THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Hon. Paul M. Burch, Presiding Judge
Circuit Court Case No. 2011-CP-26-05575

Appellate Case No. 2013-001960

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

v.

Town of Surfside Beach,.....Respondent,

INITIAL BRIEF OF RESPONDENT

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2. DID THE TRIAL COURT PROPERLY FIND THAT THE SURFSIDE TOWN COUNCIL MEMBERS' POSTING OF THE APRIL 15, 2011, SPECIAL COUNCIL MEETING MINUTES WAS NOT A DELIVERY OF THE PROPOSED LEASE.

STATEMENT OF THE CASE

The appeal involves Appellant's right to enforce a written multi-year lease against the Respondent Town of Surfside Beach's (Town), as property owner, even though the Town never signed or delivered the Lease Appellant seeks to enforce and even though the Lease expressly requires "this Lease shall become effective only upon execution and delivery hereof by both parties." [Exhibit B, p. 18] Appellant claims that although the Lease was not signed or delivered by the Town, the equivalent signatory and delivery acts occurred when Town Council approved the proposed form of the Lease and posted minutes recording its approval of the proposed form of the Lease on its website. The Town contends the proposed written Lease is void because it was never signed and delivered as contemplated by both parties.

This matter came before presiding judge Honorable Paul M. Burch on the Town's Motion for Summary Judgment. After considering the submittals of the Appellant and the Town, Judge Burch determined Summary Judgment was appropriate for the Town and granted its motion for summary judgment on the basis that the Lease in question was

void and never became enforceable because it was never executed and delivered by the Town.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Rule 56(c), SCRCP.* "[T]he evidence and all reasonable inferences there from must be viewed in the light most favorable to the non-moving party." *Byrd v. City of Hartsville* 365 S.C. 650, 620 S.E.2d 76 (S.C., 2005).

Statement of Facts

The Town of Surfside Beach sought proposals from prospective tenants to operate and maintain a restaurant on the Surfside Beach Pier located at Ocean Boulevard, Surfside Beach, South Carolina. On or about February 14, 2011, the Appellant, together with William Rempfer and Gary Sedlack, caused a Letter of Intent to be submitted to the Town. The Letter of Intent was signed by James Cole, Associate Broker of Century 21 Strand Group on behalf of an undisclosed principal (herein "Letter of Intent"). The Letter of Intent contemplated the formation of a corporation for the operation of the restaurant on the Surfside Beach Pier once there was a "meeting of the minds" as to the Lease terms. At a Special Council Meeting held on March 4, 2011, the Town Council considered the terms of the Letter of Intent. The Town Council authorized the Town Administrator to present for Council's approval a proposed Lease agreement with Appellant for the

restaurant at the pier. On April 15, 2011 a proposed Lease was presented to the Town Council at a Special Council Meeting. The proposed pier restaurant Lease agreement contained the following requirements:

> **a. 20.8 No Option.**
> The submission of this Lease for examination does not constitute a reservation of or option for the Premises and **this Lease shall become effective only upon execution and delivery hereof by both parties.** (emphasis added).
>
> **b. 20.9 No Modification.**
> This Lease can be modified only by a writing signed by the party against whom the modification is enforceable.

At the special meeting, the Town Administrator was authorized by the Town Council to execute the Lease presented to the Town by the Appellant conditioned upon the Town's receipt and acceptance of evidence of (1) the prospective Tenant's credit worthiness, and (2) satisfactory background check. Minutes of the special meeting were signed and posted on the Town's website.

Thereafter, the Town Administrator picked up Appellants' financial data and stated everything looked good and he had everything he needed. The Town Administrator then stated he would get back in touch with the Appellant. However, the Town Administrator did not sign the Lease or deliver it to Appellant. Later, at a regular Council meeting held on May 10, 2011, the Town decided it did not want the Town Administrator to execute or deliver the Lease to the Appellant. Therefore, the Lease was never formally executed or delivered by the Town to Appellant. [Affidavit of Jim Duckett, Town Administrator]

Appellant never occupied the premises. Appellant never paid any earnest money, rent or a security deposit to the Town. Appellant's only claims for damages are for potential future lost profits for the new business he planned to establish on the pier.

ARGUMENT

A. The Trial Court properly found that the Town Council's execution of the April 15, 2011 Special Council Meeting Minutes was not an execution of the proposed Lease.

