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

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SC Court of Appeals

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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RETURN OF APPELLANTS-RESPONDENTS TO RESPONDENTS-APPELLANTS PETITION FOR REHEARING

April 22, 2016

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ARGUMENT

Respondents-Appellants Nichols Holding, LLC and J. Wade Nichols (collectively "Nichols") have petitioned this Court for rehearing pursuant to Rule 221 of the South Carolina Appellate Court Rules. For the reasons set forth below, Appellants-Respondents Divine Capital Group, LLC, John S. Divine, IV, Nathan Anderson, and Divine Dining Group, Inc. (collectively "Divine") respectfully submit that this Court should deny Nichols' Motion because this Court has neither overlooked nor misapprehended the governing law.

I. THE COURT PROPERLY HELD THAT DIVINE HAD NO DUTY TO ADVISE OR DISCLOSE TO NICHOLS THAT DIVINE HAD NOT PURCHASED THE OPTIONAL ADDITIONAL WATER AND SEWER CAPACITY.

Contrary to Nichols' argument, this Court neither overlooked nor misapprehended State contract law in holding that Divine had no duty to advise Nichols that Divine had made the business decision to pay the Georgetown County Water and Sewer District ("GCWSD") demand charge instead of purchasing the optional additional water and sewer capacity. The Record evidence supports this Court's findings that

> (1) the Agreement did not impose on Divine a duty to advise Nichols that Divine had not purchased additional water and sewer capacity and (2) Paragraph 12(d) of the Agreement of Purchase and Sell required Nichols to make itself aware of the impact fees during the "inspection" prior to closing.

A. The Agreements do not Impose a Duty on Divine to Disclose that He Had Not Purchased the Optional Additional Water and Sewer Capacity.

That Divine abided by the covenant of good faith and fair dealing inherent in all contracts is evidenced by the Agreements themselves, which do not require Divine to advise Nichols that it had made a business decision to pay the impact fees instead of

purchasing additional water and sewer capacity. (R. p. 93, ¶ 70; R. p. 692, ¶ 6) (the relevant portion of the "GCWSD" Resolution provides: "[c]ommercial accounts will have the **option** of purchasing additional Residential Equivalent Units at the prevailing impact fee rate or be charged the monthly demand charge hereafter defined."). Significantly, the Record before the Court reflects that Nichols' own counsel, Mr. Fred Newby, testified at the hearing before the circuit court 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. (R. pp. 802, lines 6-11).

Neither " water demand change" or "additional water capacity" are specifically referenced in the Agreement. Moreover, the Record evidence before the Court supports its finding that disclosure was not required pursuant to the terms of the Agreements because the provisions regarding penalties, liens, assessments, contract, and administrative agency actions are not applicable as a matter of law to water demand charges.

- **The demand charge is not a penalty.** This Court properly considered the GCWSD Engineering Director's letter, in which he emphasized that "nowhere in the Rates and Charges Resolution is the demand charge called a penalty." (R. p. 478, ¶ 10).
- **The demand charge is not a lien.** The Record contains substantial evidence that GCWSD never placed a lien on the restaurant, the property locations of the restaurants, or the GCWSD accounts associated with the restaurants. (R. p. 477, ¶ 2) (GCWSD Engineering Director: "I found no records of GCWSD ever placing a

lien on the referenced restaurant, property, or account."). Significantly, Nichols' own legal counsel admitted at the hearing that it is his belief that Dr. Nichols had access to the business documents and invoices of the business before closing and he had "no reason to believe they were not given whatever they asked for." (R. p. 801, lines 8-17). Moreover, Attorney Newby testified that he had reported no claim of any kind of issue with Georgetown County Water and Sewer to his title insurance company because he did not think that the demand charges triggered any such duty to report the matter as a violation of the technical language of the owners affidavit. (R. p. 802, lines 6-11). (Mr. Newby: "I have not [reported a violation] because I don't think it does affect the title.").

- **The demand charge is not an assessment.** The GCWSD Resolution submitted as evidence before this Court and referenced in its Order does not utilize the term "assessment" to describe the demand charge or the option to purchase additional capacity. (R. pp. 640—643, 647-648, 668-670). The GCWSD Engineering Director stated that he found "no records of GCWSD ever making an assessment on the referenced restaurant, property, or account." (R. 477, ¶ 3).
- **The demand charge is not a contract.** The substantial evidence before the Court establishes that a water demand charge is not a negotiated contract such that Section 15(f) of the Purchase Agreement would be triggered. (R. p. 783, lines 10-22). Mr. Mendoza testified that a water demand charge is not "in the realm" of the type of contract referred to in Section 15(f) because:

> [t]he District gives you really two options if you exceed a certain level of usage. And if you don't accept either option they cut off service. So, it's not as if you contract and negotiate; you either --- if you have a certain level of service and you exceed it, you either

> pay a demand charge or you purchase additional units and if you don't want to do either one, they cut off service. So, it's not like a negotiated contract. It's a take-it-or-leave-it type situation with the District.

(R. p. 783, lines 10-22). As mentioned above, Nichols' real estate closing attorney, Fred Newby, testified at the hearing that he reported no contractual violation to the title insurance company because it was his opinion that the water demand charges did not trigger a duty to report.

