THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master in Equity for Charleston County

Mikell Ross Scarborough, Master in Equity

Case No. 2013-CP-10-4019

THE WASHINGTON LIGHT INFANTRY OF CHARLESTON SOUTH CAROLINA, INC., ... Respondent,

v.

THE SEA GRANT CONSORTIUM, An Agency and Political Subdivision of the State of South Carolina, ... Appellant.

INITIAL BRIEF OF APPELLANT

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II. **The Master erred by holding that under the Lease Agreement Appellant Sea Grant Consortium cannot use the existing HVAC system without repair or replacement.**

III. **The Master erred by holding that under the Lease Agreement if Appellant Sea Grant Consortium wishes to avail itself of HVAC services, it must repair the existing system, if it can be repaired, in a manner so as to prevent mold accumulation, and if it cannot be repaired, to replace the current HVAC system with a system that will function without causing mold accumulation.**

IV. **The Master erred in finding that under the Lease Agreement Respondent Washington Light Infantry is not required to provide HVAC services to the Appellant, nor is it obligated to repair or maintain the existing HVAC system.**

V. **The Master erred in holding that the Lease Agreement in no way obligates Appellant Sea Grant Consortium to replace the HVAC system.**

VI. **The Master erred in holding that if Appellant Sea Grant Consortium wishes to avail itself of the HVAC system in place, then the Lease Agreement places the obligation of maintenance and repair on it.**

VII. **The Master erred in holding that under the Lease Agreement if the HVAC system cannot be repaired to prevent mold accumulation, then the Respondent must replace it if it wishes to avail itself of HVAC services.**

STATEMENT OF THE CASE

This is an action to construe a commercial lease agreement drawn by the S.C. State Budget and Control Board which is scheduled to expire on June 30, 2015. The action was commenced on July 10, 2013, for a Declaratory Judgment concerning Respondent's rental of a portion of the Washington Light Infantry building in downtown Charleston. Appellant answered and counterclaimed for the "taking" of a portion of its leased premises because of necessary

remediation of the HVAC system by Respondent lessor.

The issues were tried before the Honorable Mikell R. Scarborough, Master in Equity for Charleston County, on January 17, 2014, and December 1, 2014. On October 8, 2014, Judge Scarborough granted partial summary judgment to Respondent, holding that the HVAC problems did not constitute a "taking", but that the rents should be equitably apportioned under the lease for the time Appellant was dispossessed by HVAC remediation. Following the December 1, 2014, hearing the Master issued his Declaratory Judgment on December 3, 2014, ruling that lessor WLI has no responsibility under the lease to maintain, repair or replace the existing HVAC system; that Appellant cannot use the existing HVAC system without repair or replacement because such would present potential harm to persons or property and be in violation of the lease; and that if Appellant wishes to avail itself of HVAC services it must repair the existing system so as to prevent mold accumulation, but if the HVAC system cannot be repaired, Appellant must replace the current system with one which will function without causing mold accumulation.

On January 2, 2015, Appellant served its Notice of Appeal, and this appeal followed.

ARGUMENT

I. The Master erred in holding that Respondent Washington Light Infantry has no responsibility under the Lease Agreement to maintain, repair, or replace the existing HVAC system.

II. The Master erred by holding that under the Lease Agreement Appellant Sea Grant Consortium cannot use the existing HVAC system without repair or replacement.

III. The Master erred by holding that under the Lease Agreement if Appellant Sea Grant Consortium wishes to avail itself of HVAC services, it must repair the existing system, if it can be repaired, in a manner so as to prevent mold accumulation, and if it cannot be repaired, to replace the current HVAC system

with a system that will function without causing mold accumulation.

IV. **The Master erred in finding that under the Lease Agreement Respondent Washington Light Infantry is not required to provide HVAC services to the Appellant, nor is it obligated to repair or maintain the existing HVAC system.**

V. **The Master erred in holding that the Lease Agreement in no way obligates Appellant Sea Grant Consortium to replace the HVAC system.**

VI. **The Master erred in holding that if Appellant Sea Grant Consortium wishes to avail itself of the HVAC system in place, then the Lease Agreement places the obligation of maintenance and repair on it.**

VII. **The Master erred in holding that under the Lease Agreement if the HVAC system cannot be repaired to prevent mold accumulation, then the Respondent must replace it if it wishes to avail itself of HVAC services.**

Because the exceptions are intertwined and all embraced and covered by the Lease Agreement all seven will be discussed together.

