THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-In-Equity

Case No. 2014-CP-10-7481
Appellate Case No. 2015-002259

Lee & Associates Charleston, LLC, Respondent,

v.

Chicora Gardens Holdings, LLC, Chicora Life Center, LC, and Jeremey Blackburn,

Of whom Chicora Gardens Holdings, LLC, And Chicora Life Center, LC, are Appellants.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

This action arises from Respondent Lee & Associates Charleston, LLC's efforts to collect a real estate commission due and owing by Appellants Chicora Gardens Holdings, LLC, and Chicora Life Center, LC (collectively referred to as "Chicora"). Chicora retained Lee & Associates as its *exclusive* agent to find tenants for the former Naval Hospital property located at 3600 Rivers Avenue in North Charleston, South Carolina (hereafter "the Naval Hospital"). The parties entered an Exclusive Agency Agreement to Lease Real Property ("Exclusive Agency Agreement") on February 21, 2014. Exclusive Agency Agreement, Record on Appeal ("R.") pp. 39-47. The Exclusive Agency Agreement was for a one year term commencing February 21, 2014 and expiring January 31, 2015. Exclusive Agency Agreement, Section 2, R. p. 39.

As indicated by the title of the Agreement, Chicora contracted to make Lee & Associates the exclusive agent for Chicora in its efforts to lease space at the Naval Hospital. Exclusive Agency Agreement, Section 3, R. p. 39. Chicora owes a commission to Lee & Associates regardless of who locates the potential tenant. Exclusive Agency Agreement, Section 4(b), R. p. 40. Chicora is required to refer to Lee & Associates all inquiries from prospective tenants of the Naval Hospital. Exclusive Agency Agreement, Section 15(c), R. p. 43. The commission is "deemed earned and payable to Agent when a tenant has entered into a ratified lease." Exclusive Agency Agreement, Section 15(g), R. p. 43.

On June 30, 2014, during the term of the Exclusive Agency Agreement, Chicora entered a lease agreement with Charleston County to lease a large part of the Naval Hospital. Charleston County Lease, R. p. 48-89. The twenty-five (25) year lease

provided for base rent of $12.00 per square foot and 98,087 square feet of leased space for a rent of $1,177,044.00 per year. Charleston County Lease, Basic Lease Information, R. p. 48.

Charleston County is specifically referenced as a potential tenant in Exhibit B to the Exclusive Agency Agreement. Exclusive Agency Agreement, Exhibit B., R. p. 47. Pursuant to Section 23 of the Exclusive Agency Agreement, Lee & Associates is owed a commission of one percent (1%) for leases entered with "Excluded Entities" listed in Exhibit B, including Charleston County, between May 1, 2014 and June 30, 2014. Exclusive Agency Agreement, Section 23, R. p. 45. Pursuant to Section 4(a) of the Exclusive Agency Agreement, 50% of the commission is due upon execution of the lease and 50% upon occupancy. Exclusive Agency Agreement, Section 4(a), R. p. 40.

Chicora has not paid any commission to Lee & Associates.

On or around August 6, 2014, Lee & Associates filed a Mechanic's Lien against the Naval Hospital property pursuant to S.C. Code Ann. §§ 21-5-20 and 21-5-21 in the amount of $138,000.00. Notice and Certificate of Mechanic's Lien and attached Verified Statement, R. p. 90-106. This amount was half of the total estimated commission of $276,000 owed because Charleston County had executed the lease but not occupied the premises. The total $276,000 commission owed was based on an estimate of the lease amount because Chicora refused to provide Lee & Associates with a copy of the Charleston County Lease.

On August 22, 2014, Chicora filed a Cash Bond to Release the Mechanic's Lien in the amount of $179,400.00. Cash Bond, R. 107-111.

Lee & Associates eventually obtained a copy of the Charleston County Lease. Based on the Lease, Lee & Associates re-calculated the total commission amount as $294,261.00 ($12.00 base rent per foot[1] x 98,087 rentable square fee[2] = $1,177,044.00 rent per year x 25 year lease term = $29,426,100 x 1% commission = $294,261.00 total commission), again 50% of which is due and owing as of June 30, 2014 when the lease was executed, and 50% of which is due and owing upon occupancy. Based on the Lease that it now had, Lee & Associates filed an Amended Verified Statement claiming that Chicora currently owed $147,130.50 (50% of $294,261.00) in commissions. Amended Verified Statement, R. p. 215-217.

