

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Nichols Holding, LLC and
J. Wade Nichols,

Plaintiffs,

vs.

Divine Capital Group, LLC;
John S. Divine, IV; Nathan Anderson;
and Divine Dining Group, Inc.,

Defendants.

C/A NO. 2011-CP-26-2722

ORDER COMPELLING
SETTLEMENT

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JULIA HUGGINS-WARD

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I. BACKGROUND FACTS

THIS MATTER IS BEFORE THE COURT based on Defendant's Motion to Compel Settlement, filed June 15, 2013. This case involves John S. Divine, IV, and J. Wade Nichols who were adversaries in three lawsuits commenced in 2010 and 2011, in the Court of Common Pleas for the Fifteenth Judicial Circuit. The lawsuits involved business deals between the parties including loans and restaurant operations.

Pursuant to a Consent Order dated January 23, 2012, Divine agreed to the entry of a judgment in favor of Nichols against Divine in the amount of \$8,642,379.70. After months of negotiations, the parties agreed to execute an agreement to purchase and sell certain real property and restaurants located in Murrells Inlet. (Exhibit 10 in the Court's record).¹

The settlement agreement in essence required Divine to sell certain improved and unimproved real and personal property to Nichols. In exchange, Nichols agreed to assume or pay off certain existing bank loans in the approximate amount of \$5,000,000.00 on the properties. The

¹ The parties also signed a Settlement Agreement contemporaneously. (Exhibit 12).

real property, including the restaurants known as Bovine's and Divine's, were transferred to Nichols based on the Agreement of Purchase and Sale (See Exhibit 10). The transaction was exceedingly complex, and resulted in a settlement agreement and release in full. (Exhibit 12 in the Court's records).

The case now centers around two central issues: Whether Nichols was required to pay Trade Debt upon assuming control of the restaurants and whether Divine was required to disclose that he had excess water demand charges on the Bovine's and Divine's restaurants with the Georgetown County Water and Sewer Authority. Both of these issues are more fully detailed in the Agreement of Purchase and Sale (Exhibit 10) and will be fully discussed by the Court.

II. STANDARD OF REVIEW

The Defendants have moved to compel settlement, and it is well settled in this State that settlement agreements are viewed as contracts, *Harris-Jenkins vs. Nissan Car Mart, Inc.*, 348 S.C. 171, 177, 557; SE 2d 798, 711 (Ct. App. 2001); see also *Pruitt vs. South Carolina Medical Malpractice Liability Joint Underwriter's Association*, 343 S.C. 335, 339, 540; SE 2d 843, 845 (2001). (enforcement of the terms of a settlement agreement is a matter of contract law); see also *Mattox vs. Cassidy*, 289 S.C. 57, 61, 344; SE 2d 620, 622 (Ct App. 1986) (applying the general rules of contract construction to a settlement agreement).

At the outset, the Court notes that while this is a contract, both parties have agreed and asked the Court to determine these issues based on its view of the evidence. There is no request for a jury trial and the parties are before the Court with witnesses to offer testimony on their view of the the settlement agreement. As a result, this Court heard testimony and reviewed the settlement agreement along with the affidavits submitted by the parties and the exhibits presented during the

hearing. Further, the Court is very familiar with this case having held numerous hearings since it was filed.

III. THE TRADE DEBT ISSUE

Because this is a complex transaction, the Court believes it in the best interests of both parties to address the issues separately. The Defendants argue that they are entitled to \$62,809.08 for back due Trade Debt on the Bovines and Divine's restaurants. Trade Debt is defined in the Agreement of Purchase and Sale on Page 5 as follows:

"Trade Debt" includes all amounts outstanding for and from the operation of the restaurants and bars, which are normal operating expenses of the restaurants and bars and which are reasonably consistent with past operating expenses of the restaurants and bars. The Trade Debt includes the fee for administrative services provided to the restaurants and bars by Divine Dining Group, Inc., (DDG); provided, however, that the administrative services fees of DDG shall not exceed DDG's actual costs and shall not exceed normal rates for fees of this kind in the greater Myrtle Beach and South Carolina market area. The Trade Debt shall not include, but specifically excludes, intercompany debt owed to Divine or companies owed by Divine other than the fees due to DDG for its administrative services for the restaurant and bars.