Appellant states in his brief: "It is the position of the Appellants (sic) 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 members of the Town Council, constituted signing of the Lease Agreement." [Initial Brief p. 5] The Town disagrees.

1. The Lease.

Lease provisions are construed under rules of contract interpretation. *S. Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC,* 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008). The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. *McGill v. Moore,* 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. *Id.* A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. *Id.* It is a question of law for the court whether the language of a contract is ambiguous. *S.C. Dep't of Natural Res. v. Town of McClellanville,* 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001).

As stated above, the Lease expressly provides:

b. 20.8 No Option.
The submission of this Lease for examination does not constitute a reservation of or option for the Premises and **this Lease shall become effective only upon execution and delivery hereof by both parties.** (emphasis added).

b. 20.9 No Modification.
This Lease can be modified only by a writing signed by the party against whom the modification is enforceable.

The Lease language is clear. The actual Lease must be signed and delivered by both parties to be enforceable by either party. In the face of such express language multiple letters or documents cannot become a substitute for the actual Lease. See *Dean v. Dean*, 229 S.C. 430, 93 S.E.2d 206 (1956); *Oeland V. Kimbrell's Furniture Co.* 210 S.C. 223, 42 S.E.2d 228 (S.C. 1947) (It is a well-founded rule of law that a contract for sale or lease of real estate may be consummated by letters without the execution of a formal instrument and the fact that it is understood that the contract is to be reduced to a formal instrument does not invalidate such agreement unless there be a positive agreement that it shall not be binding until formally executed); Also see *17A Am. Jur. 2d Contracts § 175.* The question as to whether those who have signed are bound is generally to be determined by the intention and understanding of the parties at the time of the execution of the instrument. The reason for holding the instrument void is that it was intended that all the parties should execute it and that each executes it on the implied condition that it is to be executed by the others, and, therefore, that until executed by all, it is inchoate and incomplete and never takes effect as a valid contract, and this is especially true where the agreement expressly provides, or its manifest intent is, that it is

not to be binding until signed. *Dean v. Dean*, 229 S.C. 430, 436, 93 S.E.2d 206, 209 (1956).

2. *Town Council's Minutes of the April 15, 2011 Special Meeting.*

Appellants claim that Town Council's signing of the April 15, 2011, Special Council Meeting Minutes was an effective execution of the Lease and satisfied the execution requirements of §20.8 of the Lease. Appellant's claim is not supported by the plain language of the special meeting minutes executed by Town Council. The pertinent parts of minutes of the special meeting held April 15, 2011 contain the following statements:

> Mr. Smith made a motion to authorize the Administrator to enter into the Lease agreement tended (sic) to the Town by Mr. John Sifonios contingent upon the Town's receipt and acceptance of evidence of one, the prospective tenants credit worthiness, and two, satisfactory background check.
>
> ....
>
> **Mr. Samples:** ... I presume that we will reconvene or at least once be apprised of the outcomes of that credit check and criminal background checks so that we are assured that the prospective tenant is somebody who would be a good ambassador for the Town of Surfside Beach.
>
> **Mr. Johnson:** I agree with Mr. Samples and I would like to ask our Town Administrator to at least keep Council apprised of the results of those inquiries, please.
>
> **All voted in favor. Motion carried.** [Minutes, Town Council Special Meeting, April 15, 2011]

As shown in the above excerpt, Appellant's claim that it was the Town's intent for the minutes of the special April 15th meeting of Town Council to serve as a substitute for the Lease is contradicted by the plain language of the actual minutes. Minutes properly authenticated or verified are the only competent evidence of the proceedings of the transactions of Town Council. *5 E. McQuillan, The Law of Municipal Corporations §*

14.05 (3d ed. 1989). A town council has the express duty to keep minutes of its proceedings which shall be a public record. S.C. Code Ann. § 5–7–250(b) (1976). Parol evidence cannot be admitted to explain, enlarge, or contradict minutes of the proceeding of a town council unless the minutes are incomplete or ambiguous. *Id. § 14.07.* Otherwise, parol evidence could render official minutes uncertain and unreliable so that the minutes would fail to afford dependable evidence of the proceedings of the municipal body. *Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant,* 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992).

