IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr.
Circuit Court Judge

Case No.: 2017-002196

Condo-World Development, LLC
and Heron Point Golf Club Limited Partnership.....Plaintiffs

v.

Myrtle Beach Golf & Yacht Club
Association,
Inc.....Appellant

AND

Myrtle Beach Golf & Yacht Club
Association,
Inc.....Appellant

v.

South State
Bank.....Respondent

FINAL REPLY BRIEF OF APPELLANT

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The Appellant Myrtle Beach Golf & Yacht Club Association, Inc. ("Appellant") hereby replies to the brief of Respondent South State Bank ("Respondent")[1]. Appellant has limited its Reply Brief to address certain portions of Respondent's Initial Brief that required further exposition and analysis. To the extent that the Reply Brief does not address each and every argument made by Respondent, Appellant relies upon the arguments set forth in its Initial Brief. Appellant hereby incorporate all arguments made in its Initial Brief, as though fully set forth herein, and does not waive any of the arguments asserted in the Initial Brief.

I. THE LOWER COURT APPLIED THE WRONG STANDARD OF REVIEW IN DISMISSING APPELLANT'S CAUSES OF ACTION

The lower court erred in its application of the Rule 12(b)(6), *SCRCP*, standard of review. Respondent argues that any discussion of factual matter not within the four corners of the pleadings did not influence the lower court's legal analysis. By so arguing, Respondent admitted that the scope of oral argument exceeded that of a Rule 12(b)(6), *SCRCP* motion. Respondent, attempts to cure this error, by arguing that the lower court articulated the correct standard of review. Respondent's argument, however, fails to acknowledge that a court may *articulate* the correct standard of review while simultaneously *applying* a different standard of review and, thus, commit error. A review of the transcript and the Order indicate that despite articulating the correct standard of review, the lower court did not *apply* the standard of review appropriate for a Rule 12(b)(6), *SCRCP*, motion. [R. p. 8-21, 703-761]. Instead, the lower court applied a standard of review more appropriate for a Rule 56, *SCRCP*, motion.

[1] Capitalized terms that were defined in the Initial Brief shall have the same meaning in this Reply Brief.

Respondent's argument would have this Court ignore the transcript of oral argument of Respondent's Motion to Dismiss. *See* Respondent's Brief, generally. Respondent would prefer this Court ignore the transcript, because the transcript indisputably supports Appellant's argument that the lower court applied the wrong standard of review and considered matters outside the four corners of the Third-Party Complaint. The lower court admitted, at least, twice, during oral argument that it had exceeded the scope of a Rule 12(b)(6), *SCRCP*, motion. [R. p. 758, l.13-16; R. 703-761, *generally*].

Further, despite Respondent's arguments to the contrary, the argument indisputably influenced the lower court's order, as the lower court referenced its consideration of arguments of counsel twice in its Order. [R. p. 8-22]. In the introductory paragraph, the lower court stated: "After carefully considering the pleadings, the Motions and Memorandum… and **the arguments of counsel**, the Court finds as follows:". [R. p. 9] (emphasis added). In concluding its Order, the lower court stated "After careful review of the pleadings **and hearing arguments of counsel**, this Court concludes it has property considered the Third-Party Complaint of Myrtle Beach Golf & Yacht Club Association, Inc. as well as the Motion to Dismiss filed by South State Bank." [R. p. 821] (emphasis added). Thus, the Order implicitly referred to matters outside the pleading because it referred to the arguments of counsel – the very arguments that that the lower court and Respondent previously admitted were beyond the scope of a Rule 12(b)(6), *SCRCP*. motion. [R. p. 8-21, *see* Respondent's Brief].

Moreover, as more fully stated in Appellants' Initial Brief and the instant Reply Brief, in its Order, the lower court applied the incorrect standard of review to Appellants

motion. Accordingly, the lower court erred in dismissing the three causes of action against Respondent

II. APPELLANT'S CAUSE OF ACTION FOR BREACH OF CONTRACT IS NOT BARRED BY THE STATUTE OF LIMITATIONS

Appellant's cause of action for breach of contract cannot be dismissed on a Rule 12(b)(6), *SCRCP*, motion because the application of the discovery rule is a question of fact. In its brief, Respondent ignores Appellant's argument that whether Appellant knew it had a cause of action for breach of contract is a question of fact. Instead, Respondent argues that the mere recordation of the Waiver of Restrictions operated as sufficient notice to Appellant of the breach. In essence, Respondent's argument is that the "world" is on notice of every public document the minute the document becomes public. Respondent's argument would, in essence, eviscerate and nullify the discovery rule with respect to all public documents. Moreover, Respondent does not cite a single case that stands for such a broad proposition.

