

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM HORRY COUNTY
Court of Common Pleas**

Paul M. Burch, Presiding Judge

**Case No. 11-CP-26-5575
Appellant Case No. 2013-001960**

**John Sifonios, individually and as agent for William Rempfer
and Gary Sedlack.....Appellants,**

v.

Town of Surfside Beach.....Respondent.

INITIAL BRIEF OF APPELLANTS



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February 26, 2014

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I. STATEMENT OF ISSUES ON APPEAL

A. Does the signing of the April 15, 2011 Minutes by the Members of the Surfside Beach Town Council in approving the Lease which is the subject of this Appeal constitute sufficient signing for purposes of Section 20.8 of the Lease Agreement?

B. Does the posting of the April 15, 2011 Minutes on the website maintained by the Town of Surfside Beach (www.surfsidebeach.org) and subsequent comments by the Town Administrator constitute delivery of the Lease Agreement which is the subject of this Appeal and satisfy the requirements of Section 20.8 of that Lease Agreement?

II. STATEMENT OF THE CASE

This case was commenced by John Sifonios, individually and as agent for William Rempfer and Gary Sedlack (herein "Appellants") on July 1, 2011 by the filing of a Lis Pendens, Summons and Complaint in Horry County. The Appellants sought a Declaratory Judgment as to the validity of a Lease Agreement between the Town of Surfside Beach (herein "Respondent") and John Sifonios. The Town answered the Complaint, raising the defenses of sovereign immunity and lack of standing. By Motion filed February 15, 2013, the Respondent moved for Summary Judgment, seeking to dismiss the Complaint on the grounds that it had not been signed by the Town of Surfside Beach and/or delivered by the Town of Surfside Beach pursuant to the express terms of the Lease Agreement.

A hearing was held on the Respondent's Motion for Summary Judgment on May 15, 2013. By Order filed July 12, 2013, the Court granted the Respondent's Motion for Summary Judgment. By Motion to Alter and/or Amend the Judgment pursuant to Rule 59 (which was filed July 25, 2013), the Appellants sought express rulings as to whether the signing of the Minutes for the Special Meeting held on April 15, 2011 by the Members of the Surfside Beach Town Council constituted a sufficient signing of the Lease Agreement and whether the posting of the April 15, 2011 Minutes on the website maintained by the Town of Surfside Beach and subsequent comments by the Town Administrator constituted delivery of the Lease Agreement. By Order filed August 12, 2013, the Trial Court denied the Appellant's Motion.

Notice of Intent to Appeal was served on September 13, 2013.

III. STATEMENT OF FACTS

On September 24, 2008, the Town of Surfside Beach (herein "Town") acquired the Surfside Beach Pier (herein "Pier"). At the time the Town acquired the Pier, there was a restaurant operated on the Pier and the Lease under which the restaurant's Tenant operated was scheduled to expire on December 31, 2010. On or about April 15, 2010, the Respondent Town sought applicants to lease the restaurant premises on the Pier.

On March 15, 2011, the Appellants submitted a Letter of Intent to the Town which was accepted at the Town Council Meeting held on March 4, 2011. Thereafter, a Lease was negotiated and, at the insistence of the Town, signed by the restaurant operator, John Sifonios, for presentment at a Special

Council meeting to be held on April 15, 2011. The Lease was approved at the April 15, 2011 meeting; the Town Administrator was authorized by the Town Council to enter into the Lease Agreement presented to the Town by the Appellants, conditioned upon the Town's receipt and acceptance of evidence of 1) the prospective Tenant's credit worthiness and 2) satisfactory background check. The Appellants William Rempfer and Gary Sedlack submitted the information required by the Town and they were informed that such information was acceptable to the Town. On May 10, 2011, the Town rescinded its acceptance of the Lease.

IV. STANDARD OF REVIEW

It is well established that summary judgment shall be granted only when it is perfectly clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn therefrom. SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990); Hiers & Hiers v. Mullens, 310 S.C. 63, 425 S.E.2d 57 (Ct. App. 1992). The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact and the Court must view the evidence before it and the inferences to be drawn therefrom in the light most favorable to the non-moving party. Clyburn v. Sumter County School District No. 17, 317 S.C. 50, 451 S.E.2d 885 (1994); Charleston Lumber Company, Inc. v. Miller Housing Corp., 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.

USAA Property and Casualty Insurance Company v. Clegg, 377 S.C. 643, 661 S.C.2d 791 (2008).

V. ARGUMENT

A. The Trial Court erred in failing to find that the signing of the April 15, 2011 Special Council Meeting Minutes by the Members of the Surfside Beach Town Council in approving the Lease constituted sufficient signing for purposes of Section 20.8 of the Lease Agreement.

