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 Jeremy Blackburn,

Of whom, Chicora Gardens Holdings, LLC and Chicora Life Center, LC are

Appellants.

APPELLANTS' FINAL REPLY BRIEF

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ARGUMENTS

Appellants will not attempt to use this Reply Brief to rehash arguments merely because Respondent made assertions in direct opposition in its Brief (i.e., the very purpose of opposing briefs). There are, however, several positions and arguments asserted by the Respondent that warrant a response.

I. ANALYSIS OF THE COMMISSION RATES WAS NECESSARY TO DISCUSS THE EXTENT OF THE LOWER COURT ERRORS.

Respondent takes particular exception to the Appellants fleshing out how various plausible commission rates under the Agreement [1] could be calculated. Respondent states, "[d]espite 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 [Agreement] governing the calculation of the commission amount." (Resp't Br. p. 7). It must be noted by the Appellants that a five page subsection hardly constitutes "much" of their thirty-five page Brief. More importantly, Appellants felt that this Court should fully understand the possible calculations in the context of other rulings made in error by the Lower Court.

A. Several vastly different proposed commission rates do "open the door for the entire Agreement to be unenforceable."

Appellants offered the commission calculations on pages 8 through 13 of their Brief to show the extent of the ambiguity of the Agreement and argue that the Lower Court should not have ruled on liability because there exists the possibility that the Agreement could be "so ambiguous as to render the entire contract unenforceable." (Appellants' Br. p. 13). Respondent

[1] This Reply Brief will use all abbreviated names, nicknames, or monikers used in the Appellants' Brief. For example, in this instance, "Agreement" refers to the Agency Agreement entered into by the Appellants and the Respondent.

notes that this argument was made without citation, before asserting that ambiguity in a contract would then call for interpretation of the parties' intent. (Resp't Br. p. 7). While this is correct, Respondent is also incorrect insofar as determining intent may only get a finder of fact so far, when facing an ambiguous contract.

It is well established that "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis in original); *see also Potomac Leasing Co. v. Otts Mkt., Inc.,* 292 S.C. 603, 358 S.E.2d 154 (Ct.App.1987) ("It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms."). Other authorities have come to the same conclusion. *see* 1 Corbin on Contracts § 2.8 (Rev. ed. 1993) (stating, "[e]ven if an intention to be bound is manifested by both parties, too much indefiniteness may invalidate the agreement, because of the difficulty of administering the agreement."). Moreover, this Court has further clarified what is required in a services contract such as the Agreement, holding "[i]n a contract for services two essential terms are the scope of the work to be performed and the amount of compensation." *W.E. Gilbert & Assocs. v. S.C. Nat. Bank*, 285 S.C. 421, 330 S.E.2d 307 (Ct.App.1985).

There is a long line of precedent that require a meeting of the minds as to all material terms before there exists an enforceable contract. As Appellants argued in their Brief and was held by this Court in *W.E. Gilbert & Assocs. v. S.C. Nat. Bank*, the Agreement's commission rate is a material term, if not the most material term. (Appellants' Br. p. 12). Considering the divide between the Appellants' interpretation of the commission rates and that of the Respondent, there

is in fact a distinct possibility that there was no meeting of the minds with respect to a material term, thus an unenforceable agreement.

B. By holding that that the Respondent is entitled to pursue its attorney's fees, the Lower Court made a ruling with respect to the amount of commission due to the Respondent.

Respondent argues in its Brief that the Lower Court did not assign a value to attorney's fees and, therefore, did not find that the Respondent is entitled to fees. (Resp't Br. p. 20). In the same paragraph, however, the Respondent quotes actual language from the Order that completely contradicts this argument. Its Brief states, "[t]he lower court also held that [the Respondent] can 'pursue its attorney's fees and costs.'" *Id.* This is precisely the problem raised in the Appellants' Brief. (*see* Appellants' Br. pp. 33-35). The Order is completely void of any reference to the Appellants being entitled to "pursue" their fees. (*see* R. p. 15). It is clear that the Lower Court has determined that the Respondent is entitled to attorney's fees, but it simply has yet to assign value to these fees.

This ruling by the Lower Court necessitated a comprehensive discussion of the various commission rates to show that the Appellants could be considered the "prevailing party" and, thus, entitled to fees. (*see* Appellants Br. pp. 33-35; S.C. Code, § 29-5-20(C)).

To expound on this assertion, by ruling that the respondent alone was entitled to fees, the Order had the effect of placing a value on the commission owed to the Respondent. Under South Carolina mechanics' lien statutes, attorney's fees are awarded to the "prevailing party," which is discussed in Section 21-5-20(C) as follows:

> For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action. One verdict assumes some entitlement to the mechanic's lien and the consideration of compulsory counterclaims. The party whose offer of settlement is closer to the verdict reached is considered the prevailing party in the action. If the difference between both offers and the verdict

> is equal, neither party is considered to be the prevailing party for purposes of determining the award of costs and attorney's fees. If the plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer of settlement. If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement. If the defendant has not asserted a counterclaim, his offer of settlement is considered to be zero.

S.C. Code, § 29-5-20(C). No settlement offers were filed and served, so the amount the Respondent claims, $147,130.50, is considered its final offer of settlement. The Appellants asserted counterclaims, specifically breach of contract and dissolution of the mechanic's lien. Under their dissolution of lien counterclaim, the Appellants obviously asserted that the Respondent is not entitled to foreclose the lien, thus a settlement offer of zero. Under § 29-5-20(C), the "party whose offer of settlement is closer to the verdict reached is considered the prevailing party in the action," for the purposes of awarding attorney's fees. *Id.* By virtue of holding that the Respondent, and only the Respondent, is entitled to fees, the Court effectively placed a value of the commission in excess of half of $147,130.50, yet it also stated it could not determine the same.

All of this was done in error, and the Appellants respectfully request this Court to reverse the Lower Court's ruling with respect to this issue.

II. ALL ISSUES RAISED ON APPEAL WERE ARGUED TO AND RULED ON BY THE LOWER COURT.

In passing, Respondent claims that Appellants' arguments regarding why the Lease does not meet the requirements of Section 29-5-21 of the South Carolina Code of Laws was raised for the first time on appeal. (Resp't Br. p. 19). The Appellants have made this argument several times, and in various forms or fashions, throughout this litigation. Appellants have contended the Lease is not an instrument that would warrant filing and foreclosure of a mechanic's lien, the

Respondent's filing of the lien was premature and the lien runs afoul of the purpose of South Carolina's mechanics' liens statutes. (*see* R. pp. 509-510; R. pp. 876-877, pp. 878-879, Tr., pp. 26-31, 35-37).

CONCLUSION

For these and all reasons stated in their Brief, the Appellants respectfully request this Court to overturn the Lower Court's ruling and remand this case, as more fully set forth in the Appellants' Brief.

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CERTIFICATE OF APPELLANTS

The undersigned certifies that the Appellants' Final Reply Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

The undersigned certifies that the Respondent, Lee & Associates Charleston, LLC, was personally served a copy of the Appellants' Final Reply Brief, at the offices of the Respondent's attorneys of record, Joseph C. Wilson, IV and Carl E. Pierce, II, 321 East Bay Street, Charleston, South Carolina 29401, on April 4, 2016.

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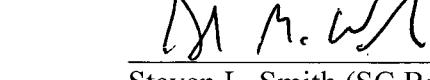

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