Further, in its attempt to ignore the application of the discovery rule and the proper standard of review on a motion to dismiss, Respondent heavily relies on cases that are inapposite because the cases were determined on summary judgment or after trial, not on a motion to dismiss. *See Matthews v. City of Greenwood*, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991) (affirming partial summary judgment); *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 6445 (1996) (holding directed verdict of Circuit Court was correct); *Walsh v. Woods*, 358 S.C. 259, 594 S.E.2d 548 (Ct. App. 2004) (affirming summary judgment); *Burgess v. American Cancer Soc.*, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989) (affirming summary judgment); *Dillon County Sch. Dist No. Two v. Lewis Metal Works, Inc.*, 286 S.C.207, 332 S.E.2d 555 (Ct. App. 1985) *overruled on other grounds* by

Atlas Food Systems and Services Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp., 319 S.C. 5556, 462 S.E.2d 858 (1995)[2] (affirming in part, reversing in part and remanding an order of summary judgment); *Fuller-Ahrens v. SC Dept. of Highways and Pub. Transp.*, 311 S.C. 177, 427 S.E.2d 920 (Ct. App 1993) (affirming motions to dismiss that were properly converted to summary judgment motions); *Landmark 501(c)(9) Trust Agreement for the Landmark Group ex rel. Dunlap v. Pierce, Couch, Hendrickson, Baysinger & Green*, 2004 WL 6331249 (Ct App 2004) (affirming motions for summary judgment). Other cases cited by Respondent are similarly inapposite. For instance, *Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 744 S.E.2d 178 (2013), is a case that interprets Delaware law.

In sum, Respondent's arguments regarding the discovery rule's application ignore the process of discovery and jump directly to the summary judgment stage of proceedings – which remains consistent with the arguments of Respondent, the transcript of the hearing on the motion to dismiss, and the Order. [R. p. 703-761, R. p. 8-22]. However, Respondent never converted its motion to a motion for a summary judgment.

Accordingly, at this early stage of proceedings, with every doubt resolved in favor of Appellant, Appellant has stated a claim for breach of contract under the discovery rule. South State Bank, the successor-in-interest to Peoples, breached the 1988 Settlement Agreement and 1992 Indenture Deed and failed to act in good faith by failing to provide Appellant notice or information regarding the Waiver of Restrictions. [R. p. 414-432]. The breach resulted in damages, which damages includes the diminution in property values, and attorney's fees, cost and expenses incurred in the first party litigation. [*Id.*]

[2] Respondent's Brief failed to mention that the *Dillon* case was overruled on other grounds by the *Atlas* case.

When the cause of action accrued and how the discovery rule is applied are questions for the jury (or ultimate finder of fact at a trial) that cannot and should not have been resolved on a motion to dismiss. Similarly, whether the facts and circumstances in this case – specifically the Waiver of Restrictions existence - could have been known to Appellant by the exercise of ordinary care and due diligence is a question that cannot be resolved on a motion to dismiss when all facts are resolved in favor of Appellant. Accordingly, Appellant stated a cause of action for breach of contract sufficient to survive a motion to dismiss.

III. APPELLANT STATED A CAUSE OF ACTION FOR CONTRACTUAL INDEMNIFICATION

Appellant stated a cause of action for contractual indemnification. Respondent's argument – raised for the first time on appeal – that the contractual indemnification language is an unenforceable "agreement to agree" would render the operative language of the indemnification clause ineffectual and meaningless. However, if at all practical, agreements should be construed to render each provision effectual. *See, generally, LandBank Fund, VII, LLC v. D.R. Horton, Inc.*, 2009 WL 10678320 (U.S.D.C. S.C. Flo. Div. 2009) (denying motion to dismiss where party argued that there was an agreement to agree because Plaintiff were entitled to an opportunity to bring forth extrinsic evidence showing a more specific agreement, and holding that whether extrinsic evidence is proper goes beyond the scope of a motion to dismiss); *Ecclesiastes Production Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007); *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 329 S.C. 206, 494 S.E. 2d 465 (Ct. App. 1997). *See also Goodman v. Resolution Trust Corp.*, 7 F.3d 1123 (4th Cir. 1993) ("Contract terms must be construed to give meaning and effect to every part of

the contract, rather than leave a portion of the contract meaningless or reduced to mere surplusage.") Respondent's interpretation of the indemnification clause should be rejected as an attempt to violate a cardinal rule of contract construction.

