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SC Court of Appeals

**The State of South Carolina**
In The Court of Appeals

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**Appeal from Charleston County**
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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Appellate Case No.: 2015-00-2187

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Sea Island Food Group, LLC
d/b/a Squeeze,

Appellant,

v.

Yaschik Development
Company, Inc. d/b/a Yaschik
Enterprises, Hilton Smith,
East Bay Company, LTD.,
Thomas M. Ervin, and
Michael J. Quillen Family
Limited Partnership,

Defendants of whom
Hilton Smith and East
Bay Company, LTD
are Respondents,

Quillen Enterprises, LLC
d/b/a The Brick,

Appellant,

v.

Yaschik Development
Company, Inc. d/b/a Yaschik
Enterprises, Hilton Smith,
East Bay Company, LTD.,
Thomas M. Ervin, and
Michael J. Quillen Family
Limited Partnership,

Defendants of whom
Hilton Smith and East
Bay Company, LTD
are Respondents,

Michael J. Quillen Family
Limited Partnership,

Third-Party Plaintiff,

v.

Top of the Bay, Inc., d/b/a
Club Light,

Third-Party
Defendant,

Top of the Bay, Inc., d/b/a
Club Light,

Fourth-Party Plaintiff,

v.

Yaschik Development
Company, Inc., d/b/a Yaschik
Enterprises,

Fourth-Party
Defendant.

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**Brief of Appellant**

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## Overview

Appellants operate their business out of 213 East Bay Street, commercial spaces that they sublease from the building's master tenant. According to the master lease, the premises must be restored by the owner of the building, Yaschik Development Co., to their earlier condition in the event of a fire as long as the building is not a total loss.

After a fire in 2013, Yaschik Development Co. began discussing the sale of its building to a potential buyer, Respondent East Bay Co., that did not want the old configuration. The building had not been a total loss, but instead of restoring the building's interior, Yaschik Development Co. purported to cancel the lease. No longer facing the requirement of restoring the interior, Yaschik Development Co. was able to sign an agreement with Respondent East Bay Co. to buy the property. Their agreement confirmed that the building had to be sold lease-free.

Appellants sued Respondent East Bay Co. asserting that Respondent East Bay Co. had intentionally procured a breach of the master lease, resulting in the loss of Appellants well-known business locations. Respondent East Bay Co. moved to dismiss the cause of action, and the trial court granted that motion.

Because the trial court's ruling is based on three errors, this Court should reverse the trial court and permit this case to proceed to the discovery stage.

## Statement of the Issues on Appeal

The trial court's errors raise three issues on appeal:

1. **Subtenants of Master Lease Are Third-Party Beneficiaries.** Although not signatories under a contract, third-party beneficiaries may enforce a contract if the contract creates a direct benefit to the third parties. The language of the Master Lease unequivocally envisions subleases of 213 East Bay Street and provides that the premises be restored to its status before the fire. As subtenants of 213 East Bay Street, are not Appellants the direct and intended beneficiaries of the Master Lease and its restoration language?

2. **Respondent Lacked Justification.** A party commits the tort of interference with contract by actively soliciting the breach of another contract rather than merely accepting the offer of a party to another contract. Following the fire and over the course of months, Respondent injected itself in between the Master Lease holder and the owner of the building and began actively soliciting the purchase of 213 East Bay Street and the breach of the Master Lease. Was Respondent's actions justified when it had no contractual rights to pursue?

3. **Respondent Proximately Caused the Breach.** Respondent conditioned its purchase of 213 East Bay Street on the cancellation of the underlying subleases. Prior to the breach of the Master Lease, Respondent engaged in repeated discussions of the purchase of the building and the solicitation of the breach of the Master Lease. Is it reasonable to assume all of these events were connected?

## Statement of the Case

On December 5, 2013, Sea Island Food Group, LLC, doing business as Squeeze ("Squeeze"), initiated this litigation against Yaschik Development Company, Inc., doing business as Yaschik Enterprises, Thomas M. Ervin, Charleston Capital, and the Michael J. Quillen Family Limited Partnership ("Quillen FLP"). The Quillen FLP filed its answer on February 18, 2014, and Yaschik Development Co., Thomas M. Ervin, Charleston Capital filed motions to dismiss. And, on July 7, 2014, Thomas M. Ervin and Charleston Capital were dismissed by Consent Order.