On December 8, 2014, Lee & Associates filed a civil suit alleging breach of contract and several tort claims and seeking to foreclose on the bond. Complaint, R. p. 24-89. Chicora filed an Amended Answer and Counterclaim on February 11, 2015. Amended Answer, R. p. 140-154. On January 21, 2015, a Consent Order was entered referring the matter to The Honorable Mikell R. Scarborough, Master-In-Equity for Charleston County. Consent Order Referring Action, R. p. 1-3. The Consent Order called for direct appeal to the Supreme Court or the Court of Appeals. Id.

On May 1, 2015, Lee & Associates moved for summary judgment on its foreclosure and breach of contract claims. Lee & Associates' Motion for Summary Judgment, R. p. 155-293. On September 3, 2015, Chicora filed its own Motion for Summary Judgment seeking a dissolution of the lien. Chicora Motion for Summary Judgment, R. p. 502-828.

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[1] Charleston County Lease Agreement, Basic Lease Information, R. p. 48.
[2] Charleston County Lease Agreement, Exhibit A, R. p. 73.

On October 8, 2015, Judge Scarborough held a hearing on the cross-motions for summary judgment. On October 16, 2015, Judge Scarborough issued an Order granting Lee & Associates' Motion for Summary Judgment on its breach of contract and foreclosure actions. Summary Judgment Order, R. p. 4-22. Judge Scarborough did not rule on any damage issue in his Summary Judgment Order, but found that a damages hearing would be necessary to determine appropriate damages. Summary Judgment Order, pp. 13-15, R. p. 16-18.

Chicora timely appealed the Summary Judgment Order on October 30, 2015.

SUMMARY JUDGMENT STANDARD

Chicora ignores the summary judgment standard when dealing with an unambiguous contract. The primary concern of the court interpreting a contract is to give effect to the intent of the parties. Lee v. Univ. of S.C., 407 S.C. 512, 757 S.E.2d 394, 397 (2014). The best evidence of the parties' intent is the contract's plain language. Id.

The question of whether a contract is ambiguous is a question of law. Id. A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485, 493 (Ct.App. 2004). If a contract's language is unambiguous, the plain language will determine the contract's force and effect. Lee, 757 S.E.2d at 397.

A contract must be read as a whole document so that one party may not create ambiguity by pointing out a single sentence or clause. S. Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444, 590 S.E.2d 27, 29 (2003). "Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it." Laser

Supply & Servs., Inc. v. Orchard Park Assoc., 382 S.C. 326, 676 S.E.2d 139, 143–144 (Ct.App. 2009); N. Am. Rescue Products, Inc. v. Richardson, 411 S.C. 371, 769 S.E.2d 237, 240-41 (2015).

ARGUMENTS

I. CHICORA OWES LEE & ASSOCIATES A COMMISSION UNDER THE UNAMBIGUOUS TERMS OF THE EXCLUSIVE AGENCY AGREEMENT.

"To establish the right to recover a commission from a principal for services rendered in procuring a purchaser of property, the broker must establish that a contract for the payment of a commission existed between himself and the principal at the time the services were performed." Hilton Head Island Realty, Inc. v. Skull Creek Club, 287 S.C. 530, 339 S.E.2d 890, 893 (Ct. App. 1986) (citing 12 C.J.S. Brokers § 118 at 334-38 (1980)). "[A] real estate broker is entitled to compensation, where a sale is effected during the continuance of the broker's agency." Hutson v. Stone, 119 S.C. 259, 112 S.E. 39, 40 (1922).

Chicora has acknowledged the existence of an Exclusive Agency Agreement between Lee & Associates and Chicora at the time Chicora entered the Charleston County Lease Agreement. Appellants' Brief, Page 3. Moreover, the Exclusive Agency Agreement explicitly recognizes that Lee & Associates is entitled to a 1% commission on any lease with Charleston County entered between May 1, 2014 and June 30, 2014. Exclusive Agency Agreement, Section 23, R. p. 45. The Exclusive Agency Agreement contains no provisions allowing Chicora to terminate the Agreement before the end of the one year term. The Exclusive Agency Agreement contains no provisions that allow Chicora to escape its obligations to pay Lee & Associates a commission. It was the clear

intent of the parties that Lee & Associates was to receive a commission for all leases of the Naval Hospital during the term of the Exclusive Agency Agreement regardless of who located the tenant. Exclusive Agency Agreement, Section 4(b), R. p. 40.