Moreover, the indemnification provision is not an unenforceable "agreement to agree." As stated in Appellant's Initial Brief, a contract is not "unenforceable for indefiniteness because its performance is, as to particular details, left open to subsequent agreement of the parties." *Aperm of S.C. v. Roof*, 290 S.C. 442, 351 S.E.2d 171 (Ct. App. 1986). The lower court held that there was an indemnification agreement, but that it was unambiguous and did not apply by its terms to the facts of this case because: (i) Plaintiffs are not parties to the 1988 Settlement Agreement and (ii) the first party action was initiated after execution of the 1988 Settlement Agreement. [R. p. 8-22]. However, a motion to dismiss under Rule 12(b)(6), *SCRCP*, should not be granted and the complaint dismissed merely because the court doubts Appellant will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987). The lower court impermissibly made findings of facts. Specifically, the lower court determined that that there was no subsequent agreement based on the fact that no general release was attached to the pleading and no document had been produced or discovered in the first-party action. However, at no point, did Appellant allege or concede that no general release existed. Appellant, at a minimum, should be permitted to engage in discovery with Respondent to determine if such a release exists.

Respondent, once again, would have this Court apply a summary judgment standard. Appellant filed a Complaint against Respondent alleging the necessary facts to state a cause of action. Contrary to Respondent's contention, Appellant is not asking the

Court to consider allegations not contained in Appellant's Third-Party Complaint. Rather, Appellant's arguments demonstrate the reason this cause of action is not ripe for adjudication on a motion to dismiss. To wit: Appellant has a right to engage in discovery to: (i) determine whether a subsequent agreement or general release was executed pursuant to the 1988 Settlement Agreement; (ii) determine if there was part performance; (iii) determine if there is extrinsic evidence showing a more specific agreement; and (iv) determine the intent of the parties to the 1988 Settlement Agreement.

Continuing its application of the summary judgment standard of review, Respondent continues to reiterate facts not relevant to a four-corners review of the pleadings. For instance, Respondent asks this Court to consider facts such as: Appellant and Plaintiffs have engaged in discovery and the Agreement was produced during discovery by Respondent in response to a subpoena. [R. p. 703-761]; *see* Respondent's Brief, p.18. Even if this Court were to consider those facts – which it should not – those facts do not deprive Appellant of a right to engage in discovery regarding its claims against Respondent with Respondent.

Accordingly, the Court should reverse the dismissal of Appellant's cause of action for contractual indemnification.

IV. APPELLANT ALLEGED FACTS SUFFICIENT TO STATE A CAUSE OF ACTION AGAINST RESPONDENT FOR EQUITABLE INDEMNIFICATION

South Carolina law permits the pleadings of causes of action in the alternative. The lower court found that contractual indemnification agreement was valid, but inapplicable to Plaintiff's claims against Appellant. To the extent the lower court found the contractual indemnification clause inapplicable to Plaintiff's claims, then Appellant is

without an adequate remedy at law. "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Milliken & Co. v. Morin,* 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009) (internal quotations omitted). Even if the 1998 Settlement Agreement contained a valid contractual indemnification provision and Respondent is a party to it, Appellant does not have a "certain, practical, complete and efficient" remedy at law if the Plaintiffs' claims against Appellant are not encompassed by that indemnification clause. At this early stage of litigation, this alternative claim should not be dismissed.

Contrary to Respondent's arguments, Appellant has alleged the necessary elements to state a cause for equitable indemnification. Respondent incorrectly states that Plaintiffs' Complaint does not request any damages from Appellant. In truth, although Plaintiffs request declaratory relief in its Complaint, Plaintiffs have also requested "attorneys (sic) fees, costs and expenses" in its Prayer for Relief. [R. p. 29-38]. Thus, Plaintiffs have sought damages against Respondent.

