THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Mikell R. Scarborough, Master in Equity

Appellate Case No. 2015-000034

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.

FINAL REPLY BRIEF OF APPELLANT

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SCOPE OF REVIEW

I. The scope of review of the issues in this appeal is plenary and without deference to the Trial Court. *J.K. Constr., Inc. V. W. Carolina Reg'l Sewer Authority*, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999).

The parties disagree as to the proper scope of review. In its Brief, Respondent asserted, "In an action at law, tried without a jury, the appellate court's standard of review extends only to the correction of errors of law." (Resp. Br. p. 4) (citing *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006)). And further argued, the "lower court must be affirmed where there is 'any evidence' to support its findings." (Resp. Br. p. 4) (citing *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2nd 773, 775 (1976). Respondent asserted, "Such is the case, even when there has been a reference to a master-in-equity." *Id.*

Appellant disagrees with Respondent's position because this case is a declaratory judgment action and the parties have stipulated to the facts. Thus the Court is presented with a question of law. Accordingly, Appellant submits that the case of *J.K. Constr., Inc.* is dispositive that the scope of review is plenary, by the Court of Appeals, without deference to the Master in Equity. That case states:

> In this case, the parties have stipulated to the facts, and thus we are presented with a question of law. Where the action presents a question of law, as does this declaratory action, this Court's review is plenary and without deference to the trial court.

Crossmann Cmtys of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 47, 717 S.E.2d 589, 592 (2011) (citing *J.K. Constr., Inc.*, 336 S.C. at 166, 519 S.E.2d at 563).

Additionally, because the Master ordered injunctive relief, which is clearly equitable, Appellant's Brief asserted that the scope of this Court's review in this case was equitable, and that the Court could therefore take its own view of the preponderance of the evidence. *Townes Assocs., Ltd.*, 266 S.C. at 86, 221 S.E.2d at 775; *see also Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d, 538, 543 (1989). The declaratory judgment of the Master ordered injunctive relief, which is clearly equitable.

> IT IS FURTHER ADJUDICATED, ADJUDGED AND DECREED Defendant cannot use the existing HVAC system without repair or replacement as such would present a potential harm to persons or property and be in violation of the provisions of Article 8.1(f) of the Lease.
>
> IT IS FURTHER ADJUDICATED, ADJUDGED AND DECREED that if the Defendant 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 which will function without causing mold accumulation.

(R. p. 108).

The case of *Williams v. Wilson*, discussed a declaratory judgment supported by accompanying injunctive relief and held that "Respondents' action could be construed as an action at law, Respondents' and Appellants' briefs argued the action sounded in equity because 'the primary relief sought by [Respondents] was a declaratory judgment and injunctive relief in support of the declaratory judgment.'" 341 S.C. 136, 140 n. 3, 533

S.E.2d 593, 595 n. 3 (Ct. App. 2000) *affirmed in part and reversed in part on other grounds by Williams v. Wilson*, 349 S.C. 336, 563 S.E.2d 320 (2002).

The main problem and objection Appellant has to the Master ordering injunctive relief is that Respondent did not request or pray for any injunctive relief in its Complaint. In its Complaint Respondent prayed:

> WHEREFORE, your Plaintiff respectfully prays that this Honorable Court investigate the matters set forth herein, construe the Lease attached hereto as Exhibit 1, and issue its lawful Declaratory Judgment declaring that the obligation to install a working HVAC system in the Leased premises is the responsibility and obligation of the Defendant and the Defendant alone, and to also grant such other and further relief as this Honorable Court may deem just and proper.

(R. p. 3). Accordingly, as to the issue of injunctive relief, Appellant submits that the Master went far beyond the relief requested by Respondent in its Complaint, and thus committed error.

II. The Master misapprehended South Carolina law and misconstrued the Lease Agreement by declining to rule that

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

Article 8.1(b), Lease Agreement (R. pp. 21, 78)

In regard to Article 7.1(f) and Article 16.1 of the Lease Agreement the Master ruled, "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 [Respondent]." (R. p. 103). Appellant certainly agrees with the logic of the Master because those two Articles 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) (R. p. 20, 77).

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., (R. p. 24, 81).

However, the Master then proceeded to negate and disregard the two above Articles after stating it "would appear that the onus of repair or replacement of the HVAC system is on [Respondent] (R. p. 103) by ruling that "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,' . . . [because] it should not have limited the repair exclusion to repairs which were necessitated by 'defects in labor, workmanship, materials,' etc." (R. p. 105).

As discussed more fully in Appellant's Brief, "Canons of construction ordinarily suggest that terms connected by a disjunctive [i.e. "or"] be given separate meanings, unless the context dictates otherwise. . . ." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The "use of the word 'or' in a statute is a disjunctive particle that marks an alternative.'" *K & A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 580,

682 S.E.2d 252, 261 (2009) (emphasis added) (citing *Brewer v. Brewer*, 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963)).

