THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

Case No. 2008-CP-40-5518

Les Springob, Paul Trussell, Barton Dumas,
Stanley Harpe and John Yenco, ... Plaintiffs,

Of Whom, Paul Trussell, Barton Dumas,
and John Yenco are ..... Appellants,

v.

The University of South Carolina and the
University of South Carolina Gamecock Club, ... Respondents.

INITIAL BRIEF OF RESPONDENTS

Andrew F. Lindemann
William H. Davidson, II
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondents

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STATEMENT OF THE CASE

The Appellants Paul Trussell, Barton Dumas, and John Yenco brought this action alleging breach of contract and seeking specific performance.[1] The Appellants' allegations stem from an alleged oral contract between the Appellants and the Respondent University of South Carolina pursuant to which the Appellants claim "perpetual entitlement" to certain premium seating at South Carolina Gamecock basketball games at the Carolina Center (now Colonial Life Arena).

It is undisputed that, prior to the opening of the Carolina Center, the Respondents University of South Carolina and the Gamecock Club (collectively referred to as "University") published and distributed a promotional brochure to Gamecock Club members at the Silver Spur level and above announcing the opportunity for premium seating at basketball games at the new Carolina Center. (Massaro Dep., pp. 29-30). These seats, specifically Courtside Club Seats and Founders Club Seats, differed only in location and included the same amenities and pricing structure. (Massaro Dep, p. 33). The distributed brochure explained the amenities and pricing information and expressly provided for a "five year term." (Brochure). (R. ___).

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[1] Two additional Plaintiffs, Les Springob and Stanley Harpe, have not appealed from the summary judgment in favor of the Respondents and are not parties to this appeal.

It is undisputed that each of the Appellants met with Gamecock Club officials and paid $5,000 per seat during year one which made them eligible for the premium seating. The Appellants then renewed the privilege to have these seats by paying an additional $1,500 yearly during years two through five. Each of these payment during years one through five were listed on a Tax Receipt provided by the University to the Appellants. (Yenco Dep., p. 12). No formal contract or agreement was ever executed by the parties for the premium seating. The only documentation in existence that addresses the premium seating plan is the brochure distributed by the Gamecock Club which promotes the premium seats as available for a "five year term." (R. ___).

After the five year term ended in 2007, the University required the Appellants to continue to pay $1,500 during year six for the premium seating. The Appellants allege that they each individually had oral discussions with Chris Massaro, a representative of the Gamecock Club, at the time of their initial payment of $5,000 and that these discussions created binding oral contracts. They allege that Massaro represented that "at the end of the five year term of payments, they would be required only to maintain Gamecock Club membership level and to annually purchase season tickets for each seat." (Amended Complaint, para. 9). In other words, the Appellants believe that in exchange for the $11,000 they paid over a five year period making them eligible for premium seating, they received the

legal right of what they have called "their perpetual entitlement to the seats" and all amenities that accompany those seats. (Amended Complaint, para. 11).

The University maintains that no such representations were ever made to the Appellants to the effect that the five years of payments would entitle them to the premium seating in perpetuity. Indeed, it would be unreasonable for the Appellants to acquire "perpetual entitlement" to this seating. (Massaro Dep., pp. 52-55). As previously stated, no written contract was ever entered into binding the two parties to these terms. The only related writing in existence, the brochure distributed by the Gamecock Club, corresponds with the University's position that the $11,000 was intended for a "five year term" of premium seat entitlement only.

The Appellants brought claims for breach of contract against the University in their Amended Complaint seeking equitable relief in the form of specific performance. The Appellants claim "the right to the continuous use of the seating purchased." (Amended Complaint).

After the completion of extensive discovery, the parties filed cross motions for summary judgment which were heard by Circuit Court Judge Alison Renee Lee on September 4, 2009. By order filed October 20, 2011, Judge Lee granted in part and denied in part the University's motion for summary judgment. She granted the motion based upon the Statute of Frauds defense and dismissed the Appellants' breach of contract claims. Judge Lee denied the motion with respect to the

University's statute of limitations defense. She also denied the Appellants' motion for summary judgment in its entirety. In effect, the October 20, 2011 order dismissed the entire action. (R. ___).

The Appellants filed a Rule 59(e) motion for reconsideration, which was denied by Judge Lee in her order filed December 1, 2011. (R ___). The Appellants subsequently filed a timely appeal to this Court.

ARGUMENTS

I. The Appellants are precluded from appealing the denial of their motion for summary judgment.

As their first issue on appeal, the Appellants assert that Judge Alison Lee erred in denying their motion for summary judgment and claim for specific performance. The Appellants' appeal, to the extent they are seeking a reversal of the denial of their motion for summary judgment, must be dismissed.

