avoid the threat of ambiguity. Instead, all that is required is for the modification to meet the formal requirements of a valid contract – offer, acceptance and consideration. Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). The Release meets all of these requirements.[1] Furthermore, the Release complied with the Lease's requirements concerning a modification thereof.[2] Nothing more is needed.

Germania also implies that because of the long-term nature of the Lease, the parties would have used more "formal" language if they intended to amend the Lease. Notwithstanding the fact that the letter was sent certified mail and required CGI's signature, (R. at 29-30), because the language of the Release is clear and unambiguous, the Court must enforce the same although certain words or more "formal" language was allegedly not used. Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App.

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[1] See discussion in Respondent's Final Brief at p. 11, n.4.
[2] See discussion above at p. 4-5.

1997) (citing Ellis v. Taylor, 316 S.C. 245, 449 S.E.2d 487 (1994) ("The court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully."))

Germania also argues that the Release is ambiguous because "responsibilities" was not defined and terms such as "payment" or "rent" were not used. Germania's argument has no basis. The plain and clear language of the Release refers to *all* of Harris Teeter's obligations under the Lease, including the payment obligation. (See discussion above at p. 5).

II. WAS THE COURT OF APPEALS' DECISION CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND THE COURT OF APPEALS?

In an apparent effort to fit its Petition within the purview of Rule 242(b), Germania contends that the Court of Appeals' decision was in conflict with prior decisional law. Nevertheless, Germania's argument fails as the cases cited to support its argument are distinguishable for the current case and most were cited by Germania to the Court of Appeals who considered and rejected Germania's argument.

A. The Court of Appeals Correctly Applied Precedent Concerning Contractual Ambiguity.

Each case cited by Germania is distinguishable as each was decided on the particular language of the contract at issue and the facts of the case. No case cited by Germania is identical to the case at bar or involve the same contractual language in the Release or Lease.

Germania relies heavily on H.K. New Plan Exchange Property Owner I, LLC v. Coker, 375 S.C. 18, 649 S.E.2d 181 (Ct. App. 2007) where the Court of Appeals found that a lease amendment created an ambiguity, in part, because the amendment did not speak to whether a co-tenant remained liable under the lease. In contrast to the Coker

decision, there is no question in the case at bar that the plain language of the Release provided that Harris Teeter was no longer liable under the Lease. AS noted above and in all prior briefs, the Assignee [Bi-Lo] was to be responsible for "***all of Harris Teeter's obligations*** under the ***Lease*** . . . ." and CGI "will look ***solely*** to Assignee [Bi-Lo] for performance of the ***'Tenant's'*** responsibilities under the ***Lease*** . . . ." (R. at 29-30) (emphasis added). Using the term "all," as well as the special emphasis on "Lease" and "'Tenant's,'" shows the parties' intent that CGI look to Bi-Lo to fulfill *all* of Harris Teeter's responsibilities under the Lease, including its payment obligations. To contend the Court of Appeals' decision is in direct conflict with Coker fails completely since different contractual language was involved and the Release specifically provided that Harris Teeter would no longer be liable under the Lease. Contrary to Germania's assertion, Coker is consistent with the case at bar as Coker concerned an amendment which did not speak to a co-tenant's continued liability under a lease. Here, the Release unquestionably speaks to Harris Teeter's continuing liability (or lack thereof) under the Lease.

The remaining cases cited by Germania are equally distinguishable. None deal with the specific contractual language at issue, and each are decided on the particular language and facts of the case. Southern Atlantic Financial Servs., Inc. v. Middleton, 356 S.C. 444, 590 S.E.2d 27 (2003) (involving provision in a note containing both "may" and "must" language whereas no such language, or issue, is at issue in the case at bar); S.C. Langston v. Niles, 265 S.C. 445, 219 S.E.2d 829 (1975) (finding ambiguity where an assignment did not speak to certain terms, whereas the Release specifically references *all* of Harris Teeter's obligations under the Lease); Crystal Pines Homeowners Assoc. v.