Accordingly, based on the accepted and settled interpretation of the disjunctive "or" Article 8.1(b) Lease Agreement, thereby should have been construed to read:

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

Article 8.1(b) (R. pp. 21, 78).

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" (R. p. 86, ¶ 8) and that "The Tenant has been using the HVAC system that was in place when the Washington Light Infantry acquired the Armory" (R. p. 86, ¶ 9) 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 not be obligated to make any repairs arising out of or in any way caused by" the HVAC equipment. (Article 8.1(b), Lease Agreement (R. pp. 21, 78 (emphasis added)).

Appellant sets forth in its Brief more fully its argument and position that the Master thus erred in construing the Lease Agreement terms as he did because he misapprehended or disregarded applicable South Carolina law on the use of the disjunctive "or." Appellant has noted that Respondent in its Brief has failed to challenge

or contest Appellant's position. Appellant can only surmise that, in regard to this provision of the Lease Agreement and the Master's Order, that such is, therefore, incontestable.

III. The Master misconstrued and misinterpreted the provisions of Article 6.1 concerning "services incidental to the use and enjoyment of the demised premises." The error being that all of these enumerated "services" were monthly fees and use obligations, being costs of operating infrastructure and equipment related to those services, and did not impose upon Tenant any obligation to provide any infrastructure and equipment necessary to provide such services.

The Lease Agreement provides:

> ARTICLE 6 - SERVICES
>
> 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 [sic] 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.

(R. pp. 19; pp. 76).

These "services" are exactly that, charges made by providers for electricity, gas, water, sewer, and all to be paid, as customary in rental situations, separately by Tenant under the provision, "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." (R. pp. 20, 77)

It is important in construing Article 6.1 that the "services" that are enumerated, i.e., "electric and gas services" and "telephone services and infrastructure and equipment relating thereto" are the only ones pertaining to "infrastructure and equipment relating thereto." All the others "water, sewer, security service, heating or air conditioning, ventilating, artificial lighting or other lighting . . . janitorial services, maintenance services, and other related services" are exactly that, monthly charges for which tenant is required to pay.

Other than "electric and gas services" and "telephone services and infrastructure equipment relating thereto" none of the other enumerated services, including "heating or air conditioning" have any requirement that the machines or mechanisms furnishing the services should be provided by the Tenant.

IV. The Master's conclusion that if the existing HVAC system cannot be repaired and Appellant wishes to avail itself of such services, Appellant is then required "to replace the current HVAC system with a system that will function without causing mold accumulation" does not comply with Rule 52, SCRCP.

The Declaratory Judgment of the Master stated:

> IT IS FURTHER ADJUDICATED, ADJUDGED AND DECREED that if the Defendant [Appellant] 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 which will function without causing mold accumulation.

(R. p. 108).

Rule 52, SCRCP, provides:

RULE 52. FINDINGS BY THE COURT

> **(a) Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. . . . Requests for findings are not necessary for purposes of review. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

The Master made no findings of fact and conclusions of law concerning the above injunctive provision. In fact, the above portion of the Master's Decree exceeded and went beyond any relief prayed for in the Complaint.

Accordingly, since the above injunctive portion of the Declaratory Judgment has not complied with Rule 52, SCRCP, this appeal should be remanded to the Master in Equity for clarification and enumeration.

CONCLUSION

The Lease Agreement was drawn by the State Budget and Control Board because Appellant Sea Grant Consortium is a state agency. "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) *vacated on other grounds by Ward v. West Oil Co.*, 387 S.C. 268, 692 S.E.2d 516 (2010). 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, it seems inconceivable that the intent, or even the inclination of the Budget and Control Board, would be that a State agency in downtown Charleston is required to provide its own air conditioning, and maintenance,

repairs, and replacement to an existing HVAC system which was in place when it entered into a Lease Agreement for the premises.

Appellant requests a literal and common sense reading of its Lease Agreement.

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October 8, 2015
Charleston, South Carolina

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PROOF OF SERVICE FOR FINAL REPLY BRIEF OF APPELLANT

I, R. Bruce Wallace, hereby certify that I have served a copy of the FINAL REPLY BRIEF OF APPELLANT upon counsel for Respondent by mailing a copy to them at the address below via the United States Mail this 8th day of October, 2015.

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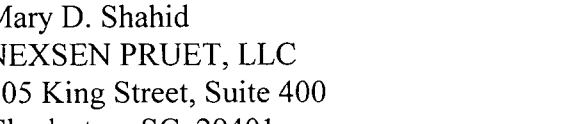

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