

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Opinion No. 4914 (S.C. Ct. App. Filed November 30, 2011)

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S.C. Supreme Court

Stevens & Wilkinson of South Carolina, Inc.,
Gary Realty Company, Inc., Garfield Traub
Development, LLC, and Turner Construction
Company. Plaintiffs,

Of Whom

Stevens & Wilkinson of South Carolina, Inc.
Gary Realty Company, Inc. and Garfield Traub
Development, LLC are Respondents,

vs.

City of Columbia, Paul C. "Bo" Aughtry III,
Windsor/Aughtry Co., Inc., Vista Hotel Partners,
LLC, and Hilton Hotels Corporation Defendants,

Of Whom

City of Columbia is Petitioner.

REPLY BRIEF OF PETITIONER

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September 23, 2013
Columbia, South Carolina

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REPLY ARGUMENTS

This appeal sets before this Court the clear opportunity to reiterate if not redefine the purpose and practice of summary judgment in South Carolina. The Court also is presented with an opportunity to provide guidance to the bar and business community about a critical tool used in complex commercial enterprises – the Memorandum of Understanding, or “agreements to agree.”

a) Summary Judgment: What are “genuine issues of material fact” for trial?

As the Petitioners have previously discussed, the purpose of summary judgment is to determine whether there exists a genuine issue of fact to be tried. Dismissing cases on summary judgment frees the courts to consider only meritorious claims and releases the prevailing party, and by extension society, from the further burden and expense of protracted unnecessary litigation. Yet, there are many on the bench and at bar who regularly say, “There is no such thing as summary judgment in South Carolina.”

By failing to uphold a grant of summary judgment in a clear-cut case such as this, the message to the bench is to be even more circumspect in granting summary judgment, and to the bar in making such a motion. Thus, summary judgment practice becomes an irrelevant and ineffective part of pre-trial procedure that only increases time and expense, with little expectation of success. Instead, the City would urge this Court to reverse the Court of Appeals in this matter and provide guidance to the bench and bar that summary judgment remains a viable and useful process for disposing of cases.

This appeal is ideal for this purpose because the facts supporting the trial court’s decision to grant summary judgment are clear. There was no meeting of the minds in the MOU as to essential

provisions of the hotel development project; instead, those terms were to be set forth in subsequent definitive written agreements. Thus, the MOU itself was not an enforceable contract.

What may not be clear to this Court is why Respondents Stevens & Wilkinson of South Carolina, Inc. (“Stevens & Wilkinson”) and Garfield Traub Development, LLC and Gary Realty Company, Inc. (collectively, “Garfield Traub/Gary Realty”), and other project team members, would voluntarily work for almost a year on developing the convention center hotel project knowing that they were working “at risk” of never being compensated. The answer is that with great risk came the possibility of great reward, not unlike a lawyer taking on a risky case on a contingency fee basis. The Respondents moved forward with developing the hotel project because they hoped for an eventual significant payday, all the while knowing that there existed the possibility of never seeing a penny of payment. The potential reward was worth the known risk – for example, 7.5% for Stevens & Wilkinson of an unknown number based upon construction costs if the hotel was built. Accordingly, the Respondents were willing to work within the framework of the MOU even though the material terms of the undertaking were not discernable.

The risk of non-payment having been realized, the Respondents now seek to convert the MOU from a non-binding, complex framework for development into a simple binding contract for the payment of services. This is where the City and the Respondents’ positions on the MOU differ the most. Of the many material terms not defined by the MOU, the most critical terms of the hotel development project outlined in the MOU were the amount of the bonds to be issued and the amount of the City Credit Support – what this hotel project was going to cost the City. The decision as to what the City was willing to pay, and what long-term risk it was willing to subject its taxpayers to, was always within the sole authority of the City to approve and both of which remained open terms

from the execution of the MOU to the date Columbia City Council voted to issue a second RFP for a privately-funded convention center hotel.

The express terms of the MOU underscore that the project team's purpose was to develop, finance, and operate the convention center hotel.

WHEREAS, the Project Team submitted a proposal to finance, develop, and operate the Hotel in response to the City's solicitation; and

WHEREAS, the City and the Project Team desire to document the understandings reached with respect to the financing, development and operation of the Hotel.

(MOU, Page 1, Appx. p. 1444.) The MOU was not a simple "contract for services" as asserted by the Respondents but instead was a framework for the development of the convention center hotel, including financing and operation.

The Respondents maintain that the only material terms of the MOU were the terms providing for payment to them and that those terms were sufficiently defined to form a contract for the City to pay them for their services. As to both Respondents, any payment to them would have hinged on the ultimate amount and structure of the bond issue. Not only did the bond issue never occur, but even after the non-profit corporation (not Columbia City Council) voted on February 4, 2011, to approve the financing proposal, the bond structure and amount continued to evolve.