The Exclusive Agency Agreement also unambiguously states that he commission is "deemed earned and payable to Agent when a tenant has entered into a ratified lease." Exclusive Agency Agreement, Section 15(g), R. p. 43. Section 4(a) states that half of the commission is deemed earned and payable upon execution of the lease. Exclusive Agency Agreement, Section 4(a), R. p. 40.

In short, Chicora undoubtedly owes Lee & Associates a commission for the Charleston County Lease. Pursuant to S.C. Code § 29-5-21(B), Lee & Associates was also entitled to a mechanics' lien on the Subject Property to enforce its rights.

The lower court correctly ruled that the unambiguous terms of the Exclusive Agency Agreement entitled Lee & Associates to a commission and to a mechanics' lien to enforce its rights. The lower court did not attempt to calculate the amount of the commission owed, reserving that ruling for a later hearing. Since the lower court was interpreting the unambiguous provisions of a contract, it was entirely correct to do so as a matter of law prior to the damages hearing. As such, the lower court's ruling should be affirmed.

II. THE LOWER COURT GRANTED SUMMARY JUDGMENT ONLY ON CHICORA'S LIABILITY, NOT THE AMOUNT OF COMMISSION OWED.

Chicora has acknowledged that the Summary Judgement Order on appeal did not determine the amount of damages or the commission owed but rather scheduled a damages hearing to reach that determination. Appellants' Brief, Pages 5. In other words,

the Summary Judgment Order simply determined that Chicora owed a commission, not the amount of the commission. Summary Judgment Order, pp. 13-15, 19, R. p. 16-18, 22.

Despite the fact that the appealed Summary Judgment Order does not address the amount of the commission owed, Chicora devotes much of its Brief pointing out alleged ambiguities in the Exclusive Agency Agreement governing the calculation of the commission amount. More specifically, Chicora has raised several questions regarding how Section 23, setting out the commission rates for Excluded Entities, interacts with Section 4(a), which governs the calculation of commissions in general. Appellants' Brief, Pages 8-14. Chicora concludes that the "Lower Court should have held a trial to determine the parties' intent, with respect to how, if at all, Sections 23 and 4a work together." This, of course, is precisely what the Summary Judgment Order proposes: to hold a trial on damages. Since the Summary Judgment Order did not address the commission amount, but rather sets a trial to determine the commission amount, Chicora's arguments are entirely irrelevant to the appealed order at hand, which addresses whether the commission is owed in the first place.

Chicora claims without citation that "ambiguity in these provisions [governing the calculation of the commission] opens the door for the entire Agreement to be unenforceable." Appellants' Brief, Page 13. Ambiguity in a contract does not make the contract unenforceable, but rather calls for the court to "determine the parties' intent." Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 649 S.E.2d 494, 502 (Ct.App. 2007). In addition, the South Carolina Rules of Civil Procedure

explicitly recognize the court's authority to grant summary judgment on some issues but not others. Rule 56(d), SCRCP.

Since the lower court did not rule on any damage issues but instead scheduled a hearing to make those determinations, any complaints about ambiguities regarding the calculation of damages do not warrant reversal.

III. THE WORD "RATIFIED" IN THE EXCLUSIVE AGENCY AGREEMENT DID NOT CREATE AN AMBIGUITY.

Section 15(g) of the Exclusive Agency Agreement notes that the commission "shall be deemed earned and payable to Agent when a tenant has entered into a ratified lease with Client even if Client refuses to lease once Client has entered into a ratified lease with a tenant." Exclusive Agency Agreement, Section 15(g), R. p. 43. Chicora argues that the use of the term "ratified" in this single section creates an ambiguity. Appellants' Brief, Pages 15-16.

"A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571, 574 (2009). Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract. Williams v. Gov't Employees Ins. Co. (GEICO), 409 S.C. 586, 762 S.E.2d 705, 710 (2014).

