

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Blackstone and Chase, LLC; Mark T.)
 Thomas; Tensley E. Thomas; and)
 Bradley W. Kerr,)
)
 Plaintiffs,)
)
 v.)
)
 Margaret H. Durham Living Trust;)
 Multiplex Systems, Inc.; Ice Rink)
 Engineering and Manufacturing Company,)
 LLC; EZ Glide 350, LLC; Margaret H.)
 Durham; James W. Durham; Helen W.)
 Shockley; and Tamala D. Crane,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No. 2017-CP-23-07837

ORDER

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 NOV 29 2018
 SC Court of Appeals

This matter arises out of a dispute between the parties over a written lease agreement and its interpretation and enforceability. The Plaintiffs are the tenants who were evicted and removed from the premises by the Defendants, the landlord, for failure to pay rent.

EXISTENCE OF LEASE SUMMARY JUDGMENT

Plaintiffs motioned verbally for summary judgment regarding the existence of a lease. Defendant Margaret H. Durham Living Trust (hereafter the "Landlord") entered into a contract for lease (the "Lease") of real property with Plaintiff Blackstone and Chase, LLC represented by Plaintiff Bradley W. Kerr. During Lease negotiations Kerr represented himself as a member of Blackstone and Chase, LLC and Plaintiffs acknowledge as much. Blackstone and Chase, LLC is a member managed limited liability company and

"any member of a member-managed company . . . may sign and deliver any instrument transferring or affecting the company's interest in real property. The

instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument.”

S.C. Code Ann. §33-44-301(c).

Plaintiffs have provided no evidence of public restrictions upon the authority of the Members of Blackstone and Chase, LLC, and therefore, Landlord could rightly rely upon the inherent authority of Kerr to bind Blackstone and Chase, LLC as a member of the company.

After executing the Lease, Plaintiffs entered into the building and took possession of the premises as allowed in the Lease. Plaintiffs signed multiple addendums to the Lease. Plaintiffs admit in their Complaint that each and every Plaintiff made payment upon the Lease. Plaintiffs chose to benefit from the Lease and are therefore bound by the terms of the Lease. The acts of occupying the premises and paying upon the Lease were ratifications of the same by Plaintiffs.

That Kerr signed the contract with Landlord prior to the formation of Blackstone and Chase, LLC does not negate the enforceability of the Lease. The signatory to a pre-formation contract is personally liable upon the contract, and when a company “assumes the obligation [of a contract] by its own act after incorporation” it will also be held liable upon the contract. *Hansen v. Fields Co.*, 409 S.C. 541, 763 S.E.2d 31 (S.C., 2014). All members of Blackstone and Chase, LLC and the company itself made payment upon the Lease, Blackstone and Chase, LLC took possession of the premises under the Lease, and the signatory to the Lease became a member of the company able to bind the company in matters of real property. S.C. Code Ann. §33-44-301(c). The knowledge of the terms of the Lease known by the signatory Kerr is imputed to the company through its member Kerr who signed and received a copy of the Lease. *See Indep. Nat. Bank v. Buncombe Prof'l Park, LLC*, 411 S.C. 605, 608, 769 S.E.2d 663, 665 (2015) (“The rule is that a principal has constructive notice of all the material facts which its agent,

while acting in the scope of his authority, receives notice.”). Blackstone and Chase, LLC ratified the Lease “by accepting its benefits with full knowledge of its terms.” *Hansen, 541*.

Even had Plaintiff Blackstone and Chase, LLC not ratified the Lease, Kerr is still obligated to Landlord under the Lease, and any other occupants of the premises become guests of Kerr without the privilege of being tenants. Any attempt by Kerr to sublet or assign the Lease without Landlord’s permission would be a violation of Section 22 of the Lease. Therefore, even had Blackstone and Chase, LLC not ratified the Lease, Kerr is still bound by the Lease, and any occupants of the premises occupied the premises under the Lease and through Kerr.

The Court finds a valid contract was formed between Landlord and Kerr when he signed the Lease on behalf of Blackstone and Chase, LLC, and the company ratified the Lease when its member, Kerr, knowing the terms of the Lease, took possession of the premises and made payment upon the Lease for Blackstone and Chase, LLC. A single member of an LLC may bind the company, and an operating agreement is ineffective against a party who gave value in good faith. S.C. Code Ann. §33-44-301(c). The other Plaintiffs received the benefit of the Lease, made payments upon the Lease, and recognized the Landlord as such thereby ratifying the contract.