As to the compensation of Stevens & Wilkinson in particular, the MOU did not contemplate that the City would have any contract for payment directly to Stevens & Wilkinson. Instead, Turner Construction was to pay Stevens & Wilkinson pursuant to a Design/Build Agreement. (MOU § VII .1, Appx. 1447.) This Design/Build Agreement was one of the many subsequent "definitive written agreements" that was never completed. Thus, the MOU cannot be a contract for services to be paid by the City to Stevens & Wilkinson.

The MOU was not a contract for services with either of the Respondents but was a conceptual framework for the development, financing, and operation of a convention center hotel. The essential terms of the hotel project upon which all other provisions depended were the amount of the bond issue and the amount of City Credit Support.

As detailed in the City's Brief of Petitioner, there was never a meeting of minds between the City and the other parties to the MOU as to the actual amount of the bond issue or the City Credit Support. In order to form an enforceable contract, there must be offer, acceptance, and a meeting of the minds as to the terms of the contract.

It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms. Kitchens v. Lee, 221 S.C. 59, 69 S.E.2d 67. Furthermore, the assent must be as to all of the terms of the contract. Lee v. Travelers' Insurance Company of Hartford, Conn., 173 S.C. 185, 175 S.E. 429.

Edens v. Laurel Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978).

"For a contract to arise there must be an agreement between two or more parties. There must be an offer, there must be an acceptance, and there must be a meeting of the minds of the parties involved." Hughes v. Edwards, 265 S.C. 529, 536, 220 S.E.2d 231, 234 (1975).

Rushing v. McKinney, 633 S.E.2d 917, 922 (Ct. App. 2006).

In fact, throughout the period of the project team's work, the amount of the bond issue and the amount of the City Credit Support continually increased, and the City never approved any bond structure or issue. Because there was no meeting of the minds as to these two essential terms of the MOU, there could be no offer and acceptance necessary to the formation of an enforceable contract.

b) Memoranda of Understanding or “Agreements to Agree.”

The law surrounding the enforceability of “agreements to agree” in South Carolina is sparse. This case, therefore, provides this Court with a prime opportunity to clarify that memoranda of understanding that do not contain the terms material for carrying out the undertaking considered by the document are not enforceable contracts.

The express language of the MOU demonstrates that it was merely a non-binding agreement to agree and not itself a final enforceable contract. The very first page of the MOU sets forth that its purpose is to lay the groundwork for subsequent “definitive written agreements with respect to the business terms and conditions” contained in the MOU. (MOU § I.1, Appx. 1444.) Such an agreement to agree in the future does not render the preliminary writing an enforceable contract. It is only in cases where all of the terms of a subsequent contract are contained in the preliminary understanding that such a preliminary document may itself be an enforceable contract. That is not the case here. Here, it was the subsequent definitive written agreements that were to contain many essential terms not set forth in the MOU or even negotiated.

One key term that was never resolved was whether the non-profit corporation, which was to own the hotel, would be required to pay property taxes for the hotel or whether it would be exempt from property taxes. This was a material term which none of the financial projections for the hotel ever took into account. (Deposition of William Corrado, 99:20-24, Appx. 1321; Affidavit of Joel Gottlieb ¶ 10, Appx. 1398.) Under the financial projections developed by the project team, the hotel would not have generated sufficient revenues to pay its anticipated expenses and property taxes, i.e. the project would not have “cash flowed.” (Handwritten minutes from February 11, 2004 meeting of Columbia Convention Center Hotel Corporation, Appx. 1637-1641.)

Another significant open issue remaining to be included in the Design-Build Agreement related to payment for the initial inventory, or the so-called “steaks in the freezer” issue. (Affidavit of Joel Gottlieb ¶ 13, Appx. 1399; Email chain between Joel Gottlieb and Kathleen Wu, Appx. 1728-1732.) The City expected that the Guaranteed Maximum Price (“GMP”) would include payment for initial inventory; however, there is no evidence in the record that a final agreement satisfactory to the City was ever reached concerning how the initial inventory would be funded. (Id.)

Yet another critical but unresolved issue was how executive compensation to the members of Hilton Hotels' upper-level management would be handled in a manner that satisfied Hilton Hotels without violating the requirements of the Internal Revenue Service Revenue Ruling that allowed for the issuance of tax-exempt bond to fund the hotel. (Affidavit of Joel Gottlieb ¶ 12.a, Appx. 1399; Email chain from Kathleen Wu, dated January 6, 2004, Appx. 1733-1734.) If not resolved, the tax-exempt nature of the bond issue would be in jeopardy, completely changing the nature of the bond structure.

These key financial considerations cannot be found in the MOU. There were terms left to be determined and set out in the subsequent definitive written agreements. Therefore, the MOU could not and did not contain all of the terms necessary for development of the hotel plan. Thus, the MOU was an unenforceable agreement to agree rather than an enforceable contract.

