IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Steven H. John, Circuit Court Judge

Civil Action No.: 2011-CP-26-2722

Nichols Holding, LLC and J. Wade Nichols .....Respondents-Appellants

vs.

Divine Capital Group, LLC, John S. Divine, IV,
Nathan Anderson and Divine Dining Group, Inc. .....Appellants-Respondents

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APPELLANTS-RESPONDENTS REPLY BRIEF

August 7, 2014

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II. DID THE LOWER COURT ERR IN ITS RULING REQUIRING DIVINE TO PAY GCWSD $53,760.00 FOR UNASSESSED IMPACT FEES BECAUSE NICHOLS HAS SUFFERED NO DAMAGES?

III. DID THE EVIDENCE BEFORE THE COURT SUPPORT AN AWARD OF THE FULL TRADE DEBT AMOUNT?

STATEMENT OF THE CASE

The Appellants-Respondents incorporate the Statement of the Case contained in their Initial Brief filed on June 26, 2014.

ARGUMENT

I. THE LOWER COURT'S RULING THAT DIVINE WAS LIABLE FOR UNASSESSED IMPACT FEES IS IN ERROR AS SUCH RULING IS BEYOND THE SCOPE OF THE GOVERNING AGREEMENTS AND CONTRADICTS THE EVIDENCE BEFORE THE COURT. [1]

As stated in Divine's Motion to Alter or Amend pursuant to Rule 59(e), the lower court's ruling is erroneous as it contravenes the language of the contractual agreements and the evidence before the court. (Defendants Divine Capital Group, LLC, John S. Divine, IV, Nathan Anderson and Divine Dining Group, Inc., Notice of Motion and Motion to Alter or Amend Order Pursuant to Rule 59(e), SCRCP, filed January 15, 2014).

A. The lower court failed to properly apply the controlling principles of contract law, and thereby failed to give full effect to the clear and unambiguous language of the Agreements between the parties.

A settlement agreement is an agreement in contract which must be interpreted pursuant to the principles of contract law. *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799 (Ct. App. 2009). "An action to construe a contract is an action at law." *Silver v. Aabstract Pools & Spas, Inc.*, 658 S.E.2d 539, 541, 376 S.C. 585, 591 (Ct. App. 2008).

Respondents-Appellants attempt to divert this Court's focus by alluding to issues that are matters of fact, when, in actuality, the lower court erred as a matter of law by

[1] Respondents-Appellants' Statement of Issues on Appeal does not coincide with the questions presented in its Argument; we have elected to address the Respondents-Appellants' arguments in the order set forth in the Argument section of its brief.

failing to properly apply contract law principles, which are controlling in this dispute over contract interpretation. No language in the Agreements requires Divine to investigate local water and sewer rules and disclose the possibility that Nichols may have to pay impact fees if he chooses to open a new account. The lower court exceeded its authority in requiring Divine to pay GCWSD for unassessed impact fees as this ruling is beyond the scope of the language of the Agreements. (See Appellants-Respondents Initial Brief, dated June 26, 2014, Argument I(C)).

B. The lower court incorrectly determined that Divine was liable for unassessed impact fees as the evidence before the court contradicts this ruling.

In addition to failing to comply with the principles of contract interpretation, the lower court's ruling—that Divine violated the Agreements by failing to disclose impact fees—is also an error as the evidence before the court establishes the contrary.

Respondents-Appellants contend that the legal standard in this case is the "any evidence standard." Thus, "the scope of review on appeal [is] limited to determining whether there was any evidence to support the trial court's decision." *Pruitt v. S.C. Med. Malpractice Liability Joint Underwriting Ass'n.,* 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). Nichols has failed to produce any evidence to support his argument that Divine was required to independently disclose the water demand charges and is thus liable to GCWSD for unassessed impact fees. To the contrary, the evidence before the court supports Divine's arguments that he (1) had no duty to independently disclose the water demand charges to Nichols, and (2) is not liable to GCWSD for yet-to-be assessed impact fees that Nichols may have to pay if he elects to open a new account.

The facts relating to the contract are uncontroverted. In regards to the arguments

and misstatements of fact in Nichols' Argument III, Divine specifically responds as follows:

- It is undisputed that Divine signed a Settlement Agreement stating that there were "no service, maintenance, property management, leasing or other contracts affecting the Property" which would be in existence as of the date of the closing. (Aff. of Divine, Ex. B, the Purchase Agreement, p. 16, ¶ 15(f)) (emphasis added). Nichols has put forth no evidence to support his contention that a water demand charge constitutes a contract. In fact, Mr. Mendoza testified at the hearing that the water demand charge was not a contract. (Transcript p. 45, l. 10-22).
- Nichols introduced a letter into evidence that actually supports Divine's argument in that it expressly states that the water demand charge was optional and that Divine was free to elect to pay the water demand charge instead of purchasing additional capacity. (Plaintiff's Ex. 5, Letter to Divine Fish House from John F. Buck, Finance/Administration Director, GCWSD, dated June 22, 2012 ("You have the option of purchasing the additional capacity by paying and eliminating or reducing the monthly Demand Charges.")) (emphasis added).
- The evidence establishes that Divine provided copies of all invoices, including the water and sewer billing, to Mr. Newby at closing. (Aff. of Divine, p. 4, ¶ 18). The water demand charge was a cost of operating the restaurants, and a utility charge that Nichols, as a buyer, should have discovered in his review of the nearly one year's worth of utility bills,