Yaschik Development Co. filed its answer on July 14, 2014, and the Quillen FLP filed its amended answer on July 17, 2014.

On August 14, 2014, the court filed the consent order to intervene of Quillen Enterprises, LLC, doing business as The Brick ("The Brick"), and The Brick filed its summons and complaint on August 15, 2014.

On May 6, 2015, the court filed the consent order to amend of Squeeze and The Brick ("Appellants") seeking claims against Hilton Smith and East Bay Company ("Respondents"). On May 13, 2015, Respondents filed their motions to dismiss, and following a hearing on the matter on July 7, 2015, the lower court granted Respondents' motions to dismiss in an order filed on July 14, 2015.

On July 31, 2015, Appellants filed their motions to alter or amend the judgment, but on September 9, 2015 the lower court denied their motions in a

written order received by Appellants on September 14, 2015. On October 1, 2015, Appellants filed this Notice of Appeal.

## Brief Statement of Facts

There are three layers of owners involved in 213 East Bay Street: an owner, a tenant, and subtenants.

At one time, the property was owned by 213 East Bay Associates, Inc. (Am. Comp. ¶ 11.) In 1997, Charleston T&T, Inc. leased the entire building with express rights to sublease any portion. (Am. Comp. ¶ 8; Ex. 1.) Indeed, the right to sublet the property was not part of the pre-printed master lease and was typed in as an added term by the parties. (Am. Comp. Ex. 1.)

Both the original owner and tenant have been replaced, but everyone agrees that those changes have always been complete transfers and that each business now stands in the same shoes as the originator of its own chain. Yaschik Development Co., Inc. bought the real estate in 2003 (Am. Comp. at ¶ 11) and now stands in the shoes of the original owner and is subject to all of its predecessor's agreement. Likewise, Michael J. Quillen Family Limited Partnership ("Quillen FLP") assumed the master lease from Charleston T&T, Inc. in 2012 (Am. Comp. at ¶ 18) and stands in its shoes.

Since at least 2006, the premises have been sublet. The predecessor of current master tenant Quillen FLP Tenant sublet parts of the property to R&R Entertainment. (Am. Comp. ¶ 13.) R&R Entertainment assigned its rights to Sea

Island Food Group, LLC in 2011. (Am. Comp. ¶ 15.) Other parts of the premises were sublet to The Brick in 2010. (Am. Comp. ¶ 16.)

The original master lease was made with the intent that the subtenants would benefit from its terms. (Am. Comp. ¶ 38.) Specifically, the master lease provides that, as long as a disaster does not cause a total loss of the property, then the owner (that is, Yaschik Development Co.) must rebuild the property and return it to the same condition it was in before the loss. During the time it takes to rebuild, the master lease abates. If, however, the building is a total loss, then the lease between the owner and its tenant (currently, Quillen FLP) is cancelled.

When a fire occurred in 2013 (Am. Comp. ¶ 21), the building survived in part (Am. Comp. ¶ 33) and must be rebuilt. A potential buyer of the property, East Bay Co., would like to replace Yaschik Development Co. in the hierarchy (Am. Comp. ¶¶ 28, 30, 31). But, the potential buyer would like to take advantage of the fire to redo the building in a manner that is *inconsistent* with the subtenants' existing uses. Unless the potential buyer can demonstrate that the subtenants have no standing to enforce the "rebuild" terms of the master lease, its plans will not work out. (Am. Comp. ¶¶ 32-33.)

The subtenants sued both Yaschik Development Co. (the current owner) and Respondent East Bay Co. (the potential buyer), asserting their third-party beneficiary interests in the "rebuild" terms of the master lease. That is,

Appellants should be allowed to step into the shoes of the master tenant and expect the owner to restore the building to its prior condition, suitable for a bar.

The trial court granted the potential buyer Respondent East Bay Co.'s motion to dismiss on the basis that the subtenant Appellants are not third-party beneficiaries of the master lease between the owner and the master tenant.

## Standard of Review on Appeal

In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). A 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Id.* The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.*

## Argument

Appellants sued Respondent East Bay Co. asserting that Respondent East Bay Co. interfered with Appellants' contractual rights. The elements of a cause of action for tortious interference with a contract are (1) the existence of a

valid contract, (2) the wrongdoer's knowledge of the contract, (3) his or her intentional procurement of its breach, (4) absence of justification, and (5) resulting damages. *S. Contracting, Inc. v. H.C. Brown Const. Co.*, 317 S.C. 95, 450 S.E.2d 602 (Ct. App. 1994). The only basis cited by the trial court for its order was the absence of justification for procuring Yaschik Development Co.'s breach.