Because the language of the MOU demonstrates that it is not an enforceable contract, it is not necessary to consider parol evidence. The Respondents provide a great deal of argument regarding their work done between execution of the MOU and the issuance of the second RFP. It is the Respondents' contention that they would not have undertaken this work if they did not think that the MOU was an enforceable contract for payment to them. This argument is negated by the fact

that the express terms of the MOU stated that the Respondents would not be paid if the bonds failed to close, i.e. they were working “at risk.” As set forth above, the Respondents were willing to work “at risk” for the potential upside reward which would occur if – and only if – the bonds closed.

The Respondents raise two other issues in their briefs that require response. First, the Respondents argue that the existence of boilerplate or “classic contract language,” as they call it, is evidence that the parties intended the MOU to be binding contract. However, it is the meaning of the document as a whole and not particular “pro words” that determine whether that document is a binding contract or not. In this case, the recitation of “classic contract language” fails to overcome the fact that the MOU was an agreement to agree on future definitive written contracts and that there was never a meeting of the minds as to the bond amount or the City Credit Support.

Second, Respondent Stevens & Wilkinson also argues that the feasibility provision is a condition subsequent, and that existence of a condition subsequent transforms the document into an enforceable contract. To the contrary, a condition subsequent will only be found to exist if there is already a determination that a binding contract exists. This is different than a condition precedent, which must occur before a contract can be found. Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 207, 687 S.E.2d 714, 719 (Ct. App. 2009).

Based upon the fact that there was no meeting of the minds as to the essential terms of the hotel development plan and the fact that the contractual provisions were to be contained in never-finalized “definitive written contracts,” the Court of Appeals erred in reversing the trial court’s grant of summary judgment in favor of the City on the issue of whether the MOU, standing alone, was an enforceable contract for the payment of compensation to the Respondents. This Court, therefore, should reverse the Court of Appeals.

c) Quantum Meruit.

As to Garfield Traub/Gary Realty's claim for quantum meruit, there is no evidence in the record that the City retained any benefit from Garfield Traub/Gary Realty's work. What Garfield Traub/Gary Realty attempts to posit as circumstantial evidence of the retention of a benefit is merely speculation and jury argument without factual support. For example, the fact that the City passed along to Windsor/Aughtry a rendering of the hotel is not circumstantial evidence that the City retained any benefit from the rendering. This is particularly true considering that the hotel constructed by Windsor/Aughtry is only two-thirds of the size of the one proposed by the project team. Furthermore, as set forth extensively in the City's Brief of Petitioner, even Garfield Traub and Gary Realty's principals were unable to identify any particular benefit retained by the City for their work other than the alleged resemblance of the constructed hotel to the project team's plan. (Brief of Petitioner, Pages 35-38.) Accordingly, the Court of Appeals erred in finding that a scintilla of evidence exists to support Garfield Traub/Gary Realty's claim for quantum meruit, and this Court should reverse the Court of Appeals on this issue.

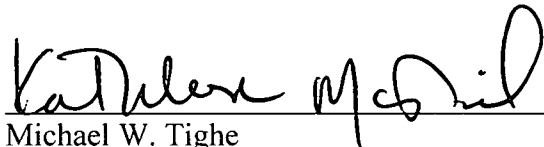
Finally, it must be noted that the Respondents overstate the status of the hotel project at the time the City issued the second RFP. Both Respondents assert that the hotel project was shovel-ready and that they were "on the cusp of breaking ground," (Brief of Stevens & Wilkinson, Page 6.) Stevens & Wilkinson asserts that the City had "analyzed and determined the economic feasibility of the Hotel Project, received approval of bond financing from the bond underwriter, and received commitment of insurance of the indebtedness." (Brief of Respondent Stevens & Wilkinson, Page 5.) These statements are simply inaccurate. Even after the non-profit corporation meeting on February 4, 2011 – when the Respondents seem to believe the financing plan was given final

approval – the amount and structure of the bond issue continued to change. By issuance of the second RFP, the City demonstrated its determination that the project proposed by the Respondents was not feasible. At the time the City issued the second RFP, the project team did not have a financing plan in place, much less a plan that could support the imminent breaking of ground.

CONCLUSION

Based upon the foregoing, this Court should reverse the Court of Appeals and affirm the trial court holding that the MOU was not an enforceable contract and that Garfield Traub/Gary Realty are not entitled to recover under a theory of quantum meruit.

Respectfully submitted,



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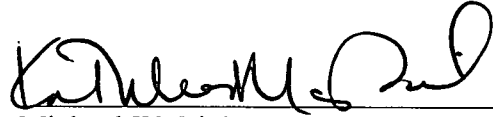
Of Whom

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PROOF OF SERVICE

I certify that I have served the **REPLY BRIEF OF PETITIONER** on the Respondents herein, by causing copies of same to be hand-delivered, to its attorneys of record, Richard A. Harpootlian and Graham L. Newman, at 1410 Laurel Street, Columbia, South Carolina 29202 and

Kenneth M. Suggs, Esquire and Francis M. Hinson, IV, Esquire, at JANET JENNER & SUGGS, LLC, 500 Taylor Street, Suite 301, Columbia, South Carolina 29202, on September 23, 2013.



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