

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-8241

George Giannaras as guardian and
conservator for Emmanuel Kehagias.....Appellant,

v.

Richard Ruth Sr. and Jane Ruth, both individually and as owners/operators of Richard
Ruth's Bar & Grill, LLC, Adrian Lamar Smalls, and 2233 Highway 17 North, LLC
Of whom, 2233 Highway 17 North, LLC is.....Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE JURISDICTION

This appeal arises out of an Order of the Circuit Court granting Respondent's Motion for Summary Judgment and dismissing Appellant's causes of action with prejudice. The trial court's final judgment was entered on January 21, 2014, and disposed of all claims as to Respondent. Appellants filed a notice of Appeal on February 17, 2014. This Court has jurisdiction to entertain the appeal and correct errors of law pursuant to S.C. Code Ann. § 14-3-330.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

- I. Did the trial court err in finding there was not a scintilla of evidence that Respondent 2233 Highway 17 North, LLC and Richard Ruth's Bar & Grill constituted a partnership, resulting in the Trial Court granting Respondent's Motion for Summary Judgment?**

STATEMENT OF THE CASE

This case arises out of a dram shop liability case, where Appellant Emmanuel Kehagias was a patron of Richard Ruth's Bar & Grill (herein referred to as "Richard Ruth's"), which is located within Respondent's facility at 2233 Highway 17 North, LLC (herein referred to as "Respondent"), at the time of his injury. Appellant George Giannaras, as guardian and conservator for Emmanuel Kehagias (herein referred to as "Appellant"), alleges two causes of action against Respondent 2233 Highway 17 North, LLC. First, Appellant alleges violations of both S.C. Code Ann. § 61-4-580 and § 61-6-2220. Second, Appellant alleges Respondent was negligent in not protecting patrons of Richard Ruth's Bar & Grill, which operates out of Respondent. Appellant contends that due to the partnership between Respondent and Richard Ruth's, Respondent has co-liability for any wrongful acts or omissions of its partner.

On December 19, 2012, Appellant filed suit in the Court of Common Pleas, Charleston County, alleging as against Respondent, Richard Ruth Sr. and Jane Ruth, as owners/operators of Richard Ruth's, and Adrian Lamar Smalls causes of action for Negligence, Gross Negligence, Negligence Per Se, and Violation of S.C. Code Ann. § 61-4-580 and § 61-6-2220. Respondent Answered on February 1, 2013 and ultimately filed a Motion for Summary Judgment on September 23, 2013, alleging that it owed no duty to the Appellant.

Respondent's Motion for Summary Judgment was argued before the Honorable R. Markley Dennis, Jr. on January 7, 2014. By Order completed January 21, 2014, the Circuit Court granted Respondent's Motion for Summary Judgment and dismissed Appellant's claims with prejudice.

It is from that Order that Appellant appeals. Appellant's Notice of Appeal was served on Respondent on February 17, 2014.

STATEMENT OF FACTS

Respondent owns a facility located at 2233 Highway 17 North, Mt. Pleasant, South Carolina 29644. Richard Ruth's, Co-Defendant in the underlying case, is a restaurant and bar situated in Respondent's facility. Appellant was a patron of Richard Ruth's at the time of his injury. The Hon. Clifton B. Newman has subsequently awarded a \$5,000,000.00 judgment to Plaintiff against Richard Ruth's.

Warren Holliday is the owner of Respondent's property. (Holliday Dep. 69:4-13). Warren Holliday also owns and is the registered agent for Zeezrom Properties, LLC (herein referred to as "Zeezrom"), a holding company which included Holliday

Amusements among its holdings, and Respondent. (SC Secretary of State, <http://www.scsos.com> (last updated June 16, 2014, 6:01 PM)). Beginning at approximately the end of 2010, Ross Samuel Holliday (herein “Mr. Holliday”), Warren Holliday’s son, began “managing” Respondent’s property exclusively for Zeezrom. (Holliday Dep. 69:4-13). Although Mr. Holliday is acting as the property manager of Respondent, Mr. Holliday does not currently hold, nor has he ever held, a license to be a property manager in the state of South Carolina. (Holliday Dep. 11:20-25, 12:1-5). Mr. Holliday has lived in Utah since 2004 and has not lived in South Carolina since 1992 or 1993. (Holliday Dep. 10:8-15, 11:10-11). He does not own any real estate in South Carolina or expect to purchase any. (Holliday Dep. 21:25, 22:1-8).