It is well settled that an order denying summary judgment is never appealable. In *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003), the South Carolina Supreme Court held that the denial of a motion for summary judgment is never immediately appealable nor even appealable after final judgment. 580 S.E.2d at 443. *See also*, *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994). Therefore, to the extent that the Appellants are appealing the denial of their motion for summary judgment, that appeal should be dismissed.

Because the law on this appealability point is clearly established, the Respondents decline to even address the merits of that portion of the Appellants' brief. Judge Lee dismissed the Appellants' action on the basis of a Statute of Frauds defense. If she erred in that regard, which is denied, then the only result on appeal is a remand to the lower court for further proceedings. This Court cannot

grant the Appellants' motion for summary judgment or grant specific performance as sought by the Appellants.

II. The Appellants are in error in appealing on a statute of limitations defense because the Appellants actually prevailed on that issue in the Circuit Court.

As their third ground for appeal, the Appellants contend that Judge Alison Lee erred in dismissing their claims on the basis of a statute of limitations defense. This represents a clear misreading of Judge Lee's summary judgment order. In her order filed October 20, 2011, Judge Lee ***denied*** the University's motion on its statute of limitations defense. After a brief discussion of the law and applicable facts, Judge Lee wrote: "Defendants' assertion that the Plaintiffs' claims are barred by S.C. Code Ann. § 15-3-530 is **DENIED**." (R. ___). (Emphasis in original). Therefore, there is no comprehensible reason for the Appellants to be appealing on the statute of limitations issue. They prevailed at summary judgment on that defense, even though the action was ultimately dismissed on other grounds, namely the Statute of Frauds defense.

III. The Circuit Court was correct in finding that the Appellants' breach of contract claims are barred by the Statute of Frauds.

As indicated, Judge Alison Lee granted summary judgment on the basis of the University's Statute of Frauds defense. The Statute of Frauds is the sole issue properly before this Court on appeal.

The Statute of Frauds, codified at S.C. Code Ann. § 32-3-10, requires certain contracts to be in writing in order to be enforceable. The Statute of Frauds provides, in pertinent part, as follows:

> No action shall be brought whereby:
>
> * * * * *
>
> (5) To charge any person upon any agreement that is not to be performed within the space of one year from the making thereof;
>
> Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

S.C. Code Ann. § 32-3-10. Therefore, "[t]o satisfy the Statute of Frauds, every essential element of the contract must be expressed in a writing signed by the party to be compelled." *Ficil v. Koon*, 372 S.C. 341, 642 S.E.2d 602, 605 (2007). "The burden of proof is on the party seeking to enforce the contract." *Id. See also, Cash v. Maddox,* 265 S.C. 480, 220 S.E.2d 121 (1975).

In challenging Judge Lee's ruling that their breach of contract claim is barred by the Statute of Frauds, the Appellants make the following arguments: (1) the agreement was capable of being performed in one year, (2) the Gamecock Club brochure constitutes a writing required by the Statute of Frauds, (3) part performance is an exception to the Statute of Frauds, and (4) the University should be estopped from asserting the Statute of Frauds. Each of these issues will be addressed in turn below.

A. Impossibility of Performance Within One Year

In accordance with Section 32-3-10(5), "the Statute of Frauds applies only to contracts which are impossible of performance within one year." *Roberts v. Gaskins*, 327 S.C. 478, 486 S.E. 2d 771 (Ct. App. 1997). However, "[i]f there is a possibility of performance within a year, the contract is not barred by the Statute of Frauds." *Id.*

In granting summary judgment to the University, Judge Alison Lee concluded as follows:

> Under any reading of the agreement between the two parties, both Defendants and Plaintiffs were obligated to perform over several years. It is undisputed that at a minimum the agreement between the parties was at least five years. Clearly, it would be impossible for Defendants to perform a five year agreement within one

> year. A contract of this length must be in writing to be enforceable under the statute of frauds.

(R. ___). Judge Lee's ruling is correct. The Appellants cannot show that the parties could perform all essential terms of the purported agreement within one year.

The Appellants have alleged the existence of an enforceable contract that provides them perpetual rights to premium basketball seats at the Colonial Life Arena. The Appellants believe that they entered into a contract, whereby they were required to pay $11,000 in installments during a five year period, and in exchange the University would provide them with the right of premium courtside seating at basketball games. This purported contract cannot be performed within one year. Even assuming the Appellants had chosen to pay the $11,000 upfront during year one, they would be paying for and expecting to receive a minimum of five years of premium seating at basketball games. Clearly, it would be impossible for the University to perform its end of the alleged contract within one year.