Chicora has ignored this well-settled law and quoted only the first part of Section 15(g). Taken as a whole, the language of Section 15(g) simply clarifies that Lee & Associates is entitled to a commission even if the tenant does not ultimately occupy the premises.

Looking at the Exclusive Agency Agreement as a whole, the term "ratification" is plainly meant to apply to a lease entered by the agent, Lee & Associates, that must be

ratified by the principal, Chicora. Lincoln v. Aetna Cas. & Sur. Co., 300 S.C. 188, 386 S.E.2d 801, 803 (Ct.App. 1989) ("Ratification, as it relates to the law of agency, means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent."). Since the Charleston County Lease Agreement was entered by Chicora, not Lee & Associates as agent for Chicora, the term "ratification" has no relevance to this dispute and is not ambiguous in any case.

IV. THE CHARLESTON COUNTY LEASE IS A "LEASE" THAT HAS BEEN EXECUTED.

Next Chicora argues that the Charleston County Lease is not "effective" or "enforceable" but rather was an "agreement to agree." Appellants' Brief, Pages 16-20. Chicora contends that this imagined distinction is relevant because Section 4(a) of the Exclusive Agency Agreement includes the following sentence: "In all events, it is understood that no fee shall be deemed earned until and unless the lease or other agreement shall have become effective between the tenant and the Client [Chicora] *by the execution of a contract* or other enforceable instrument." Exclusive Agency Agreement, Section 4(a), R. p. 40 (emphasis added). Chicora argues that the Lease has not become "effective" because Charleston County has not occupied the premises or entered an "enforceable instrument."

Chicora is once again extracting a single sentence from the entire Agreement and attempting to conjure an ambiguity by ignoring the context of the sentence and, in fact, simply ignoring the plain intent of the sentence. Chicora's argument both misinterprets the quoted sentence and misrepresents the actual facts.

First, the subject sentence is not ambiguous. It simply states that Lee & Associates' fee is earned when the lease becomes effective "by execution of a contract." It is a clarification and reiteration of the prior sentence stating that half the fee is due upon execution of the lease. The sentence does not add a "condition precedent" that a lease must become "effective" (whatever that might mean) but rather plainly states that the lease becomes "effective" upon "execution."

Second, Chicora has admitted that it "executed a lease" with Charleston County during the term of the Exclusive Agency Agreement. Appellants' Brief, Page 3. This admission is confirmed by the Charleston County Lease itself, which is signed by all parties. Charleston County Lease, p. 22, R. p. 72. The Lease has all the appropriate and substantive terms of a lease, including identification of the term of the lease, the lease rate, and the square footage to be leased. Even though Charleston County has not yet occupied the premises, it still executed an enforceable lease with Chicora. As is repeatedly recognized throughout the Exclusive Agency Agreement, executing a lease and occupying the property are simply two different events, and the commission becomes due and owing upon execution of a lease, which has happened.

The language of the Exclusive Agency Agreement triggering payment of the commission upon execution of the lease is not only enforceable, but a common term in such brokerage agreements. See, e.g., Maro v. Lewis, 389 S.C. 216, 697 S.E.2d 684, 689 (Ct.App. 2010) ("Per the parties' listing agreement, executing a contract for sale of the property during the listing period appears all that was necessary to secure Maro's commission."). In fact, when the brokerage agreement does not specify when the commission is due and owing, it is typically deemed due and owing upon entering the

sales contract. Springs & Davenport, Inc. v. AAG, Inc., 385 S.C. 320, 683 S.E.2d 814, 816 (Ct.App. 2009) ("Generally, a broker earns his commission when he procures a purchaser who is accepted by the owner of the property and with whom the latter, uninfluenced by any representation or fraud on the part of the broker, enters into a valid and enforceable contract.").

The Charleston County Lease was signed during the pendency of the Exclusive Agency Agreement. The Lease may contain any number of contingencies regarding occupancy of the premises, but this does not alter the fact that it is an enforceable Lease, and the commission is due upon execution of the Lease, which has occurred. Any other issue is related to how much commission is owed, which the lower court set aside for trial and did not rule on.