The master lease for 213 East Bay Street requires its owner, Yaschik Development Co. to restore the premises to *status quo ante* condition at the owner's expense so long as the building is not completely destroyed by an occurrence. A fire damaged the premises in 2013 but did not destroy the building. As subtenants and the third-party beneficiaries of the master lease, Appellants are entitled to enforce the "rebuild" term of the lease.

Instead of undertaking the restoration of the premises, the owner of 213 East Bay Street has given notice that it will be cancelling its lease with its master tenant. The owner has been prompted to do so by Respondent East Bay Co., a potential buyer of the building. Respondent East Bay Co. will then purchase the building free and clear of the existing lease's obligations and will remodel the interior in a manner inconsistent with Appellants' continued use.

At this stage, the trial court should be hesitant to dismiss a complaint because of the low standards for pleading a cause of action. "Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. In considering such a motion, the

trial court must base its ruling solely on allegations set forth in the complaint. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Bergstrom v. United Health Alliance*, 2004 WL 834095 (S.C. Apr. 19, 2004). Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.*

**1. The trial court erred in dismissing Appellants' interference with contract complaint upon an incorrect belief that only those parties present at the time of a contract's execution can enjoy third-party beneficiary status.**

Although signatories are ordinarily the ones with rights under a contract, *see, e.g.*, *Hardaway Concrete Co. v. Hall Contracting Corp.*, 374 S.C. 216, 225, 647 S.E.2d 488, 492 (Ct. App. 2007), "if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." *Id.* at 225, 647 S.E.2d at 492–93 (internal quotation marks omitted).

**1.1 Because the owner and master tenant expressly envisioned subleases of 213 East Bay Street when they executed the master lease, Appellants, as subtenants, can qualify as third-party beneficiaries of the owner's promise to restore the property to prior conditions after a fire.**

It is an error of law to assert that one's arrival to a contract after its execution prevents a claimant from being a third-party beneficiary. When a contract

envisions a third-party by description, a later arriving party may certainly fill that position.

It is not important that the third-party beneficiary actually be named in the contract as long as he falls within the class of intended beneficiaries. The South Carolina Supreme Court opinion in *Pharr v. Canal Insurance Co.*, 233 S.C. 266, 104 S.E.2d 394 (1958), conclusively establishes that there is no requirement that a third-party beneficiary be named in the contract. There, Mr. Bush purchased an automobile insurance policy from Canal Insurance Co. and later caused a wreck involving the plaintiffs. *Id.* at 269, 104 S.E.2d 395. Mr. Bush was sued for his negligence, but he later disappeared and could not be located by Canal Insurance Co.'s best efforts. *Id.* at 270, 104 S.E.2d 396. Since he was not available to take part in his own defense, Canal Insurance Co. sought to terminate any obligations it owed on his behalf and secured a declaratory judgment saying so. *Id.* at 270, 104 S.E.2d 396.

The victims of the car wreck sued Canal Insurance Co. after having received their own judgments against the insured driver. *Id.* at 270, 104 S.E.2d 396. Canal Insurance Co. was granted a directed verdict and freed of any obligations to the victims. *Id.* at 271, 104 S.E.2d 396. On appeal, however, the South Carolina Supreme Court ruled that the victims of the wreck were the third-party beneficiaries of the insurance contract and could enforce the terms for their own benefit. *Id.* at 276, 104 S.E. at 399. Even though there were no liability claimants

until nearly a year after the insurance contract had been executed, the Court still recognized the eventual victims as third-party beneficiaries of the contract:

> This provision of the contract is for the benefit of the injured party who can exercise the rights therein given by compliance with the conditions stated in this paragraph of the contract. This Court has held in numerous cases that a contract between two persons for the benefit of a third, even though such third party be not named therein, can be enforced by such third party.