In the present case summary judgment is appropriate because the Lease was not executed on behalf of the Town and because the plain language of the Town's minutes show that the intent of the Town was to delay execution of the Lease until satisfactory credit and back ground checks were obtained. See *Dean v. Dean*, 229 S.C. 430, 93 S.E.2d 206 (1956); *Oeland V. Kimbrell's Furniture Co.* 210 S.C. 223, 42 S.E.2d 228 (S.C. 1947).

B. The Trial Court properly found that the Surfside Town Council members' posting of the April 15, 2011, Special Council Meeting Minutes did not constitute delivery of the proposed Lease.

Appellant claims the posting of special meeting minutes on the Town's website constitutes sufficient delivery of the Lease so as to satisfy the delivery requirements of §20.8 of the Lease. Delivery is a prerequisite to the validity of a written lease. *49 Am. Jur. 2d Landlord and Tenant § 30.*

The Town contends the law governing the delivery of a lease as an interest in real property is similar to a delivery of a deed. A deed is not legally effective until it has been delivered. While there is no prescribed method for an effective delivery of a deed, manual transfer of the instrument into the hand of the grantee is neither required to effectuate a

valid delivery, nor dispositive of the issue. The term delivery in this regard refers to "not so much a manual act but the intention of the maker existing at the time of the transaction ... and not subject to later change of mind. Delivery of a deed includes, not only an act by which the grantor evinces a purpose to part with the control of the instrument, but a concurring intent thereby to vest the title in the grantee. The controlling question of delivery in all cases is one of intention. *Donnan v. Mariner*, 339 S.C. 621, 626, 529 S.E.2d 754, 757 (Ct. App. 2000)

Appellant's claim that the Town intended to deliver the Lease when it posted its minutes of its website is not credible. The Town is not aware of any precedent where the act of posting minutes on a website has been interpreted to constitute delivery of a written Lease. Further, Appellant's claim ignores the condition precedent to delivery contained in the minutes that were posted. Councilman Smith's motion contained the following limitation: "contingent upon the Town's receipt and acceptance of evidence of one, the prospective tenant's credit worthiness, and two, satisfactory background check." Appellant has not demonstrated any statement in the Town's minutes or in any other Town document to the effect that the Town or the Town Administrator had delivered the Lease to the Appellant. Even though Appellant conflated the remarks of the Town Administrator in connection with financial data and background information into the acceptance of that data, Appellant cannot claim that those remarks constituted a delivery of the Lease. The intent of the Town is clearly stated in the minutes that were posted. Town Council intended to reconvene or at least be apprised of the results of the background checks before the Lease was to be executed and delivered. The only evidence in the record is that when Town Council was apprised of the results of the

background check, they revoked the Town Administrator's authority to execute and deliver the Lease. The Lease never became effective according to its own terms and provisions. [See Affidavit of Jim Duckett].

Appellant's own acts clearly showed the posting of the minutes was not interpreted to be a delivery of the Lease by either party. Under the Lease a security deposit in the amount of $4,166.66 was due to be paid by Appellant to the Town upon delivery of the Lease. [Lease Agreement,§2.2 Security Deposit]. Appellant has not offered any proof that he has paid or tendered the security deposit to the Town when the Town's minutes were posted on the Town's website. [See Affidavits Gary Sedlack and William Rempfer] Further, Appellant has not offered any evidence that he actually paid any rent or took possession of the premises.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Rule 56, SCRCP. Appellant has failed to produce any facts showing that the Town intended to deliver the Lease or that Appellant ever interpreted the posting of meeting minutes as a delivery of the Lease.

CONCLUSION

The Town of Surfside Beach respectfully requests that the Court affirm the decision of Judge Burch granting the Town's Motion for Summary Judgment and dismiss Appellant's claims for specific performance and for damages.

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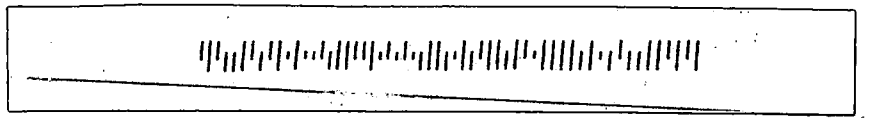
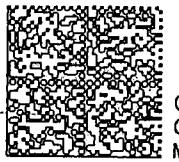
April 8, 2014





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