On November 9, 2009, Appellant entered into a three year Lease for a portion of Respondent's property at 287 Meeting Street, Charleston. On April 6, 2012, the parties renewed the lease for an additional three years to expire and end on June 30, 2015.

When Appellant took possession of the premises an HVAC system was in place, having been installed before Respondent acquired the property. It was discovered in 2013 that mold had been accumulating in the HVAC system. Respondent remediated the mold, but then the question arose as to the need to either repair or replace the HVAC system to prevent the reaccumulation of mold. In order to resolve the question of which party had legal obligation to repair or replace the HVAC system under the "very inartfully drafted Lease", as denoted by Respondent, (ROA ____), Respondent filed this Declaratory Judgment action.

On December 1, 2014, the parties tried the Declaratory Judgment action before the

Honorable Mikell Ross Scarborough, Master in Equity for Charleston County, with agreement that any appeal would be pursuant to Rule 53(e), SCRCP.

As to the duties and obligations of the parties concerning improvements, repairs, or replacement the Lease Agreement provided:

> (f) Landlord will keep the land, the Building and the Demised Premises in good order and repair and make all reasonable improvements to maintain the Land, the Building and the Demised Premises.

Article 7.1(f) (ROA _____)

and

> 16.1. If at any time during the Initial Term or Extended Term, if any, Tenant shall find in the Demised Premises items in need of repair or replacement. . . which affect Tenant's use and enjoyment of the Demised Premises. Tenant shall give written notice thereof to Landlord and Landlord shall, at its sole cost and expense, repair, replace or otherwise cure the deficiencies described by Tenant within thirty (30) days of the date of Tenant's notice thereof.

Article 16.1., Lease Agreement (ROA _____)

In regard to these two provisions of the Lease the Master opined, "In regard to these two provisions, read alone, the Court agrees that it would appear that the onus of repair or replacement of the HVAC system is on Plaintiff." (Declaratory Judgment, (ROA _____)

The Lease Agreement further provided:

> (b) . . . Tenant shall not be obligated to make any repairs arising out of or in any way caused by (1) settling. (2) Defects in labor, workmanship, materials, fixtures or equipment employed, supplied or installed by or on behalf of Landlord . . . .

Article 8.1(b), Lease Agreement (ROA _____)

This provision of the Lease Agreement seems to provide that the Tenant/Appellant is not obligated to make any repairs "arising out of or in any way caused by . . . equipment employed, supplied or installed by or on behalf of Landlord." However, the Master interpreted this provision thus:

> Under this provision, Tenant is exempted from making repairs to fixtures and equipment supplied or installed by or on behalf of Landlord which were defective in 'labor, workmanship, materials,' etc. Even if, *arguendo*, the HVAC were supplied with by Landlord, which the Court rejects *infra*, there is no evidence which was introduced that the repairs in question were necessitated by 'defects in labor, workmanship, materials,' etc. Defendant drafted the lease, if Defendant wished the provision to be universally inclusive of relieving Defendant of the obligation of making any repairs, it should not have limited the repair exclusion to repairs which are necessitated by 'defects in labor, workmanship, materials,' etc, (Declaratory Judgment (ROA _____)

Reading Article 8.1(b) as "Tenant shall not be obligated to make any repairs arising out of or in any way caused by . . . equipment employed, supplied or installed by or on behalf of Landlord" comports with established statutory construction because the disjunctive particle "or" suggests that the terms connected by a disjunctive be given separate meanings, thus, one category is "Tenant shall not be obligated to make any repairs arising out of or in any way caused by, 1)., 2) defects in labor, workmanship, materials, fixtures" and the second category, following the disjunctive particle "or" is: "Tenant shall not be obligated to make any repairs arising out of or in any way caused by equipment employed, supplied or installed by or on behalf of Landlord." (ROA _____)

"Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise."), *K & A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 580, 682 S.E.2d 252, 261 (2009) (The "use of the word 'or' in a statute 'is a disjunctive particle that marks an alternative.' ").

In light of the remedial nature of the statute, and its plain language, we find the Legislature intended the word "or" in accordance with its common, disjunctive usage. *Brewer v. Brewer*, 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963) (noting that the use of the word "or" in a statute "is a disjunctive particle that marks an alternative").