The Plaintiffs, in response to the Trade Debt provision of the contract, argue that they are only liable for 30 days past due operating expenses of the restaurants. Plaintiffs argue that the definition of Trade Debt and past sales at the restaurants would only support payment of \$45,673.00 for Trade Debt. After hearing the testimony and reviewing the Affidavits, there is no limitation on the Trade Debt of 30 days after the sale of the restaurants. Accordingly, the Court finds as a matter of law that based on all the evidence, testimony, affidavits, and a review of the Agreement of Purchase and Sale that the Trade Debt which Nichols Holding owes Divine is \$62,809.08 and that all vendors shall be paid with one caveat. The Court heard the testimony of the receiver, Arlene Jascott, and reviewed her affidavits (Exhibits 3 and 11). The Affidavits of Arlene Jascott indicate that some of the Trade Debt has been paid by Nichols. The Court finds that Nichols has produced

the following invoices for Trade Debt that he has paid, which shall reduce the Trade Debt owed in the amount of \$9,022.43.

Those include the following:

1. Roper	\$ 1,751.27
2. Santee Cooper	\$ 3,126.58 (Divine's)
3. Santee Cooper	\$ 3,129.66 (Bovines)
4. Horry Telephone	\$ <u>1,014.92</u>

Total \$9,022.43

As a result of these checks (or paid invoices) being produced to the Court, the Trade Debt to be paid to the vendors is \$53,786.65.

Further, because this is a settlement agreement between the parties of a complex transaction, Plaintiff Nichols is ordered to pay the vendors less the amounts he has already paid within ten (10) days of this Order. Both the settlement agreement and release (Exhibit 12) and the Agreement of Purchase and Sale (Exhibit 10) require that the vendors be paid. Further, the Court has authority to order specific performance of the Agreement of Purchase and Sale. The Court references Section 18 of the Agreement of Purchase and Sale, which provides for specific performance in a court of competent jurisdiction. Accordingly, the Court finds that Nichols shall immediately comply with the terms of the Agreement of Sale and Purchase and pay the vendors as per the Agreement of Purchase and Sale in the Settlement Agreement in the amount of \$53,786.65.

IV. THE DEMAND CHARGE ISSUE

The Court now turns to the Georgetown County Water and Sewer issue between the parties. Apparently, after the closing, the Plaintiffs, through their authorized agent, Ernest Edwards, went to the Georgetown Water and Sewer Authority to change the water and sewer accounts over into Nichols' name. It was at that time that Edwards learned for the first time that the water and sewer accounts for Wahoo's and Bovine's have been operating for years without buying additional water

and sewer capacity, and instead were paying extra demand charges. Exhibits 6 and 7 and the testimony reveal that in order for Nichols Holding, LLC, to obtain water and sewer in their name, it would be required to pay \$53,760.00 for an additional 24 water and sewer impact fees that had not been paid by Divine. Further, according to Exhibit 7, Tommy Kennedy of the Georgetown Water and Sewer District, in a letter to Plaintiff's Counsel dated June 17, 2013, noted, "Before the request to transfer, the Owner (Divine) had received yearly notices that the account had gone over its allocated capacity of water and sewer."

Additional testimony from Fred Newby, attorney for the Nichols, who was handling this closing, indicates that there were no liens filed in the courthouse and that the Plaintiffs could not have discovered that Divine had been paying additional charges and/or penalties rather than buying additional capacity.

The Court reviewed the Settlement Agreement and turns its attention to the Agreement of Purchase and Sale, (Exhibit 10). Section 15 of Exhibit 10 governs the parties' conduct regarding this issue. It is entitled Representations and Warranties of Sellers' and Divine. The Court's attention was directed to Section 15 (f), which provides in pertinent part:

There are no service, maintenance, property management, leasing or other contracts affecting the property which will be in existence as of the Closing Date, other than the Operating Agreements described on Exhibit C....