V. THE EXCLUSIVE AGENCY AGREEMENT DOES NOT ALLOW CHICORA TO UNILATERALLY TERMINATE THE AGREEMENT DURING THE ONE YEAR TERM.

Chicora argues that there is evidence that it properly terminated the Exclusive Agency Agreement the day before it executed the Charleston County Lease. Appellants' Brief, Pages 20-23. As an initial matter, there is nothing in the record showing that Chicora even attempted to terminate the Exclusive Agency Agreement prior to June 30, 2014, when Chicora entered a lease with Charleston County. There is no email, letter, or other notice from Chicora to Lee & Associates attempting to terminate the Agreement because Chicora did no such thing. Chicora attempted to renegotiate the terms of the Exclusive Agency Agreement around the time it signed the Charleston County Lease, see Defendants' Response to Plaintiff's Motion for Summary Judgment, Exhibit C, R. p. 481-

482, but there is no documentation supporting Chicora's current claim that it terminated the Agreement prior to June 30, 2014.

More to the point, the Exclusive Agency Agreement simply has no provision allowing Chicora to unilaterally terminate the Agreement on the eve of signing the first tenant. This is hardly surprising. Most agency agreements based on commissions earned are not terminable at-will. If such agreements were subject to unilateral termination, principals would be free to terminate the agency agreements the day before a lease or purchase agreement is executed, thus denying agents a commission after all the work is done prior to execution. Indeed, this is precisely what Chicora is attempting to do.

In order to avoid just such a scenario, the Exclusive Agency Agreement contains extensive terms regarding payment of Lee & Associates even after the expiration of the Agreement for prospective tenants identified during the term of the Agreement. Exclusive Agency Agreement, Section 4(d), R. p. 40. So, even if Chicora had properly terminated the Agreement, Lee & Associates would still be entitled to a commission for the Charleston County Lease.

The fact that the word "termination" appears in the Exclusive Agency Agreement does not grant Chicora the right to unilaterally terminate the Agreement. Rather, the term simply references a potential termination of the Agreement after the initial term has expired. Chicora is once again plucking out individual terms rather than reading the Agreement as a whole.

Chicora also argues that Lee & Associates breached the Exclusive Agency Agreement entitling Chicora to terminate the Agreement. Appellants' Brief, Page 21. The Affidavits of Douglas Durbano and Jeremy Blackburn submitted by Chicora do not

provide evidence of a breach of the Exclusive Agency Agreement. Durbano Affidavit, R. p. 484-486; Blackburn Affidavit, R. p. 488-490. Both Affidavits reference a "Marketing Plan" that was not attached to the Affidavits, not made a part of the Record on Appeal, and, most importantly, is not part of the Exclusive Agency Agreement. Specifically, Chicora alleges that Lee & Associates did not comply with a timeline set out in this unidentified "Marketing Plan." There are no such timelines appearing in the Exclusive Agency Agreement.

To incorporate the terms of extrinsic material, the contract "must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history)." Stevens Aviation, Inc. v. DynCorp Int'l LLC, 394 S.C. 300, 715 S.E.2d 655, 659 (Ct.App. 2011), aff'd in part, rev'd in part, 407 S.C. 407, 756 S.E.2d 148 (2014) (*quoting* Northrop Grumman Info. Tech., Inc. v. United States, 535 F.3d 1339, 1345 (Fed.Cir. 2008)). Neither the unidentified "Marketing Plan" nor the alleged timelines were incorporated into the Exclusive Agency Agreement. As such, these imagined terms cannot form the basis for Chicora's breach of contract allegations. Since Chicora has not even identified a provision in the Exclusive Agency Agreement that has been breached by Lee & Associates, the lower court properly ruled that Chicora could not terminate the Agreement based on an alleged breach of contract.

VI. LEE & ASSOCIATES PROVIDED LICENSED SERVICES THAT RESULTED IN THE PROCURING OF THE CHARLESTON COUNTY LEASE.

Chicora next argues that Lee & Associates is not entitled to a mechanic's lien for its commission because it did not provide "licensed services that result, during the term of a written agreement described in item (a) of this subsection, in the procuring of a person or entity that rents or leases the commercial real estate," as required by S.C. Code § 29-5-21(B)(2)(b). Appellants' Brief, Pages 23-30.[3]

Chicora asserts that Lee & Associates does not meet this statutory requirement for a mechanic's lien because 1) most of Lee & Associates' work on procuring Charleston County as a tenant of the Naval Hospital occurred months before the Charleston County Lease was executed, and 2) Lee & Associates was not involved in the final negotiations of the Lease terms. Chicora's arguments are not supported by the language of the mechanic's lien statute or the facts before the court.