233 S.C. at 276, 104 S.E.2d at 399 (citations omitted).

It is not even required that a third-party be *aware* that a contract has been executed to claim third-party beneficiary status. In *Johnson v. American Railway Express Co.*, 163 S.C. 191, 161 S.E.473 (1931), the plaintiff sued American Railway Express Co. for firing him without having provided due process. The process that was due appeared in a contract between American Railway Express Co. and a union for messengers, but the plaintiff was not a party to that contract. *Id.* at ____, 161 S.E. at 473. Indeed, there was nothing in the opinion of the Court even suggesting that the plaintiff had been working as a messenger at all when the contract was signed. Nevertheless, because the intended beneficiaries of the contract were the actual messengers, the plaintiff had a right to expect performance even though he was not a party to the contract at all: "It has been held by this court in numerous cases that where a contract is made between two persons, and there is in it a provision that enures to the benefit of a third person *not a party to the contract, and perhaps ignorant of its execution*, he acquires an

enforceable interest in the contract so far as the provision of his interest is concerned." *Id.* at ____, 161 S.E. at 476 (emphasis added).

The timing of the lease agreement was the basis for the Court's decision. Explaining its decision to grant Defendant's motion to dismiss, the Court claimed that, because the owner and master tenant's lease was signed in 1997, the subtenants could not possibly be third-party beneficiaries of that master lease; the subtenants, after all, he explained, arrived on the scene *after* that master lease was signed. (Order at 3 ("This 1997 lease was entered into many years before either Squeeze or The Brick came to occupy the premises.").)

As demonstrated above, the belief that a third-party beneficiary cannot acquire that status unless specifically identified at the time of the underlying contract is wrong as a matter of law, and the decision to dismiss Appellants' claims should be reconsidered and corrected.

### 1.2 The intent of the lease's signatories to benefit sub-tenants with a term requiring the restoration of 213 East Bay St. to its condition status quo ante is a fact-intensive question of intent not properly decided by a motion to dismiss.

While parties joining a relationship after the execution of an underlying contract certainly can be third-party beneficiaries of the contract, not everyone enjoys that status of course. Rather, one's status as a third-party beneficiary requires an investigation of the contract itself along with the surrounding facts and circumstances to determine the signatories' intent. 13 Williston on Contracts sec.

37:10 (4th ed.). Resolving such fact-intensive questions as a matter of law (and especially despite express allegations in a complaint to the contrary) is a reversible error.

Notice that this is not a question of *interpreting* a contract. Admittedly, when a court is required to interpret the meaning of language in a contract, the decision should be based on the words themselves first. The present case does *not* involve any ambiguity in the lease. Rather the issue before the court is the motivation and intent of the parties *in agreeing to those unambiguous terms.* Evidence drawn from outside the four corners of a document is quite obviously a proper source for judging *intent*, not meaning. *See Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994) (affirming summary judgment on third-party beneficiary status only upon finding that no extrinsic evidence of intent had been offered).

In one case involving a commercial real estate lease, the South Carolina Supreme Court ruled that a late-arriving party to a commercial lease enjoyed third-party beneficiary status based on the extrinsic facts developed at trial. In *Wise v. Picow*, 232 S.C. 237, 101 S.E.2d 651 (1958), the owners of a store, Mr. and Mrs. Picow, leased a portion of their building to the National Shoe Co. and agreed to accept 11% of the shoe company's sales as rent. *Id.* at 239, 101 S.E.2d at 653. Two years later, National Shoe assigned its rights under the lease to Joe Isenberg, and the Picows consented. *Id.* at 240, 101 S.E.2d at 653.

When the owners of the store gave notice that they were cancelling the lease, Mr. Wise sued for unaccounted for profits and incidental losses. Mr. Wise claimed that he had been operating the shoe department for some time and taking advantage of Mr. Isenberg's rights. Mr. Wise claimed standing to sue as the intended beneficiary of the assignment between the owners' first tenant and the tenant's assignee.

The store's owners denied that there was any agreement between them and Mr. Wise and that Mr. Wise, as a stranger to the deal, had no interest in enforcing the contract. *Id.* at 240, 101 S.E.2d at 653. There was no mention of Mr. Wise's having initially been involved in procuring either the main lease or the assignment; rather, the Court recognized his third-party beneficiary status after reviewing the evidence of post-contract dealings and awareness. Based on the evidence that the owners had known that Mr. Wise was actually in control of the shoe department, the Court ruled that Mr. Wise had the ability to enforce the terms of the owners' contract with Mr. Isenberg himself as the contract's third party beneficiary.