- **The demand charge is not an administrative action.** Further, the Record evidence supports this Court's well-reasoned determination that the water and sewer accounts do not fall within the scope of the legal proceeding referenced in Paragraph 15(h), including "notice of administrative agency action." The Circuit Judge heard testimony at the hearing that a water demand charge is not an administrative action; specifically, when Mr. Connell asked if Mr. Mendoza considered Georgetown Water and Sewer's demand charge an administrative action, Mr. Mendoza responded that he did not. (R. p. 781, lines 14-18) ("[Mr. Connell]: Do you consider Georgetown Water and Sewer's demand charge . . . an administrative action? [Mr. Mendoza]: No.").

Divine fully briefed these issues in its appeal to this Court.

Accordingly, because the substantial Record evidence supports this Court's finding that the Agreements did not impose a duty on Divine to advise Nichols that he had not purchased the optional additional water and sewer capacity, this Court's ruling was proper and Nichols' motion should be denied.

B. The Terms of the Agreements Place the Duty to Inspect as to Water and Sewer Capacity Upon Nichols.

The evidence before the Court is uncontroverted that the Agreements put the onus on Nichols to perform due diligence in investigating the likely costs of operation. (R. p. 113, ¶ 3). It cannot be disputed that water and sewer service is an expected cost of operating a restaurant business. Paragraph 12(d) of the Purchase Agreement specifically places the burden on Nichols to investigate issues involving the water and sewer:

> Buyer, during the inspection period, shall satisfy itself, **in its sole discretion**, as to the physical condition of the improvements and as to the availability of the capacity of **water, sanitary sewer,** stormwater management, electricity, natural gas, telephone, cable television and other utilities serving the property.

(R. p. 120, ¶ 12(d)) (emphasis added). Prior to closing, Nichols and his hired consultant had an opportunity to review the approximately one year's worth of water billing, provided by Divine, along with other Company billing records relating to the costs of operation. (R. p. 97, ¶ 97; p. 801, lines 16-17).

Further, the rate regulations for GCWSD, which include descriptions of both the impact fee and water demand charge, are publicly available. (R. p. 572, ¶ 47; R. pp. 640-643, 647-648, 668-670). As part of his due diligence, Nichols should have inquired with GCWSD as to any new account policy and procedures applicable to the acquisition and operation of the business. Therefore, the Record substantiates this Court's holding that

> if Nichols had contacted the District during the Inspection Period . . . Nichols would have learned of the requirement that the impact fees be paid as a prerequisite to changing the name on the accounts.

Nichols could then have availed himself of the contractual option to terminate the Agreement prior to the end of the Inspection Period. Having failed to do so, as the Court has correctly noted, "Nichols waived this option" afforded by the contract negotiated by

the parties.

II. THE COURT PROPERLY FOUND THAT THERE WAS NO EVIDENCE TO SUPPORT THE CIRCUIT COURT'S OFFSET OF THE OUTSTANDING TRADE DEBT.

Nichols, suggests in his Motion that this Court overlooked the Affidavit of Arlene Jaskot in which Ms. Jaskot indicated that certain sums totaling $9,220.43 were paid by Nichols to Santee Cooper, Roper and Horry Telephone. Significantly, the Record reflects that Divine did not submit these four items as constituting trade debt owed by Nichols since it was apparent that these expenses had already been paid by the time Divine submitted his Affidavit (which only included unpaid trade debt in the total figure). (R. p. 821, lines 8-11; p. 85, ¶ 18; p. 90, ¶ 54; pp. 333-473). Accordingly, the evidence before the Court supports its finding:

> the amount of $62,809.08 set forth in Mr. Divine's Affidavit as reflecting the invoices still outstanding as of October 10, 2013, did not include the above amounts for Roper, Santee Cooper and Horry County Telephone precisely because by that time they had already been paid. Thus, Divine had already given Nichols credit for its payments to these creditors when Divine presented its evidence of outstanding trade debt to the circuit court.

Thus, the Court of Appeals correctly held that the Circuit Court had mistakenly doubled Nichols' credit for these payments by deducting the $9,220.43 from the total unpaid trade debt amount.

CONCLUSION

In sum, because this Court neither overlooked nor misapprehended the governing laws as set forth above, Divine respectfully submits that Nichols' Petition for Rehearing be denied.

Respectfully submitted,

April 22, 2016

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PROOF OF SERVICE

I certify that I have served the Return of Appellants-Respondents to Respondents-Appellants Petition for Rehearing by depositing a copy of it in the United States mail, postage prepaid, on April 22, 2016, addressed to the following:

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The Honorable Jenny Abbott Kitchings
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April 22, 2016

Via U.S. Mail and Fax Transmission
The Honorable Jenny Abbott Kitchings
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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 represents the Appellants-Respondents in the above-referenced matter. Pursuant to Rule 240(e), SCACR, please find enclosed for filing the original and seven (7) copies of the Return of Appellants-Respondents to Respondents-Appellants Petition for Rehearing in this case. Please return a clocked copy to our firm in the enclosed self-addressed stamped envelope.

By copy of this letter we are serving the attorneys of record. Please do not hesitate to contact our office if you have any questions.

Sincerely yours,

THOMAS & BRITTAIN, P.A.

Emma Ruth Brittain

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ERB/kwn
Enclosures
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