Mr. Holliday testified the Respondent has a verbal, commercial, month-to-month lease with Richard Ruth’s. (Holliday Aff. ¶ 1,3, Sept. 19, 2013). However, when asked specifically about the terms of the agreement, Mr. Holliday was vague and unknowledgeable, stating Respondent and Richard Ruth’s had a “specific understanding.” (Holliday Dep. 110:18-19). Mr. Holliday admitted he had no personal knowledge of the agreement between Respondent and Richard Ruth’s, to the extent he alleges one exists. (Holliday Dep. 111:21-24). Mr. Holliday stated he was currently negotiating a proposed “rental” increase in an attempt to improve profits from Richard Ruth’s utilization of Respondent’s facility. (Holliday Dep. 97:7-25, 98:1-11).

In addition to his position as purported property manager of Respondent, Mr. Holliday is the manager of Holliday Amusements, which shares the same CPA and office manager with Zeezrom and Respondent. (Holliday Dep. 22:18-23, 25:22-25, 26:1-21). The three corporations also share office equipment, such as a fax. (Holliday Dep. 93:11-

15, (4:1-4). When questioned about Holliday Amusements supplying gaming devices to Richard Ruth's, Mr. Holliday again appeared limited in his knowledge, stating that he was unsure when Holliday Amusements first supplied Richard Ruth's with such devices but that there have been different games in and out of clients' businesses. (Holliday Dep. 60:24-25, 61:1-4). Continuing with his consistent lack of knowledge, Mr. Holliday was also unable to give details as to the revenue collection from the gaming devices supplied by Holliday Amusements to Richard Ruth's. (Holliday Dep. 61:13-18).

STANDARD OF REVIEW

Summary judgment is an "extreme remedy to be cautiously invoked." *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 723, 729 (1986). Summary judgment is only appropriate where there is no genuine issue of material fact. Rule 56I, S.C.R.C.P. Furthermore, when the burden of proof is by a preponderance of the evidence a non-moving party need only present a scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673, S.E.2d 801, 803 (2009). In determining whether any triable issues of fact exist, the evidence and all inferences, which can be reasonably drawn therefrom, must be viewed in the light most favorable to the non-moving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Watson v. Underwood*, 407 S.C. 443, 453, 756 S.E.2d 155, 160 (Ct. App. 2014) *citing* *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

ARGUMENT

A partnership is “an association of two or more persons to carry on as co-owners a business for profit.” S.C. Code Ann. § 33-41-210. Each partnership is necessarily governed by its own facts. *Wyman v. Davis*, 223 S.C. 172, 175, 74 S.E.2d 694, 696 (1953). Because there is at least a scintilla of evidence that could allow a reasonable jury to find in Appellant’s favor as to the existence of a partnership between Respondent and Richard Ruth’s, the trial court erred in granting summary judgment for Respondent and the order should be reverse and the matter remanded for a trial on the merits.

I. The trial court erred in granting Respondent 2233 Highway 17 North, LLC’s Motion for Summary Judgment because there is a scintilla of evidence that a partnership, rather than a lease, existed between Respondent 2233 Highway 17 North, LLC and Richard Ruth’s Bar & Grill.

Parties to a contract are considered partners if they show through their acts, conduct, or agreement that they “intended to combine their property, labor, skill and experience...to carry on, as principals or co-owners, a common business, trade, or venture as a commercial enterprise, and to share, either expressly or by implication, the profits and losses or expenses that may be incurred.” *Moore v. Moore*, 599 S.E.2d 467 (S.C. Ct. App. 2004) *citing Stephens v. Stephens*, 213 S.C. 525, 532, 50 S.E.2d 577, 580 (1948)).