The Trial Court determined that Section 20.8 of the Lease Agreement provided, in pertinent part, that the Lease would become effective only upon execution and delivery thereof by both parties. The Trial Court further cited that where the parties know that the execution and delivery of a written contract is a condition precedent to their being bound, there can be no binding contract until the written agreement is executed and delivered. (Order Granting Defendant's Motion for Summary Judgment).

The Trial Court failed to consider, however, that the signatures of the Town Council Members as they appear on the April 15, 2011 Minutes constituted a sufficient signing for purposes of Section 20.8 of the Lease Agreement.

The Respondent Town of Surfside Beach has elected the Council form of municipal government. Surfside Beach Code, Section 2-1.-Form of Government. Pursuant to S.C. Code §5-11-30 (1976, as amended), all legislative and administrative powers of the municipality and the determination of all matters of policy is vested in the Municipal Council. The Council may

hire an Administrator to assist the Council and the Administrator is subject to the direction and supervision of the Council. S.C. Code §5-11-40 (1976, as amended).

South Carolina case law provides that a contract may be established by “several writings which are connected either expressly or through internal evidence of the subject matter and occasion”. Young v. Indep. Pub. Co., 273 S.C. 107, 254 S.E.2d 681 (1979); Barr v. Lyle, 263 S.C. 426, 211 S.E.2d 232 (1975). It is the position of the Appellants that the Lease Agreement signed by John Sifonios and approved at the April 15, 2011 Special Meeting of the Town Council, when considered with the Minutes of that meeting signed by the Members of the Town Council, constituted sufficient signing of the Lease Agreement.

The Trial Court cites Dean v. Dean, 229 S.C. 430, 93 S.E.2d 206 (1956) in support of its ruling in granting summary judgment. The Dean case, however, can be distinguished from the instant case in that there is no assertion by the parties in the Dean case that there is a collateral agreement which contained the signature of the omitted party. In the present case, the signing of the April 15, 2011 Minutes constituted a sufficient signing of the Lease Agreement. The Trial Court also relies upon the case of Oeland v. Kimbrell’s Furniture Company, 210 S.C. 223, 42 S.E.2d 228 (1947) in support of its ruling. The Court in Oeland, however, goes further and states

“The foregoing rule presupposes that the parties have arrived at a definite understanding as to the terms of the contract, the question being merely as to the effect of the fact that is contemplated by them that the same shall be reduced to writ-

ing to a more formal instrument. Citing 122 A.L.R. 1217, Page 1251.

The primary question therefore is whether or not there was a meeting of the minds on the essential terms of the proposed new lease.

In the instant case, there was a formal agreement which was considered at the April 15, 2011 Special Meeting of the Surfside Beach Town Council. This formal agreement was approved by the Town Council at that meeting subject to the occurrence of two conditions precedent. The clear inference is that there was a meeting of the minds on the essential terms of the proposed new lease. The Town Council could have deferred action on the approval of the new lease, pending the results of the investigation by the Town Administrator". The Town, however, elected to approve the lease as submitted at the April 15, 2011 Special Town Council Meeting.

In this case, the minutes of the Surfside Beach Town Council for the April 15, 2011 Special Meeting specifically referenced the lease and specifically authorized the Administrator to sign the contract upon the occurrence of two conditions precedent. The Appellants would assert that the signing of the minutes from the April 15, 2011 Special Meeting constituted an effective signing of the Lease.

B. The Trial Court erred in failing to find that the posting of the April 15, 2011 Minutes on the website maintained by the Town of Surfside Beach and subsequent comments by the Town Administrator constituted delivery of the Lease Agreement.

The Affidavits of William Rempfer and Gary Sedlack set forth that the Minutes of April 15, 2011 Special Meeting of the Surfside Beach Town Council have been posted on the website maintained by the Town of Surfside Beach. The Appellants argue that this constitutes sufficient delivery of the Lease Agreement so as to satisfy the requirements of Section 20.8 of the Lease Agreement.

As a general rule, manual transfer is not necessary to constitute good delivery. 30 S.C. Juris. Contracts §21. See also 17A AmJur 2d. Contracts §190. Black's Law Dictionary, Sixth Edition, defines delivery as "the act by which the res or substance thereof is placed within the actual or constructive possession or control of another". Black's Law Dictionary goes further to state that what constitutes delivery depends largely upon the intent of the parties and that it is not necessary that delivery should be manual transfer. Delivery may be by acts without words, words without acts, or both words and acts. 17A AmJur2d. Contracts §190. If the parties understand that the contract has been executed and is in operation, it will be considered as delivered. Delivery of the contract largely is a matter of intention of the parties and such intent may be actual or constructive. Delivery is a mixed question of law and fact to be determined by the jury. 49 AmJur2d. Landlord and Tenant §31.