In the present suit, the only information upon which the Court could base its decision was that found in the Complaint. Appellants unambiguously alleged that they are the intended beneficiary of the master lease. As long as that allegation can be reconciled with the law, that allegation by itself prevents the Court from dismissing the complaint based on the parties' third-party beneficiary status. The actual status of a party as a third-party beneficiary is improperly resolved by a

motion to dismiss as long as the allegation is made, since one's status as a third-party beneficiary is a question of fact, *see Concrete Contractors, Inc. v. E.B. Roberts Construction Co.*, 664 P.2d 722, 725 (Colo. App. 1982), *aff'd*, 704 P.2d 859 (Colo. 1985) ("The key question is the intent of the parties to the actual contract to confer a benefit on a third party. That intent must appear from the contract itself or be shown by necessary implication. It is a question of fact to be determined by the terms of the contract taken as a whole, construed in the light of the circumstances under which it was made and the apparent purpose the parties were trying to accomplish."); *Julian Johnson Const. Corp. v. Parranto*, 352 N.W.2d 808, 810 (Minn. Ct. App. 1984) ("Whether the parties intended to benefit a third party is a question of fact.").

Especially at this motion to dismiss stage, there is adequate basis for Appellants' suit to proceed. The master lease very specifically envisioned that sub-tenants would be using the property. The otherwise pre-printed lease had a specific term typed in by the signatories which added, "Tenant has the right to sublet." (Master Lease at 1 ("Term").) The trial court noted that fact but then made the inexplicable conclusion that the parties did not envision any subtenants. (Order at 3 ("Further, the master lease, while acknowledging the tenant's right to sublease, does not contemplate an actual sublease of the property.").)

The precise term at issue in this case requires that the premises be restored to their status before the fire and not remodeled. Not only is an occupant of the

leased space a possible intended beneficiary of that term, a future occupant of the leased space is the *only possible* beneficiary of the term. The only possible party that would ever have an interest in having property restored (and not remodeled, for better or for worse) would be the actual occupant of the property. In other words, both the terms of the lease and the surrounding facts (even if considered prematurely at the motion to dismiss stage) support Appellants' claim to be a third-party beneficiary. The trial court erred in granting a motion to dismiss on that element of Appellants' claim at the motion to dismiss stage.

**2. The Court erred when it ruled, as a matter of law, that Respondent East Bay Co.'s influence on Yaschik Development Co. was justified.**

Respondent East Bay Co. wanted to buy Yaschik Development Co.'s premises at 218 East Bay Street. To enable the sale of the premises free and clear, Respondent East Bay Co. prompted owner Yaschik Development Co. to cancel the existing lease and subleases on the property. (Am. Comp. ¶ 66.) Yaschik Development Co. has not contested the charge that its refusal to return the premises to their pre-fire condition was a breach of contract. However, Respondent East Bay Co. has contested the claim that it intentionally procured that breach on the ground that its actions were justified. (Def. East Bay Co.'s Mot. to Dismiss.) On July 14, 2015, the trial court granted Respondent East Bay Co.'s motion, explaining that, because not *every* action which prompts another party to

breach its own contracts is unlawful, this particular scenario must not have been unlawful. (Order at 4.)

To support its ruling, the trial court quoted the following passage from the Restatement (Second) of Torts: "One does not induce another to commit a breach of contract with a third person under the rule stated in this Section when he merely enters into an agreement with the other with knowledge that the other cannot perform both it and his contract with the third person." Restatement (Second) of Torts sec. 766, cmt. I (quoted in Order at 4). That Restatement comment, however, does not excuse–and certainly not as a matter of law–every instance in which a party solicits the breach of a contract by another. Indeed, such a misunderstanding would completely eliminate *every* claim for procuring breaches of contract in the first place. Instead, as the Restatement's very next sentence makes clear, the point of the comment is to explain that a defendant does not commit a tort simply by *accepting, without solicitation*, the offer of a party to another contract to breach his own contract:

> For instance, B is under contract to sell certain goods to C. He offers to sell them to A, who knows of the contract. A accepts the offer and receives the goods. A has not induced the breach and is not subject to liability under the rule stated in this Section . . . .

Restatement (Second) of Torts sec. 766, cmt. i. The purpose of that comment is to explain the limits of "inducing" the breach, as required by the Restatement, and not to create an exception to entirely swallow the rule.