Nonetheless, on appeal, the Appellants argue that an agreement that is terminable at will falls outside the Statute of Frauds. This argument fails for both procedural and substantive reasons. First, this issue was not argued to the Circuit Court until *after* Judge Lee granted summary judgment. The Appellants raised this issue for the first time in its Rule 59(e) motion, but it is well settled that "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised

prior to judgment but did not." *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481, 482 (Ct. App. 1990).

Second, on its merits, the argument fails. The Appellants cannot establish that the purported contract was terminable at will. Instead, the brochure, on which the Appellants rely to establish the essential terms of the agreement, describes the arrangement as a "five year term."[2] The cases cited by the Appellants are inapposite. In *Weber v. Perry*, 201 S.C. 8, 21 S.E.2d 193 (1942), the Supreme Court ruled that an employment contract for an indefinite term was not within the Statute of Frauds. Similarly, in *Center State Farms v. Campbell Soup Co.*, 58 F.3d 1030 (4th Cir. 1995), the contract was also for an indefinite term. In clear contrast, the purported contract here is for a definite term and was not subject of being performed within one year. In short, there is no claim or evidence presented to even suggest that the purported agreement was terminable in less than the five year period discussed in that brochure. Instead, the dispute in this litigation arises over what were the contractual responsibilities, if any, after that five year term ended.

Further, the Appellants appear to argue that the purported contract was terminable in effect by their own non-performance of the contractual requirements

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[2] The Appellants contend that "the agreement/offer was, on its face, contained in the brochure" and that the "brochure contained all of the essential terms." *See*, Appellants' Brief, p. 12. Thus, the Appellants are relying on the brochure which describes the arrangement as a "five year term."

in years two through five. Importantly, the Appellants cannot show that the contract could be *fully* performed within year one, which is the critical distinction. The Appellants cannot show that the parties could receive full benefits of the contract within year one – the Appellants obviously could not receive in year one the premium seating for the basketball games played in years two through five under any plausible scenario.

Finally, it is critical to analyze the fallacy of the Appellants' current position. The Appellants are not suing for any benefits allegedly owed in years two through five; they are suing for claimed benefits, i.e., premium seating, in year six and beyond. By suing for benefits that are not even available until year six, it is misleading and wrong for the Appellants to argue that the contract was terminable in year one which then allows them to recover for benefits admittedly not even available until year six. If that were allowed, that would render the Statute of Frauds meaningless.

In sum, because it would be impossible for the contract (according to the terms alleged by the Appellants) to be performed within one year, the Statute of Frauds applies and such a contract is unenforceable unless evidenced by writing.

B. No Writing Signed by Party Against Whom Contract to be Enforced

In order to satisfy the Statute of Frauds, there must be a writing signed by the party against whom the contract is to be enforced, and that writing must contain every essential element of the contract. *Ficil v. Koon*, 372 S.C. 341, 642 S.E.2d 602, 605 (2007). The writing is not required to take any particular form; written correspondence signed by the party may be sufficient. *Cash v. Maddox*, 265 S.C. 480, 220 S.E.2d 121, 122 (1975). "However, the writing must establish the essential terms of the contract *without resort to parol evidence*." *Id.* (Emphasis added).

In the case at bar, it is undisputed that no formal contract signed by the parties is in existence. Instead, the Appellants rely on a brochure published by the University which advertised premium seating at basketball games; however, as Judge Lee ruled, the brochure "is not sufficient to remove the alleged agreement from the Statute of Frauds." (R. ___). In particular, the brochure does not address the respective responsibilities of the parties, if any, after the "five year term" ends. The brochure does not address or support the Appellants' claim to perpetual seating following the five years, and the only way that the Appellants urge that claim is by way of parol evidence consisting of affidavit testimony. The brochure provides no

such evidence. Further, and perhaps most compelling, the brochure – the purported writing – is not signed by any agent of the University. The Appellants contend that the logo on the brochure is the equivalent of a signature, but they cite no case law or other authority that supports that assertion.

In short, the brochure does not satisfy the writing requirement under Section 32-3-10.

C. Part Performance Exception to Statute of Frauds

The Appellants have also asserted the part performance exception to the Statute of Frauds. South Carolina law provides that sufficient part performance of an oral contract may remove that contract from the Statute of Frauds. "To compel specific performance of an oral agreement where part performance is alleged to remove the contract from the statute of frauds, a court of equity must find: (1) clear evidence of an oral agreement; (2) the agreement had been partially executed; and (3) the party who requested performance had completed or was willing to complete his part of the oral agreement." *Settlemeyer v. McCluney*, 359 S.C. 317, 596 S.E.2d 514, 516 (Ct. App. 2004). *See also*, *Fesmire v. Digh*, 385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009).