Section 29-5-21(B)(2)(b) does not require the agent to be involved in every step of negotiations or to be at the closing table in order to assert a mechanic's lien. Rather, the agent need merely provide "licensed services" that result in procuring a tenant.

"Licensed services" is a term of art used in the real estate brokerage industry and is not limited to negotiating the final terms of a lease. Rather, "licensed services" are broadly defined under South Carolina law:

> A licensee may offer the following services to a customer **including, but not limited to**:
>
> (a) identify and show property for sale, lease, or exchange;
> (b) provide real estate statistics and information on property;

[3] This argument simply addresses the validity of the mechanic's lien, not whether Lee & Associates is entitled to judgment on its claim for breach of contract.

> (c) provide pre-printed real estate form contracts, leases, and related exhibits and addenda;
> (d) act as a scribe in the preparation of real estate form contracts, leases, and related exhibits and addenda;
> (e) locate a list of architects, engineers, surveyors, inspectors, lenders, insurance agents, attorneys, and other professionals; and
> (f) identify schools, shopping facilities, places of worship, and other similar facilities on behalf of any of the parties in a real estate transaction.

S.C. Code Ann. § 40-57-137(O)(1) (emphasis added).

Lee & Associates has produced ample evidence unequivocally showing that it provided a broad array of "licensed services" that resulted in the procurement of Charleston County as a tenant. Lee & Associates has produced a large collection of emails between Chicora's principals, Douglas Durbano and Jeremy Blackburn, and Lee & Associates' principals, Robert Nuttall and Milton Thomas, discussing the work done by Lee & Associates to bring in Charleston County as a tenant. Lee & Associates' Motion for Summary Judgment, Exhibit No. 4, R. p. 218-293; Lee & Associates' Memorandum in Opposition to Defendants' Motion for Summary Judgment, Exhibit No. 6, R. p. 846-866. The emails show that 1) Chicora repeatedly involved Lee & Associates in negotiations with Charleston County, 2) Lee & Associates provided substantial assistance in preparing and negotiating a term sheet, the lease terms, and the lease rate with Charleston County, and 3) Lee & Associates had multiple meetings, discussions, and emails with Charleston County representatives to discuss the lease.

Specific examples of the work performed by Lee & Associates and Chicora's acknowledgement of same include:

1. "The Lease Proposal/Term Sheet has been reviewed by us, our Brokers [Lee & Associates] and our Bank and all have concluded that it is still not financially feasible." 3/7/14 Durbano Email, MSJ-5, R. p. 222.

2. "Can we have a follow up call in the morning regarding the rates in the area? I really want to be on solid ground with the County Lease." 2/24/14 Blackburn Email to Thomas, MSJ-9, R. p. 226.

3. "I . . . will need Bob, Milton, or both to attend all meetings [with Charleston County]." 3/14/14 Blackburn Email, MSJ-11, R. p. 228.

4. "These are the issues that need to be dealt with at the County and brought to a head ASAP via a face to face meeting with County and its Advisor (Eric) and our side, including our Brokers." 3/14/14 Durbano Email, MSJ-12, R. p. 229.

5. A lengthy email from Nuttall to Durbano and Blackburn discussing various negotiation strategies with Charleston County regarding the lease rate. 3/17/14 Nuttall Email, MSJ-14 to MSJ-15, R. p. 231-232.

6. "As you know, Lee & Associates has been hired to do the leasing on the Navy Hospital property. We would like to set up a meeting with you and anyone you would like [to be] involved in the meeting, to discuss the lease proposal that has been going back and forth between the parties." 3/18/14 Nuttall Email to Charleston County representatives, MSJ-21, R. p. 238.[4]

[4] Although Chicora has asserted (without evidentiary support) that Charleston County did not want to meet with Lee & Associates, the emails actually show that Blackburn scheduled meetings with Charleston County without providing notice to Lee & Associates. Lee & Associates' Motion for Summary Judgment, Exhibit No. 4, Bates No. MSJ-19-21, R. p. 236-238. This is a violation of the Exclusive Agency Agreement, Section 15(c) requiring Chicora deal with all tenants through Lee & Associates, a provision designed to avoid these very problems. R. p. 43. In essence, Chicora is arguing that it is entitled to avoid payment of a commission based on its own acts in violation of the Exclusive Agency Agreement.