including water and sewer billing, which Nichols had access to through the court appointed receiver. (Transcript, p. 30, l. 14-25; Aff. of Divine, pp. 15-16, ¶ 96). Additionally, GCWSD's Resolution, which explains the procedure for assessing demand charges and impact fees, is publically available; Nichols cannot place legal blame and culpability on Divine for his own failure to investigate pursuant to his duty as set forth in the Purchase Agreement. (Aff. of Divine, Ex. B, Purchase Agreement, p. 14, ¶ 12(d))).

- In his Brief, Nichols refers to "***past due*** demand charges." (Initial Respondents' Brief of Respondents-Appellants, p. 4) (emphasis added). This is an incorrect statement of the facts. It is undisputed that at the time of closing, no charges or sums were due by Divine to GCWSD, i.e., the account balance from Divine to GCWSD was current, at "$0.00". (Aff. of Divine, Ex. O, P, Customer Reports from restaurants). No record evidence controverts this fact.
- Nichols' own counsel, Mr. Fred Newby, testified that he reported no contractual violation to the title insurance company pertaining to the title disclosures made by Divine because he did not think that the water demand charges triggered any duty to report. (Transcript p. 64, l. 6-11 (Specifically, when counsel for Divine asked Mr. Newby whether he had notified the title agency that there may be an issue with GCWSD affecting the title, Mr. Newby stated: "I have not [reported a violation] because I don't think it does affect the title.")). Despite this admission by his own

closing attorney, Nichols argues a failure to disclose payment of a water demand charge to the title company as the sole basis for his claim. (Initial Respondents' Brief of Respondents-Appellants, dated July 25, 2014).

- At the time of closing, all governmental services had been paid for, including water and sewer construction, as demonstrated by the $0.00 balance of the restaurants' accounts with GCWSD at the time of closing. (Transcript, p. 59, l. 1-15; Aff. of Divine, Ex. O, P, Customer Reports from restaurants). No record evidence controverts this fact.
- The sum of $53,000.00 quoted to Nichols by GCWSD was not an assessment against Nichols or a charge for any outstanding water demand charges, but was, in fact, an *estimate* as to the amount of potential impact fees that may be assessed if and when Nichols opens its own account in its name (since it may be required to purchase additional capacity as a result of the change in ownership). (See Initial Brief of Appellants-Respondents, dated June 26, 2014, Arg. I). Moreover, the $53,000.00 quoted for potential impact fees was not due at the time of closing, and was not owed at the time of the hearing. (Transcript, p. 33, l. 8-25, p. 34, l. 1-2).
- Nichols, once again, refers to the water demand charges as "penalties," even though there is no evidence to support this claim. (Initial Brief of Respondents-Appellants, p. 4). The record is undisputed that the water demand charges were not a penalty. (See Initial Respondents' Brief of Appellants-Respondents, dated June 25, 2014, Argument I(D.), pp. 16-17).
- If Nichols was, as he claims, unaware at the time of closing that he may

have to purchase $53,000.00 worth of impact fees if he elects to open a new account with GCWSD, this ignorance is a result of Nichols' own failure to institute and understand local regulations; Divine cannot be held liable for failing to educate Nichols on publicly available and regulations of GCWSD, a public utility. (See Initial Brief of Appellants-Respondents, dated June 26, 2014, Arg. I(C)). Further, Divine had no reason to inquire as to any potential impact fees GCWSD may impose upon Nichols if he opened a new account because Divine had been paying the monthly demand charge for years in lieu of paying for additional capacity, as was his option. (Aff. of Divine, p. 15, ¶ 92; Transcript, p. 45, l. 9-23).

- Divine was aware of the water demand charges—he had been paying them monthly for years—and considered these charges a cost of operating a business in the area. (Aff. of Divine, p. 12, ¶¶ 70-71).
- Mr. Mendoza testified that the water demand charge was not an administrative agency action; thus, Divine had no independent duty pursuant to the Agreements to notify Nichols of the monthly charge. (Transcript, p. 43, l. 4-18).

II. THE LOWER COURT'S RULING REQUIRING DIVINE TO PAY GCWSD $53,760.00 FOR UNASSESSED IMPACT FEES IS ERRONEOUS BECAUSE NICHOLS HAS SUFFERED NO DAMAGES.

As the party seeking relief, it was Nichols' duty to prove his damages. "In an action for breach of contract, the plaintiff must prove the existence of a contract, its breach, **and damages caused by the breach.**" *Marceron v. Helms*, 2007 WL 8400131, *3 (S.C. App. Nov. 30, 2007) (No. 2007-UP-542) (emphasis added). Nichols has put

forth no factual evidence to support the lower court's ruling, thus Nichols' claim for damages fails under the "any evidence" standard described above.[2]

Divine presented evidence establishing that Nichols had not suffered any damages at the time of the hearing. Mr. Mendoza testified that Divine had offered to let Nichols use his account indefinitely to avoid Nichols having to pay the impact fees that were to be triggered if Nichols opened a new account. (Transcript, p. 33, l. 8-25, p. 34, l. 1-2). Specifically, Mr. Mendoza testified as follows:

> Q. Do you know if [Nichols] is still using Mr. Divine's account?
>
> A. It is my understanding that he is still using the account.
>
> Q. So [Nichols] is not out of pocket any money to your knowledge as a result of the water usage issue as of this point in time?
>
> A. This is correct.