In the present case, Judge Lee ruled that "Plaintiffs fail to provide clear

evidence of an oral contract where its terms are clear, definite and certain." (R. ___). She further explained:

> The central dispute between the Plaintiffs and Defendants are the unclear and undefined issues that stem from vagueness of the discussions entered into by the parties in 2002. Plaintiffs and Defendants were unable to reach an accord as to the terms of the oral contract, most importantly the length. As such, there is no clear evidence of an oral contract and therefore there can be no relief from the Statute of Frauds by part performance.

(R. ___). In denying the Appellants' Rule 59(e) motion, Judge Lee rejected the Appellants' contention that their affidavits are undisputed and establish the essential terms of the oral contract. She determined that "[t]he submitted affidavits of the Plaintiffs confirm the confusion between the parties." (R. ___).

Moreover, in his deposition testimony, Chris Massaro of the Gamecock Club testified that he never told anyone that there would be no additional sum owed for the premium seating after the five year term ended. Massaro explained: "I can tell you that I never gave the impression that there wouldn't be payments after five years. That did not come out of my mouth. That was always our intent." (Massaro Dep. p. 53). He further testified as follows:

> Q. I understand that may have been your intent. Did you ever tell Mr. Dumas there may be payments required after the fifth year?
>
> A. I don't know if I –
>
> Q. I'm talking about you specifically.

A. Right. I don't know if I specifically told Mr. Dumas that or not. But I do remember when I was asked the question, what my answer would be.

Q. Who asked you the question?

A. I can't tell you specifically who asked it, but it was asked several times of me. And my answer was, It would mimic what we do at football. There would be an adjustment after five years.

(Massaro Dep. pp. 53-54). Thus, Massaro's testimony is clear – when asked about after the five year period ended, his response was always the same – that there would likely be an adjustment. Most importantly, he never told anyone that after the five years no further payment was required and the seat holder would have that seat in perpetuity – which is the specific contract term asserted by the Appellants in this litigation.

In order to demonstrate the part performance exception to the Statute of Frauds, South Carolina law does require that the specific terms asserted by the plaintiff be supported by clear evidence, meaning that "the terms of the contract are clear, definite, and certain and are established by competent and satisfactory proof." *Fesmire v. Digh*, 385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009), *citing Scurry v. Edwards*, 232 S.C. 53, 100 S.E.2d 812, 816-17 (1957). However, as Judge Lee correctly determined, the evidence of what was required after year five is not clear, definite and certain. Rather, that evidence was very contradictory,

similar to the evidence of the oral contract that was deemed insufficient by this Court in *Fesmire*.

As a result, the Appellants have not satisfied the first prong of the applicable test – they have not shown clear evidence of an oral agreement with the specific terms that they claim, namely the "perpetual entitlement" to premium seating after the five year term ended at no additional yearly cost. In short, the Appellants have not shown their entitlement to the part performance exception to the Statute of Frauds.

D. Equitable Estoppel

As a final argument, the Appellants assert that equitable estoppel takes the oral agreement out of the operation of the Statute of Frauds. In *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989), the Supreme Court held that "[i]n order to overcome statutory requirements that an agreement be in writing, the party asserting estoppel must show that he suffered a definite, substantial, detrimental change of position in reliance on such agreement and that no remedy except enforcement of the bargain is adequate to restore his former position." 382 S.E.2d at 894.

Judge Lee rejected the Appellants' estoppel defense to the application of the

Statute of Frauds. She explained that the Appellants claimed that their "definite, substantial, detrimental change of position" consisted of "the risk of loss of their seats at the Colonial Center." (R. ___). She did not find that alleged change of position to be "definite and substantial enough to rule that the enforcement of the bargain between the parties is the only remedy adequate to restore Plaintiffs' previous position." (R. ___).

Now, on appeal, the Appellants argue that Judge Lee "misconstrued the significance" of their "overall argument." They claim that the "loss of seating" is not the definite, substantial, detrimental change of position, but rather the $11,000 paid over the five years is. Nonetheless, the Appellants were not denied the benefits of the $11,000 for the "five year term" set forth in the brochure nor were they thereafter required to give up the premium seats. They received the benefit of the bargain for the "five year term," and they were all given the opportunity to retain those seats upon the additional payment of $1,500 annually in year six. The requirement to pay a premium for the seats after the five year term ended – *just as they had done during that five year term* – is not a "definite, substantial, detrimental change of position." Certainly, there is no basis for overriding the Statue of Frauds and its requirement for multi-year agreements to be in writing in order to be enforceable.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondents University of South Carolina and University of South Carolina Gamecock Club respectfully request that this Court affirm the orders issued by Circuit Court Judge Alison Renee Lee granting summary judgment and dismissing the Appellants' breach of contract claims.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
WILLIAM H. DAVIDSON, II
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondents

Columbia, South Carolina

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