In the present action, the trial court erred in finding there was not a scintilla of evidence of a partnership between Respondent and Richard Ruth’s. The trial court erred in finding there were no genuine issues of material fact, when there are disputed factual issues present. These issues are: 1) whether valid lease agreement existed between the Respondent and Richard Ruth’s; and 2) whether a partnership existed between the Respondent and Richard Ruth’s, thereby creating co-liability between the partners. Based

on the scintilla of evidence indicating the lack of a valid lease agreement and the existence of a partnership, the order of the trial court should be reversed and the matter remanded for a trial on the merits.

A. No valid lease agreement was created between Respondent 2233 Highway 17 North, LLC and Richard Ruth's Bar & Grill, LLC.

“The essential terms and conditions of a lease agreement include a definite agreement as to the extent and boundary of the property to be leased, the term of the lease, the rental as well as the time and manner of payment.” *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894-95 (1989). South Carolina requires a meeting of the minds between parties to a contract with regard to all essential and material terms of the agreement in order to have a valid and enforceable contract. *Id.* at 105, 382 S.E.2d at 894. “The construction of a contract which is ambiguous, or capable o[f] more than one construction, is a question of fact.” *Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) *citing Skull Creek Club Ltd. P'ship v. Cook & Book, Inc.*, 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct.App.1993).

No defined terms of a lease agreement exist between Respondent and Richard Ruth's. Mr. Holliday indicated in his affidavit that Respondent has a verbal, commercial, month-to-month lease with Richard Ruth's. (Holliday Aff. ¶ 1,3, Sept. 19, 2013). However, Mr. Holliday supplied no information regarding the actual terms of the lease other than claiming the parties had “a specific understanding.” (Holliday Dep. 110:18-19). Mr. Holliday did indicate that Richard Ruth's was paying \$1,800 per month in rent under the verbal agreement with Mr. Holliday's father, and that Mr. Holliday attempted to increase the rent to \$3,500 but the parties were still in negotiations. (Holliday Dep.

97:7-25, 98:1-11). If Mr. Holliday, who holds himself out as the property manager, was unable to articulate the terms of the lease in his deposition, then it is clear that the essential terms of the lease were undefined enough to meet the scintilla standard.

Since discovery was ongoing at the time Respondent's Motion for Summary Judgment was granted, the ability to uncover any additional information as to the terms of the agreement, or lack thereof, has been halted. With a scintilla of evidence indicating that the terms of the alleged lease agreement were not clear and defined, as a lease must be, there is still a viable factual dispute as to whether a valid landlord/tenant relationship existed between Respondent and Richard Ruth's.

Furthermore, Mr. Holliday does not qualify as a "property manager" as defined in South Carolina Code and therefore Mr. Holliday has no authority to create a valid lease agreement in South Carolina. A "property manager" means an individual who for a fee, salary, commission, or other valuable consideration or who with the intent or expectation of receiving compensation: (a) negotiates or attempts to negotiate the rental or leasing of real estate or improvements thereon; (b) lists or offers to list and provide services in connection with the leasing or rental of real estate or improvements thereon; (c) advertises or otherwise holds himself out to the public as being engaged in any of the foregoing activities. S.C. Code Ann. § 40-57-30(11). In the state of South Carolina, it is unlawful for an individual to act as a real estate property manager or to advertise as such without a valid license issued by the department. S.C. Code Ann. § 40-57-20.

For all types of real estate transactions, including leases, an unlicensed employee of the owner or an unlicensed individual working under the supervision of a licensee may not: (1) discuss, negotiate, or explain a contract, listing, buyer agency, lease, agreement,

or other real estate document; (2) vary or deviate from the rental price or other terms and conditions previously established by the owner or licensee when supplying relevant information concerning the rental of property; (3) approve applications or leases or settle or arrange the terms and conditions of a lease; or (4) indicate to the public that the unlicensed individual is in a position of authority which has the managerial responsibility of the rental property. S.C. Code Ann. § 40-57-135(G). The South Carolina Code regarding property managers does not apply to the sale, lease, or rental of real estate by an unlicensed owner of real estate who owns any interest in the real estate if the interest being sold, leased, or rented is identical to the owner's legal interest. S.C. Code Ann. § 40-57-240(1).