Phillips, 394 S.C. 527, 716 S.E.2d 682 (Ct. App. 2011) (involving construction of "said roads" in a deed, whereas no such language, or issue, is involved in the case at bar); Wallace v. Day, 390 S.C. 69, 700 S.E.2d 446 (Ct. App. 2010) (finding an ambiguity in a default provision of a contract involving language wholly different from that involved in the case at bar); Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (Ct. App. 2009) (finding ambiguity in the undefined term of "landlord/tenant claims" whereas "Tenant" and "Lease" were defined terms in the Lease and specifically referred to in the Release); Bishop v. Benson, 297 S.C. 14, 374 S.E.2d 517 (Ct. App. 1988) (involving contract language concerning when, and if, certain actions were to take place, whereas no such language or issue is involved in the case at bar).

While Germania contends the Court of Appeals' decision was in conflict with prior decisional law, there are a number of cases which find the exact opposite and support the Court of Appeals' decision. *See* Piedmont Interstate Fair Ass'n v. City of Spartanburg, 274 S.C. 462, 264 S.E.2d 926 (1980) (finding the clear and unambiguous language of a lease not to require the transfer of assets at the conclusion of the lease's natural term); Proffitt v. Sitton, 244 S.C. 206, 136 S.E.2d 257 (1964) (finding the language of a contract to buy real estate to be unambiguous and not include the sale of water lines); Gordon Farms, Inc. v. Carolina Cinema Corp., 294 S.C. 158, 363 S.E.2d 235 (Ct. App. 1987) (finding provision in a lease dealing with the payment of taxes to be clear and unambiguous).

B. The Court of Appeals Correctly Applied Precedent Concerning Valid Consideration.

Lastly, Germania contends that the Court of Appeals failed to consider prior case law when determining if valid consideration existed to support the Release. Germania

argues that the consideration for the Release was wholly past and of no benefit to CGI and, hence, not consideration. Germania's argument fails to consider that, but for, CGI's execution of the Release, CGI would not have obtained Bi-Lo's liability under the Lease. The acceptance of a benefit (a new tenant) is adequate consideration to support the Release. (R. at 110, ¶ 3 ("Had CGI not released Harris Teeter from the Lease obligations for the Property, Harris Teeter would have taken additional action to protect its interests including, but not limited to, not leasing the property to Bi-Lo . . . ")). CGI obtained a benefit by executing the Release because, without CGI's agreement to release Harris Teeter from its obligations under the Lease, it would not have obtained Bi-Lo's liability as a "Tenant" under the Lease. As a result, valid consideration (by way of a benefit to CGI) existed and Germania's contention otherwise fails.[3]

CONCLUSION

Considering the foregoing, Germania's Petition fails to show a special or important reason necessitating review by this Court and, as such, Germania's Petition for A Writ of Certiorari should be denied.

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[3] Notwithstanding that valid consideration existed via a benefit to CGI, promissory estoppel and the detriment suffered by Harris Teeter as a result of the Release each constitute valid consideration supporting the Release. (See discussion in Resp't Final Brief, pp.13-16).

Respectfully submitted,

W. Francis Marion, Jr., S.C. Bar. #3645
Bonnie A. Lynch, S.C. Bar #77399
HAYNSWORTH SINKLER BOYD, P.A.
Post Office Box 2048
Greenville, South Carolina 29602
Telephone: (864) 240-3200
Fax: (864) 240-3300

Attorneys for Respondent, Harris Teeter, Inc.

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PROOF OF SERVICE

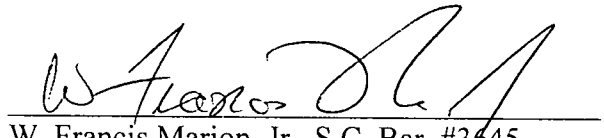
I certify this 22nd day of October, 2013, that I have served a copy of the RETURN TO PETITION FOR A WRIT OF CERTIORARI upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

Stephen R. H. Lewis, Esq.
Covington Patrick Hagins Stern & Lewis
P. O. Box 2243
Greenville, SC 29602

ATTORNEYS FOR ROPER, LLC

Sarah Day Hurley, Esq.
Turner Padget Graham & Laney, P.A.
P. O. Box 1509
Greenville, SC 29602

ATTORNEYS FOR GERMANIA OF AMERICA, INC.



W. Francis Marion, Jr., S.C. Bar. #3645
Bonnie A. Lynch, S.C. Bar #77399
HAYNSWORTH SINKLER BOYD, P.A.
Post Office Box 2048
Greenville, South Carolina 29602
Telephone: (864) 240-3200
Fax: (864) 240-3300

Attorneys for Respondent,
Harris Teeter, Inc.