Moreover, the ruling by the trial court is contrary to South Carolina Supreme Court precedent in which the Court reversed a dismissal based on the same element. In *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 426 S.E.2d 304 (1993), a lawyer had a contract to do real estate work for a client. The defendant, a third-party commercial lender, prompted the client to hire a different lawyer to handle her real estate closing. *Id.* at 515, 426 S.E.2d at 305. The lawyer sued the third-party commercial lender for procuring the breach, but the trial court dismissed the case.

On appeal, both the South Carolina Court of Appeals and then the South Carolina Supreme Court ruled that the trial court had committed a reversible error in dismissing the action. *See id.* at 517, 426 S.E.2d at 305; *see also, Camp v. Springs Mortgage Corp.*, 307 S.C. 283, 414 S.E.2d 784 (Ct. App. 1991). Unlike this trial court, neither the Court of Appeals nor the Supreme Court adopted a rule that one who procures a breach cannot, as a matter of law, be liable for procuring the breach of a contract. To the contrary, the Supreme Court ruled that the plaintiff's allegations that the third-party lender to prompted the breach by his client *did* amount to a claim, certainly adequate to survive a motion to dismiss. *Id.* at 517, 426 S.E.2d at 306 ("From this allegation it may be inferred Springs' interference with the Johnson contract was without justification. Accordingly, we affirm the Court of Appeals' ruling finding the complaint sufficient to state a cause of action for tortious interference with an existing contract.").

In an earlier case, the South Carolina Supreme Court agreed that a plaintiff's interference claim should not have been dismissed even though there was no allegation that the defendants were doing anything other than enforcing their own contractual rights. *Crowe v. Domestic Loans, Inc.*, 242 S.C. 310, 130 S.E.2d 845 (1963). In that case, the plaintiff had an employment contract with a drug store. *Id.* at 312, 130 S.E.2d at 845. When the plaintiff fell behind in payments he owed to the loan company defendants, the loan companies started calling him at his job, and the plaintiff was eventually fired. *Id.* at 312-13, 130 S.E. at 846. There was absolutely no suggestion in the court's opinion that the loan companies were doing anything other than pursuing their own contractual rights in their own best interests. Nevertheless, when the loan companies moved to dismiss the complaint[1] over causation, the trial court refused. *Id.* at 312, 130 S.E. at 845. On appeal, the Supreme Court agreed that the complaint stated a cause of action. *Id.* at 315, 130 S.E. at 847.

While discussing its possible purchase of 213 East Bay Street, Respondent East Bay Co. was not merely pursuing its own pre-existing contractual rights. Indeed, at that point, it had *no contractual rights* with Yaschik Development Co. to

[1] The defendants technically filed a demurrer to the complaint which was overruled by the trial court. A demurrer is the same as a motion to dismiss under the modern South Carolina Rules of Civil Procedure. *Port Royal Terminal Corp. v. S.C. Ports Auth.*, 291 S.C. 130, 352 S.E.2d 482 (1986) ("There is no substantive difference between a demurrer on the ground a complaint fails to state facts sufficient to constitute a cause of action and a Rule 12(b)(6) motion to dismiss upon the same ground. Differences are procedural only and involve the time and manner of presentation.").

even pursue. Rather, it was simply intermeddling in hopes of convincing Yaschik Development Co. to breach its own contract with Appellants to open the door for its own dealings with Yaschik Development Co. on the terms it desired.

Respondent did not argue that, if Appellants' claims are proven, its behavior is justified. Rather, its position was just that there have been no specific allegations that it *forced* Yaschik Development Co. to breach its master lease. Respondent suggests that perhaps it just left the matter open for Yaschik Development Co. to handle as it pleased, even if that included just walking away from Respondent's offer entirely. (Memo. in Support of Def.'s Mot. to Dimiss at 4.) That hypothetical factual scenario and others do not actually bear on the *justification* for Respondent's actions at all, and they certainly cannot be used to justify a dismissal on the pleadings. Appellants have certainly adequately pled those allegations, and the trial court erred in dismissing the intentional interference claim as a matter of law.