It is apparent through Mr. Holliday's testimony that he has been conducting negotiations on behalf of the Respondent with Richard Ruth's regarding rental price under the alleged lease. (Holliday Dep. 97: 7-13). In addition, Mr. Holliday stated "[i]t's my job to make sure...people pay their rent and that it's paid on time," and "I am specifically given the responsibility to carry out whatever is in the lease provisions." (Holliday Dep. 119:3-13). While the lease provisions in the present action may be unclear and undefined, Mr. Holliday is clearly holding himself out to the public as the property manager of Respondent. However, Mr. Holliday has lived in Utah since 2004 and has not lived in South Carolina since 1992 or 1993. (Holliday Dep. 10:8-15, 11:10-11). He does not own any real estate in South Carolina or expect to purchase any. (Holliday Dep. 21:25, 22:1-8). Since Mr. Holliday does not own property in South Carolina, he would have to secure a license to be a property manager of any real estate within South Carolina, which Mr. Holliday has not done. (Holliday Dep. 11:20-25, 12:1-5).

Additionally, Mr. Holliday and his father, the current owner of the property, do not have an identical legal interest in Respondent so as to be exempt from the South Carolina Code regarding property managers. Without a license, Mr. Holliday has no authority to create a valid lease or agreement in South Carolina and therefore no valid lease can exist between Respondent and Richard Ruth's.

For these reasons, the trial court erred in granting Respondent's Motion for Summary Judgment and the ruling should be reversed and remanded for a trial on the merits.

B. The initial agreement between Respondent 2233 Highway 17 North, LLC and Richard Ruth's Bar & Grill, LLC constituted a partnership, thereby creating co-liability between the partners.

To determine whether a partnership exists, the following tests are used: (1) the sharing of profits and losses; (2) community of interest in capital or property; and (3) community of interest in control and management. *Wyman*, 223 S.C. at 181, 74 S.E.2d at 699; *Stephens*, 213 S.C. at 531, 50 S.E.2d at 579; *Halbersberg v. Berry*, 302 S.C. 97, 101, 394 S.E.2d 7, 10 (1990). **"A partnership agreement may rest in parol. It may [also] be implied and without express intention."** *Wyman*, 223 S.C. at 174, 74 S.E.2d at 698; *Halbersberg*, 302 S.C. at 101, 394 S.E.2d at 10; accord *Beck*, 300 S.C. at 301, 387 S.E.2d at 685; *Buffkin v. Strickland*, 280 S.C. 343, 345, 312 S.E.2d 579, 580 (Ct. App. 1989) (emphasis added). **A partnership may also be found to exist by implication from the parties' conduct.** *Corley v. Ott*, 326 S.C. 89, 92, 485 S.E.2d 97, 99 (1997); *Stephens*, 213 S.C. at 532, 50 S.E.2d at 580. When, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is cause to any person, not being a partner in the partnership, or

any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act. S.C. Code Ann. § 31-41-350

Mr. Holliday claimed Respondent and Richard Ruth's had a "specific understanding" with regards to a lease without articulating any terms of the current lease except for the rental price. (Holliday Dep. 110:18-19). Mr. Holliday admitted he had no personal knowledge of the initial agreement between his father, Warren Holliday, as the owner of Respondent, and Richard Ruth's. (Holliday Dep. 111:21-24). Lack of the ability to articulate the basic lease provisions or the original essential terms of the agreement raises questions as to whether Respondent and Richard Ruth's had in fact created a partnership rather than the alleged lease.

In addition to his role as the manager of Respondent, Mr. Holliday is the manager of Holliday Amusements, which shares the same CPA and office manager with Zeezrom and Respondent. (Holliday Dep. 22:18-23, 25:22-25, 26:1-21). These three corporations also share the same registered agent and owner, Warren Holliday. (SC Secretary of State, <http://www.scsos.com> (last updated June 16, 2014, 6:01 PM)). The three corporations also share office equipment, such as a fax. (Holliday Dep. 93:11-15, (4:1-4). This sharing of management, staff, and office equipment shows a significant connection between the operations of the companies, indicating a partnership between Respondent, Zeezrom, and Holliday Amusements. Due to this connection between Respondent and Holliday Amusements, one can infer that Respondent would share profits with Holliday Amusements through the use of Holliday Amusement's gaming devices.