Id. The record clearly establishes that no change in ownership had occurred at the time of the hearing, and, as a result, no impact fees were assessed against Nichols. Accordingly, because Nichols had incurred no damages at the time of hearing, the lower court's ruling to the contrary was in error.

III. THE EVIDENCE BEFORE THE COURT SUPPORTS AN AWARD OF THE FULL TRADE DEBT AMOUNT.

Contrary to Nichols' statements in the opening of Argument V—that Divine offered neither argument nor evidence as to the amount of trade debt—Divine presented record testimony, in the form of Affidavits and live testimony, establishing the total trade

[2] Shakespeare's quote in Hamlet, cited by Respondents-Appellants, was actually made by Queen Gertrude in the context of a play within a play staged by Hamlet. The quote, which was in response to Hamlet's question to the Queen, "Madam, how do you like this play?", plays upon a *double entrende* in an effort to expose the real truth. William Shakespeare, Hamlet, Act, III, l. 227-228. Respondents-Appellants use of the quote attempts to escape the truth by diverting the Court's attention to the volume of evidence placed before it by Divine as compared to the substantive truth of the evidence, and attempts to obfuscate the lower court's error of law in failing to give effect to the clear contracted language between the parties.

debt amount of $62,809.08. Specifically:

- Divine submitted testimony in the form of an affidavit establishing the total trade debt figure of $62,809.08.[3] (Aff. of Divine, p. 9, ¶ 54; Order Compelling Settlement, pp. 3-4).
- Mr. Mendoza testified as to the $62,809.08 figure:

  Q.: Does $62,809.08 sound ---

  A.: That sounds like the general figure I saw.

  (Transcript, p. 27, l. 25, p. 28, l. 1).

Divine would also call the Court's attention to the arguments raised in its Motion to Enforce Settlement Agreement and Memorandum of Law in Support of this Motion, which set forth Divine's argument as to the amount of trade debt owed. (See Motion of John S. Divine, IV to Enforce Settlement Agreement, filed November 26, 2013; Memorandum of Law in Support of Motion of John S. Divine, IV to Enforce Settlement, with attached Affidavits of Julio Mendoza, Jr., Esquire and John S. Divine, IV, filed November 26, 2013). In sum, there was sufficient evidence before the lower court to support its finding as to the total trade debt figure of $62,809.08. This specific finding should not be disturbed as it satisfies the "any evidence" standard.[4]

CONCLUSION

Based on the evidence presented, Appellants-Respondents respectfully submit that this Court should (1) reverse the lower court's ruling ordering Divine to pay

[3] The lower court incorrectly lowered the amount owed Divine to $53,786.65 when it improperly gave Nichols credit for trade debt already paid but not included in the total $62,809.08 figure that Divine submitted to the Court. (Order Compelling Settlement, pp. 3-4).

[4] However, Appellants-Respondents maintain that the lower court erred in lowering the total figure by $9,022.43 for trade debt amounts paid for invoices that were not included in Divine's total trade debt figure presented to the court. (See Initial Brief of Appellants-Respondents, dated June 26, 2014, Arg. 2, p. 25.).

GCWSD for impact fees that have not yet been assessed (and will remain unassessed if Nichols continues to use Divine's account), and (2) reverse the lower court's subtraction of $9,022.43, thereby allowing full recovery of the trade debt amount, as presented to the court, of $62,809.08.

August 7, 2014

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Appellants-Respondents, Divine Capital Group, LLC, John S. Divine, IV, Nathan Anderson and Divine Dining Group, Inc.'s Reply Brief by depositing a copy of it in the United States mail, postage prepaid, on August 7, 2014, addressed to the following:

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Via U.S. Mail and Fax Transmission
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Re: Nichols Holding, LLC and J. Wade Nichols v. Divine Capital Group, LLC, John S. Divine, IV; Nathan Anderson; and Divine Dining Group, Inc.
Appellate Case No.: 2014-000662
Civil Action No.: 2011-CP-26-2722

Dear Ms. Kitchings:

Our firm, along with Julio E. Mendoza, Jr., Esquire, with Nexsen Pruet, LLC, represent the Appellants-Respondents Divine Capital Group, LLC, John S. Divine, IV, Nathan Anderson and Divine Dining Group in the above-referenced matter. Please find enclosed for filing the original and one copy of the Appellants-Respondents Reply Brief in this case. Please return a stamped copy to our office in the enclosed self-addressed stamped envelope.

Sincerely yours,

THOMAS & BRITTAIN, P.A.

Leah Montgomery Cromer

Leah Montgomery Cromer

LMC/kwn
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