Moreover, the fault attributable to South State Bank is manifest throughout the pleadings. In its request for declaratory relief, Plaintiffs ask for a determination that:

> That First Federal Savings and Loan Association of Charleston [the predecessor-in-interest to Respondent] had previously waived, relinquished and released the following restrictions as the same may have applied, if at all, to the Enterprise Tracts, including the golf course property, by Deed known as "Waiver of Restrictions [Deed]" recorded May 5, 2005, in Deed Book 2905, at Page 574"

[R. p. 34 ¶ 18(d)]. In Appellants' Counterclaim, the first sentence of the Counterclaim is "MBG&YC incorporates herein all prior factual allegations, defenses and counterclaims

as if fully stated herein." [R. p.. 426 ¶ 61]. In addition, the Counterclaims specifically reference Plaintiffs' Complaint in the cause of action for equitable indemnity. [R. p. 430 ¶ 87]. Further, the Counterclaims specifically reference the Waiver of Restrictions. [R. p. 428 ¶ 70]. Thus, the Counterclaims provided sufficient notice to Respondent of the allegations of fault attributable to South State Bank – the execution of the Waiver of Restriction. By executing the Waiver of Restrictions in 2005, without providing notice to Appellant, Respondent caused Plaintiffs to file a lawsuit against Appellant regarding their rights with respect to the Waiver of Restrictions. Plaintiffs have requested "attorney's fees, costs and expenses" from Respondent with respect to their lawsuit.

Taking every inference in favor of Appellant, and accepting the allegations of the Counterclaims as true, if Plaintiffs allegations are proven true, Plaintiffs' damages include the attorney's fees, costs and expenses incurred during the First-Party litigation, and Respondent is liable for those damages. Appellant was unaware of the Waiver of Restrictions when it was executed and had no responsibility for it. Appellant has incurred expenses necessary to protect its interest – including attorneys' fees. Therefore, taking every inference in favor of Appellant's, it has stated a cause of action for equitable indemnification – including liability and damages. Accordingly, the lower court improperly dismissed this claim.

V. IF THIS COURT AFFIRMS THE DISMISSAL, APPELLANT SHOULD BE PERMITTED LEAVE TO FILE AN AMENDED PLEADING

While otherwise asking this Court to ignore the trial court's "ruminations" during oral argument, Respondent points to a single section of the transcript where Counsel for Appellant stated that he could amend the Third-Party Complaint if necessary. [R. p. 739, l. 19-25, R. 740, 1-6]. The lower court stated that Appellant could so move, but indicated,

in his next sentence, that he did not believe that the allegations could be made. [*Id.*]. After that exchange, the Court dismissed three causes of action and, thereafter, denied Appellants' motion to reconsider, alter or amend judgment in chambers without oral argument and without the benefit of a transcript. [R. p. 8-22; R. p. 786-794; R. p. 4-6]. It was apparent from the denial of the motion in chambers without benefit of oral argument that a motion to amend the pleadings would be futile.

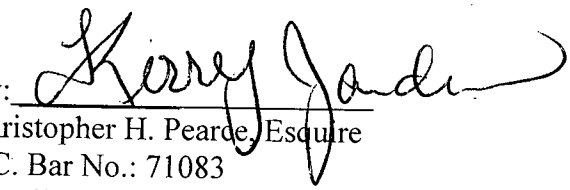
Appellant was effectually deprived of its opportunity to file and serve an amended Third-Party Complaint. *See Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006). Appellant should be granted leave, by this Court, to file an Amended Third-Party Complaint, or at a minimum a motion to amend the Third-Party Complaint. Respondent is incorrect – this Court is the correct forum to determine whether the Appellant should such leave.

In this case, Appellant has asserted additional theories of recovery and factual allegations, which when taken as true may state a claim upon which relief may be granted, to the extent it has not done so in its Third-Party Complaint. Accordingly, to the extent that the Court affirms the partial dismissal of the Third-Party Complaint, the Court should grant Appellant leave to file an Amended Third-Party Complaint within a reasonable time period. However, to the extent this Court does not permit Appellant leave to file an Amended Third-Party Complaint, then Appellant requests that this Court either clarify that the lower court's Order was without prejudice or permit Appellant leave to file a motion to amend its Third-Party Complaint.

CONCLUSION

For the foregoing reasons, Appellant Myrtle Beach Golf & Yacht Club Association, Inc. respectfully requests that the Court reverse the lower court's decision.

THE PEARCE LAW GROUP, P.C.

By: 

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