Mr. Holliday was particularly unknowledgeable about the placement of Holliday Amusement pool tables and gaming machines in Richard Ruth's. (Holliday Dep. 60:15-

25, 61:1-12). Despite Mr. Holliday's unfamiliarity, he acknowledged the existence of Holliday Amusement gaming devices within Richard Ruth's, stating "there have been different games in and out of all of our clients' businesses, and I'm not sure [who was responsible for placing games within Richard Ruth's] based on when games ever went in there. I couldn't tell you when they first, you know, went in or went out or what the combination is of games." (Holliday Dep. 60:24-25, 61:1-4). Mr. Holliday was also unable to give details as to revenue collection from the gaming devices located at Richard Ruth's. (Holliday Dep. 61:13-18).

The existence of gaming devices owned by Holliday Amusement within Richard Ruth's and the significant lack of information offered by Mr. Holliday regarding revenue collection from those gaming devices generates an additional scintilla of evidence of the sharing of profits and losses between Respondent and Richard Ruth's. Moreover, this creates a scintilla of evidence as to a community of interest in capital or property with respect to real property and the popularity of the gaming devices, further evidencing a partnership between Respondent and Richard Ruth's. Because of the presence of a partnership between Respondent and Richard Ruth's, the partnership relationship creates co-liability between the partners under South Carolina law. Since Appellant incurred and is accruing substantial damage due to his injuries on Richard Ruth's property, Respondent and Richard Ruth's are both jointly and individually liable to Appellant through their partnership.

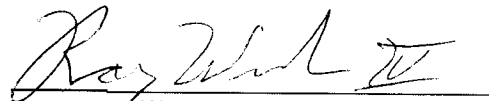
For these reasons, there exists at the very least a scintilla of disputed fact as to the existence of a partnership between Respondent and Richard Ruth's, therefore the trial

court erred in granting Respondent's Motion for Summary Judgment and the ruling should be reversed and remanded for a trial on the merits.

CONCLUSION

For all the foregoing reasons, the Order of the trial court should be reversed. This action should be remanded to the Circuit Court for a trial and final determination on the merits.

Respectfully Submitted,



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July 3, 2014

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-8241

George Giannaras as guardian and
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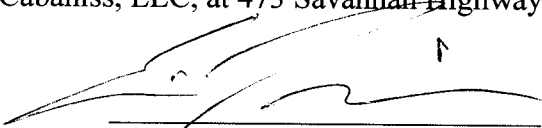
Richard Ruth Sr. and Jane Ruth, both individually and as owners/operators of Richard
Ruth's Bar & Grill, LLC, Adrian Lamar Smalls, and 2233 Highway 17 North, LLC

Of whom, 2233 Highway 17 North, LLC is.....Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Notice of Appeal and Designation of
Matter on Respondent 2233 Highway 17 North, LLC, by depositing a copy of it in the
United States Mail, postage prepaid, on July 3, 2014, addressed to its attorney of record,
F. Truett Nettles, II, Esquire of Grimball & Cabaniss, LLC, at 473 Savannah Highway,
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July 3, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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RE: *Emmanuel Kehagias v. 2233 Highway 17 North, LLC, et. al*
Case No.: 2012-CP-10-8241
Appellate No.: 2014-000336

Dear Ms. Kitchings:

Enclosed for filing is an original and one copy of our Initial Brief, Designation of Matter, and Proof of Service of the same upon the Respondent.

We would appreciate it if you would file the originals and return the copies in the enclosed envelope.

Sincerely,



Roy T. Willey, IV

Cc: F. Truett Nettles, II, Esquire
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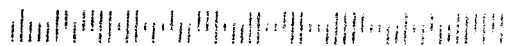
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SC Court of Appeals

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