In determining the effectiveness of delivery of a deed, South Carolina courts have found that the term "delivery" for purposes of determining legal effectiveness of a deed, refers not to the manual act, but to the intention of the maker existing at the time of the transaction, not subject to a later change of

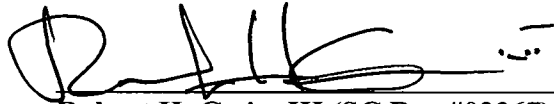
mind. Donnan v. Mariner, 339 S.C. 621, 529 S.E.2d 754 (Ct. App. 2000); First Union National Bank of South Carolina v. Shealy, 325 S.C. 351, 479 S.E.2d 846 (Ct. App. 1996). Manual transfer of the instrument is neither required to effectuate a valid delivery nor dispositive of the issue. Donnan v. Mariner, 339 S.C. 621, 529 S.E.2d 754 (Ct. App. 2000).

The Affidavits of William Rempfer and Gary Sedlack recite two incidents in which statements are attributed to the former Town Administrator Jim Duckett which would indicate that the conditions precedent had been met and that the Lease was in full force and effect. The Plaintiff contend that these words would suffice to evidence delivery of the Lease Agreement. The Appellants further would assert that the publication of the minutes of the April 15, 2011 Special Meeting on the website for the Town of Surfside Beach www.surfsidebeach.org and therefore introduced in the public domain constituted delivery of the lease. Because the inferences to be drawn from the evidence must be viewed in the light most favorable to the Appellants, as the non-moving party, summary judgment should have been denied.

V. CONCLUSION

This Court should reverse the Order Granting Summary Judgment and remand the case to the Trial Court for adjudication of the merits.

Respectfully Submitted,



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February 26, 2014

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**APPEAL FROM HORRY COUNTY
Court of Common Pleas
The Honorable Paul M. Burch, Presiding Judge**

**Case No. 11-CP-26-5575
Appellant Case No. 2013-001960**

John Sifonios, individually and as agent for William Rempfer and Gary Sedlack.....Appellants,

v.

Town of Surfside Beach.....Respondent.

**DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD
ON APPEAL**

Appellants propose that the following be included in the Record on Appeal:

1. Order Granting Defendant's Motion for Summary Judgment filed July 12, 2013
2. Order Denying Motion to Alter or Amend filed August 12, 2013
3. Notice of Appeal filed September 17, 2013
4. Complaint (with Exhibits) filed July 1, 2011
5. Answer of Town of Surfside Beach filed July 25, 2011
6. Defendant's Motion for Summary Judgment filed February 15, 2013
7. Plaintiffs' Rule 59 Motion to Alter or Amend Judgment filed July 25, 2013
8. Transcript of Summary Judgment Hearing dated May 15, 2013
9. Affidavit of Jim Duckett (with Exhibits) filed February 25, 2013

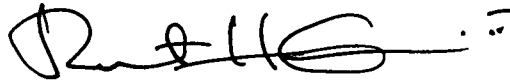
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10. Affidavit of William Rempfer filed May 15, 2013
11. Affidavit of Gary Sedlack filed May 15, 2013
12. Minutes of Town of Surfside Beach Special Meeting held on April 15, 2011

The undersigned counsel certifies that this Designation of Matter complies with Rule 209(c) SCACR, and contains no matter which is irrelevant to the appeal.



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Paul M. Burch, Presiding Judge

Case No. 11-CP-26-5575

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Town of Surfside Beach.....Respondent.

PROOF OF SERVICE

I hereby certify that I have served the Designation of Matter and Initial Brief of the Appellants by depositing a copy of it in the United States Mail, postage prepaid, on February 26, 2014, on the following Attorney for the Respondent:

Michael W. Battle, Esquire
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**Re: John Sifonois, individually and as agent for William Rempfer and Gary Sedlack v.
Town of Surfside Beach
State Court Case No. 2011-CP-26-5575
Appellate Case No. 2013-001960**

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of the Designation of Matter to be included in the Record on Appeal, along with the Initial Brief of the Appellants in the referenced case. Please file these documents and return a clocked copy to me in the envelope provided for your convenience. By copy of this letter I hereby serve counsel for the Respondents Michael W. Battle, Esquire, as evidenced by the enclosed Certificate of Mailing.

Thank you for your attention to this matter.

With kind regards, I remain

Very truly yours,

GWIN LAW OFFICE, LLC



Robert H. Gwin, III

RHG/jlj

Enclosures

cc: Michael W. Battle, Esquire (w/encl.)

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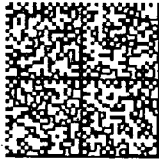
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