Further, Section 15 (h) provides:

Sellers have received no notice of administrative agency action, litigation, condemnation proceedings or proceeding of any kind pending against sellers which relates to or affects the property...

The Court reviewed this matter extensively and finds that Divine had a duty under the terms of the contract to advise the Plaintiffs that he had not purchased additional water and sewer capacity prior to the sale. Further, Exhibit 5 is a letter from Georgetown County Water and Sewer District

dated June 22, 2012, almost a year prior to the closing, in which the Divine Fish House had been advised by John F. Buck, CPA for Georgetown County Water & Sewer Authority, that additional capacity should be purchased by paying the associated impact fees. Further, the Court finds that Divine's suggestion that the water bill be left in his name so that Nichols does not have to pay these additional impact fees is unworkable. The parties have been involved in contentious litigation and the Court believes that to leave the water and sewer bill in Divine's name is a solution which will most likely lead to further involvement by the Court in the future.

The Court also takes note of the testimony of Fred Newby and his affidavit (Exhibit 4) along with the attached Exhibit A to Exhibit 4, which is an owner's affidavit for title insurance. That affidavit says in pertinent part:

That all assessments against the Owner are applicable to the real estate including assessments for street lighting, water and sewer construction, sanitary assessments, and other governmental services have been paid in full, ...

The Court notes that John S. Divine signed Exhibit 4 on May 2, 2013, at the closing.

The Court finds that the failure to disclose that Divine had not purchased additional water and sewer capacity, and instead had been paying additional charges as a penalty, is a violation of the Agreement of Purchase and Sale, specifically Section 15 (f)(h). The Court further finds that John S. Divine, IV and his related companies, Blue Water Food Service, Inc., d/b/a Bovine's Wood Fired Specialties, a/k/a Bovine's, Divine Fish House, Inc, and Abaco Holdings, LLC, and Tortola Holdings, LLC, are liable for these additional impact fees in the amount of \$53,760.00. The Court further finds that the failure to disclose those impact fees is a violation of the Agreement of Purchase and Sale (Exhibit 10) and of the Settlement Agreement (Exhibit 12).

Further, because the Agreement of Purchase and Sale has a specific performance clause (Section 18), the Court exercises its jurisdiction to require Divine and its related companies to pay

Georgetown Water and Sewer Authority \$53,760.00 because the contract between the parties clearly allows for specific performance of this "agreement" in a court of competent jurisdiction (See Agreement of Purchase and Sale, Exhibit 10, Section 18 (B), seeks specific performance of this agreement in a court of competent jurisdiction.)

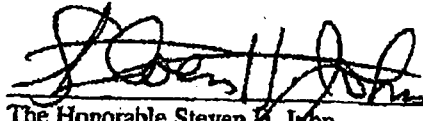
Accordingly, the Court has made two separate and distinct rulings in this case, both of which the Court requires under the doctrine of specific performance that each party perform.

Nichols Holding, LLC, and J. Wade Nichols are required to pay the vendors pursuant to the Settlement Agreement and Release in Full, and the Agreement of Purchase and Sale in the amount of \$53,786.65.

John S. Divine, IV and his related companies are required to pay Georgetown County Water and Sewer Authority \$53,760.00. Further, pursuant to the Settlement Agreement and Release in Full and the Agreement of Purchase and Sale, the Defendants are to immediately forward to Nichols Holding the sum of \$2,795.41, which has been held in trust since the sale and which represents the remaining balances in the accounts for Bovine's and Divine's restaurants on the date of sale, May 2, 2013. Accordingly, Defendants shall immediately forward a check in the amount of \$2,795.41 forthwith to counsel for Nichols holding, Gene M. Connell, Jr.

Finally, should either party fail to abide by this Order they shall be subject to contempt of court.

IT IS SO ORDERED.



The Honorable Steven H. John
Resident Circuit Judge
Fifteenth Judicial Circuit

January 6, 2014
Conway, South Carolina.