7. Even after Blackburn excluded Lee & Associates from a meeting with Charleston County, he sought Lee & Associates' input on the details discussed with the County. 3/26/14 Blackburn Email, MSJ-22, R. p. 239.

8. "Really think it is important you [Lee & Associates] meet with Eric [Meyer, Charleston County advisor] asap. Before he meets with Kurt [Taylor, Charleston County Administrator]." 3/27/14 Blackburn Email, MSJ-31, R. p. 248.

9. "As a follow-up from our meeting late yesterday with the county, Milton and I met with Eric Meyer, the county's advisor and a real estate veteran whom we have known for 20+ years to discuss the deal." 3/31/14 Nuttall Email, MSJ-33, R. p. 250.

10. "Would like to have Bob/Milts input on this [Charleston County Lease Proposal]." 4/1/14 Durbano Email, MSJ-35, R. p. 252.

11. "Bob and I are finishing up our recommended proposal [on the Charleston County Term Sheet] and will have it to you in an hour for your review." 4/4/14 Milton Thomas Email, MSJ-42, R. p. 259.

Lee & Associates also submitted the affidavit of Robert Nuttall on this issue. Mr. Nuttall testified in his affidavit that Lee & Associates met with Charleston County to negotiate the lease on at least two occasions, worked directly with Chicora to determine the net rental rate for Charleston County, and reviewed Charleston County's lay outs and plans for Chicora. Lee & Associates' Memorandum in Opposition to Defendants' Motion for Summary Judgment, Nuttall Affidavit, Exhibit No. 5, R. p. 842-845.

Finally, Lee & Associates also produced emails showing that it performed work for Chicora after April of 2014, namely providing analysis of an appraisal of the Naval Hospital. Lee & Associates' Motion for Summary Judgment, Exhibit No. 4, Bates No.

MSJ-75 to MSJ-76, R. p. 292-293; Lee & Associates Memorandum in Opposition to Defendants' Motion for Summary Judgment, Exhibit No. 5, Nuttall Affidavit, Paragraph 18, R. 844; Exhibit No. 6, Additional post-April 4, 2014 Emails, R. p. 846-866.

Against the weight of this evidence, Chicora has submitted affidavits from Chicora's two principals, Douglas Durbano and Jeremy Blackburn. The affidavits do not claim that Lee & Associates provided no licensed services in connection with Charleston County. Rather, they contain conclusory assertions that "Lee & Associates did not provide services that resulted in the procuring of any tenant for the Property." Durbano Affidavit, Paragraph 9, R. p. 485; Blackburn Affidavit, Paragraph 9, R. p. 489. Chicora has offered no evidence to support this bald conclusion.

A conclusory statement as to the ultimate issue in a case contained in an affidavit is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. Shupe v. Settle, 315 S.C. 510, 445 S.E.2d 651, 655 (Ct.App. 1994). The only relevant portion of the Chicora Affidavits is a conclusive statement with no factual support. Indeed, the conclusions stated by Blackburn and Durbano are directly contradicted by the emails they received and sent acknowledging and demanding that Lee & Associates provide licensed services in relation to Charleston County.

The Affidavits' true focus is on the fact that Lee & Associates did not participate in the final negotiation of the Charleston County Lease. The mechanic's lien statute simply does not require that the agent participate in every step of the negotiating process or be at the closing table in order to assert a lien.[5] Rather, the agent need only show that

[5] This is not an issue of ignoring any requirement that lienholders strictly follow the lien statute requirements. Appellants' Brief, Pages 23-24. Rather, Chicora is attempting to read additional, non-existent requirements into the lien statute. This is what the lower court meant when it referred to Chicora's "overly restrictive" reading of the lien statute.

it provided some broadly defined licensed services that resulted in a lease. Lee & Associates' emails conclusively satisfy this requirement. The Durbano and Blackburn Affidavits do not create an issue of fact on this requirement. As such, the lower court correctly ruled that Lee & Associates is entitled to enforce its mechanics lien under S.C. Code § 29-5-21(B)(2)(b).