In *Heyward v. Heyward's Ex'rs*, 28 S.C. Eq. 289, 7 Rich.Eq. 289, the court had under construction the clause: "Provided that N. do pay unto my brother T., or his heirs, the sum of five thousand pounds * * *." It was there held that the word "or" should be construed in its primary, natural and disjunctive sense, the court saying: "The usual and natural construction of the word "or" is disjunctive. *Love v. Love,* 208 S.C. 363, 38 S.E.2d 231, 168 A.L.R. 311 (S.C., 1946)

Accordingly, since this Article 8.1(b) provides that Appellant is not obligated to make any repairs arising out of or in any way caused by "equipment employed, supplied or installed by or on behalf of Landlord", and it is uncontradicted that the HVAC system "was present when the Washington Light Infantry acquired the Armory" (Para. 8, Stipulation of Fact (ROA _____) and that "The Tenant has been using the HVAC system that was in place when the Washington Light Infantry acquired the Armory" (Para. 9, Stipulation of Fact (ROA _____) it is beyond debate that the HVAC equipment was "employed, supplied, or installed by or on behalf of Landlord" and that Appellant thus, under the Lease Agreement "shall <u>not</u> be obligated to make any repairs arising out of or in any way caused by" the HVAC equipment. (ROA _____)

The Lease Agreement further provides:

> 6.1. The following services incidental to the use and enjoyment of the demised premises are not included in this Lease or Landlord's obligations to the Tenant and must be contracted for independently by Tenant at is own costs: electric, gas,

> and electric and gas services, water, sewer, security service, heating or air conditioning, ventilating, artificial lighting or other lighting, telephone services and infrastructure and equipment relating thereto, janitorial services, maintenance services and other related services. Landlord has provided separate water, gas and electric meters for Tenant to use in acquiring any of these services it may desire. Tenant shall be responsible financially for any services for which it contracts hereunder.

Article 6.1. SERVICES, Lease Agreement (ROA _____)

It seems clear that these "services incidental to the use and enjoyment of the demised premises" are not included in Landlord's obligations and must be contracted for independently because they are "service" costs (water, electricity, gas, etc.) for which the Tenant may choose, and contract for, or not choose and not contract for. The term "services" is thus synonymous with "utilities". This is evident because "Landlord has provided separate water, gas and electric meters for Tenant to use in acquiring any of these services it may desire." Basically, all this provision states is that the Tenant is required to pay its own utility costs, which is certainly standard.

CONCLUSION

Because this is an action in equity referred to a master-in-equity for final judgment, this Court may find facts in accordance with its own view of the preponderance of the evidence. *Thomas v. Mitchell*, 287 S.C. 35, 336 S.E. 2d 154 (SC App.1985)

The Lease Agreement was drawn by the State Budget and Control Board because Appellant Sea Grant Consortium is a state agency. When construing a lease "[t]he primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used." *Barnacle Broad, Inc. V. Baker Broad, Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct..App. 2000). "The parties' intention must be gathered

from the contents of the entire agreement and not from any particular clause thereof." *Ward v. West Oil Co.*, 379 S.C. 225, 665 S.E.2d 618, 627 (Ct.App. 2008). In construing a contract, a Court must do so in a manner which gives reasonable meaning and effect to all of the language contained in the Lease. *Brady v. Brady*, 222 S.C. 242, 72 S.E.2d 193 (1952). All of these being true, and despite the fact that the State Budget and Control Board is housed in Columbia, it seems inconceivable that its intent, or even inclination, could be that a State agency in downtown Charleston is to provide its own air conditioning, and air conditioning maintenance, repairs, and replacement. Article 7(1)(f), Article 16.1, Article 8.1(b) and Article 6, of the Lease Agreement between the parties militate against this, as does both common sense and reason.

The Lease Agreement by and between the parties expires and ends on June 30, 2015, some three and a half months from now. Appellant asks this Court to follow the dictates in the Lease Agreement, and reverse and set aside the rulings and judgment of the Master in Equity.

Respectfully submitted,

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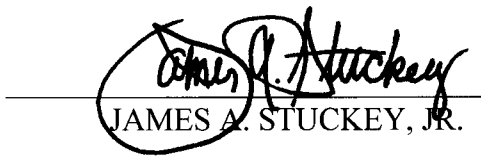
CERTIFICATE OF COUNSEL

This is to certify that the INITIAL BRIEF OF APPELLANT complies with the requirements of SCACR 210.



JAMES A. STUCKEY, JR.

March 4, 2015

Charleston, South Carolina