**3. The Court erred when it ruled that Respondent East Bay Co. could not, as a matter of law, have prompted Yaschik Development Co.'s breach before Respondent East Bay Co. and Yaschik Development Co. finalized their own agreement.**

For a defendant's conduct to be actionable interference, it must have been the reason a third-party breached its contract with the plaintiff. Appellants must demonstrate that a breach was proximately caused by the defendant. *Smith v. Citizens & S. Nat'l Bank of S.C.*, 241 S.C. 285, 128 S.E.2d 112 (S.C. 1962). Stated

another way, Appellants "must show that, but for the interference, the contractual relationship would have continued." *Jones Eng'g Sales, Inc. v. Faulkner/Baker & Assocs.*, 1999 WL 972171 (4th Cir. Oct. 26, 1999) (citations and quotation omitted).

It appears that the trial court entered its order based on a mistaken belief about the actions of Respondent East Bay Co. that interfered with Appellants own rights. To be clear, Appellants are not now and have not argued that it was Respondent's execution of its own lease that interfered with their leasehold rights. Rather, Appellants have alleged that the interference was Respondent's intermeddling in dispute about the other parties' rights under the master lease, prompting the decision by Yaschik Development Co. to terminate the lease. Thereafter, only after having freed itself of the leasehold interests, Yaschik Development Co. was able to execute a sales agreement with Respondent East Bay Co. It was the ultimate decision to condition the sales agreement on the cancellation of the leases—not the actual signing of the document reflecting that demand—that is the basis of Appellants' suit. (Am. Comp. ¶ 66.)

With that understanding in mind, a motion to dismiss Appellants' complaint was an error because the mere timing of events here is itself an adequate basis for establishing proximate cause. In *Ballenger v. Southern Worsted Corp.*, 209 S.C. 463, 40 S.E.2d 681 (1946), a worker was injured on the job when hot liquid splashed in his face, and he sought Workers Compensation benefits for an eye injury. The

employer, however, argued that there had been inadequate proof of causation between the workplace accident and the worker's eye injury. The employer claimed that the mere fact that the worker's first eye problems happened after the workplace accident was nothing more than a coincidence—an example of a *post hoc, ergo propter hoc* logical fallacy. *Id.* at 466, 40 S.E.2d at 682.

The Supreme Court recognized that the mere timing of the onset of the eye condition was itself at least some evidence of causation. It wrote that "the proximate cause of the law is not necessarily the proximate cause of the logician." *Id. at* 466, 40 S.E.2d at 682. Indeed, the Court wrote, "'Post Hoc' is some in itself." *Id. at* 466, 40 S.E.2d at 682. Whether conflicting testimony might show some other cause was not important to the Court; it would have been "unreasonable and contrary to common sense" to assume that the events were unconnected. *Id. at* 466, 40 S.E.2d at 682.

On that point, there was certainly enough alleged to survive a motion to dismiss. Appellants have alleged in unmistakable terms that the solicitation of that breach began several months *before the breach* of the underlying contract. Appellants alleged that Respondent East Bay Co. and Yaschik Development Co. discussed 213 East Bay Street on or about May 30, 2013. (Am. Comp. ¶ 28.) The conversation was memorialized in correspondence dated May 31, 2013. (Am. Comp. ¶ 28.) The discussions included references to the master lease, expiration dates, and renewals. (Am. Comp. ¶ 29.) About four months after Yaschik

Development Co. and Respondent East Bay Co. were in talks over 213 East Bay Street, Yaschik Development Co. cancelled its master lease on the building. Once that cancellation had opened the door to the sale to East Bay Co. on terms it wanted, Respondent East Bay Co. and Yaschik Development Co. agreed to buy/sell the building. (Am. Comp. ¶ 30.) Not surprisingly, the sales agreement ultimately required the termination of leasehold estates. (Am. Comp. ¶ 32.)

Refocused on the correct action of Respondent East Bay Co. as the interference, this Court should recognize that enough has been pled to entitle Appellants to move forward with its interference claim and conduct additional discovery as to the negotiations between Yaschik Development Co. and Respondent East Bay Co.

## Conclusion

Viewing the allegations of the Complaint in the light most favorable to Appellants and the arguments contained in their brief, this Court should reverse the trial court and permit this case to proceed to the discovery phase.

May 29, 2016

M. Brooks Derrick
Law Office of M. Brooks Derrick
PO Box 967
224 NE Main Street
Simpsonville, SC 29681
(864) 881-2281

*Attorney and Counselor for Appellants*

Other Counsel of Record:
Charles J. Baker
Womble Carlyle Sandridge & Rice
P.O. Box 999
Charleston, SC 29402
(843) 720-4619
*Attorney for Respondents*