VII. CHICORA HAS "LEASED" THE NAVAL HOSPITAL TO CHARLESTON COUNTY.

Next, Chicora argues that S.C. Code § 29-5-21(B)(2)(b) has not been satisfied because Charleston County has not occupied the premises. Under the statute a lien is granted when the agent's licensed services result in "a person or entity that rents or leases the commercial real estate or rents or leases an interest in the commercial real estate upon terms contained in a written agreement described in item (1) of this subsection." Id. Again, Chicora is arguing that the Charleston County Lease is not a "lease" under the statute.

As an initial matter, this argument was not made before the lower court. "[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903, 907 (2007) (internal quotation marks omitted). As such, the Court of Appeals need not address this issue.

Even if the Court of Appeals were to consider this new argument, it does not change the outcome of this matter. Chicora is again arguing that there is no "lease" and no commission owed until occupancy, which is not supported by any language in the Exclusive Agency Agreement or the lien statute. Once a lease is executed by the parties, the property is "leased" even if the tenant has not yet occupied the property. A lease is

defined as a "contract by which a rightful possessor of real property conveys *the right* to use and occupy the property in exchange for consideration." Black's Law Dictionary (10th ed. 2014) (emphasis added). In this matter, the Charleston County Lease has been executed, and Charleston County has the right to use and occupy the Naval Hospital. Chicora cannot lease the area of the Naval Hospital to anyone else. Because the property has been leased, the requirements of the lien statute have been met.

VIII. THE LOWER COURT RESERVED ALL DAMAGE ISSUES, INCLUDING LEE & ASSOCIATES' REQUEST FOR ATTORNEY'S FEES AND COSTS.

Chicora also argues that the lower court improperly awarded Lee & Associates attorney's fees and costs prior to holding a hearing on damages. Appellants' Brief, Pages 33-34. This was not the lower court's ruling. In fact, the lower court struck through all language in the proposed order related to damages and made clear that all such requests would be addressed at a hearing. Order Granting Summary Judgment, Page 14. The lower court also held that Lee & Associates can "*pursue* its attorney's fees and costs" while striking out the proposed amounts. Order Granting Summary Judgment, Page 19. This is not a ruling that Lee & Associates is entitled to attorney's fees and costs.

CONCLUSION

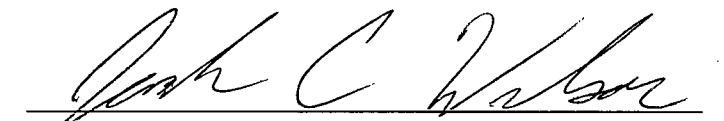
The trial court properly ruled that Chicora owes Lee & Associates a commission as a matter of law. The parties entered an Exclusive Agency Agreement that was in place when Chicora executed a lease with Charleston County. That Agreement provides that Lee & Associates is entitled to commission for any lease executed during the term of the Agreement. The Agreement unambiguously provides that the commission is due and

owing upon execution of the lease. As such, there is no question that Chicora owes Lee & Associates a commission.

Further, the lower court correctly ruled that the work performed by Lee & Associates satisfied the requirements of S.C. Code § 29-5-21(B)(2)(b). Lee & Associates provided numerous emails that unequivocally show that it provided "licensed services" that resulted in Charleston County entering a valid and enforceable lease with Chicora. The conclusory affidavits submitted by Chicora do not create an issue of fact.

Based on the foregoing, Lee & Associates would ask that the Court of Appeals affirm the lower court's order and remand this matter for a hearing on damages.

PIERCE, HERNS, SLOAN & WILSON, LLC



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3/31, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-In-Equity

Case No. 2014-CP-10-7481
Appellate Case No. 2015-002259

Lee & Associates Charleston, LLC, Respondent,

v.

Chicora Gardens Holdings, LLC, Chicora Life Center, LC, and Jeremey Blackburn,

Of whom Chicora Gardens Holdings, LLC, And Chicora Life Center, LC, are Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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