SMOKE DAMAGE INCURRED BY DEFENDANTS

Defendants allege that more than the Landlord’s real property was damaged by smoke caused by Plaintiffs, and that their claims were to include the personal property owned by all Defendants and not just Landlord. To the extent the Defendants’ claims are unclear, the Court grants the Defendants motion to make a more definite statement.

Further, only Landlord is bound by the Lease, and the other Defendants who are occupants of the building are not so bound. Plaintiffs are liable to these Defendants for their tortious acts regardless of the nature of the Lease.

CONVERSION

Defendants allegations of conversion of personal property in the form of fixtures is a cause of action found in law. *Kutter v. Smith*, 69 U.S. 491, 495, 17 L. Ed. 830 (1864). Defendants are entitled to conduct discovery on this issue and a dismissal at this stage would be premature.

NUISANCE

Defendants allege that Plaintiffs music was played at a nuisance volume while Plaintiffs allege their music was not so voluminous. Defendants are entitled to conduct discovery on this issue and a dismissal at this stage would be premature.

ABUSE OF PROCESS

The Court has already acknowledged that Plaintiffs have made this case a “procedural Labyrinth” and admonished them for failing to abide by Rule 8(a). Order, February 28, 2018, Judge Perry H. Gravely. Plaintiffs continue this behavior showing a disregard of judicial economy. Plaintiffs multiple complaints against multiple persons without specificity of who took what action leaves Defendants and the Court in a quagmire parsing what the Plaintiffs mean.

There is a factual question on why Plaintiffs have brought such convoluted and lengthy filings, and under such circumstances, Defendants charge of Abuse of Process should remain for determination by a finder of fact.

DEFENDANTS MOTION TO STRIKE DEFENSES

Plaintiffs Motion for a More Definite Statement under Rule 12(e) regarding Defendants Second, Third, and Sixth Defenses is denied.

FAILURE TO STATE A CLAIM PREVIOUSLY LITIGATE

Plaintiffs present thirteen causes of action in their Second Amended Complaint that are either new or rewritten from their previous Amended Complaint. Defendants earlier Motion to Dismiss for Failure to State a Claim was only heard for the earlier Amended Complaint that did not include the new and corrected causes of action. Defendants' current claim has not been previously litigated, and therefore the Defendants may assert this defense.

JUDGMENT ON THE PLEADINGS

Plaintiffs' Motion for Judgment on the Pleadings is inappropriate because there are numerous issues of fact. Plaintiffs and Defendants are at odds over the existence of the Lease, the validity of its clauses, its enforceability, the legality of the eviction and distraint, the existence of a nuisance, and even whether there was a fire or a smoke incident upon the premises. These issues necessitate discovery and later determination by the finder of fact.

To the extent the Court is to rule on the pleadings before it, Landlord was contractually authorized to evict the Plaintiffs without resort to the judicial process and to distraint or seize the property within the premises to cover damages incurred by Landlord.

Section 20.2 of the Lease between Landlord and Plaintiffs authorizes the Landlord to "reenter and remove all persons and properties from the Premises and dispose of such property as it deems fit." Such remedy may be resorted to "with or without legal process." *Id.* In commercial leases, the provisions of the contract control. See *KBR Development v. Yansy Realty, Inc.* 2005 WL 7083858, No. 2005-UP-217, 2. (S.C. Court of Appeals) ("The lease provided KBR with the self-help option of repossessing the property if lease payments were overdue by fifteen days. Therefore, KBR acted within their legal rights."). Improvements made to the real estate by Plaintiffs become the property of Landlord under Section 9.4 of the Lease. *Id.* ("All Lessee

Alterations, including, but not limited to, all walls, railings, carpeting, floor and wall coverings and other permanent real estate fixtures (excluding, however, Lessee's moveable trade fixtures and equipment) made by, for, or at the direction of Lessee, will when made, become the property of Lessor and will remain upon the Premises at the expiration or earlier termination of this Lease.") Trade fixtures installed by Plaintiffs become the property of Landlord if not removed by the termination of the Lease. *Id.* ("Any trade fixtures or equipment not removed by Lessee at the expiration or earlier termination of this Lease will, at the Lessor's option, become the property of the Lessor or Lessor will be entitled to remove and dispose of such property.") Consequently, Landlord was within its contractual rights to take the actions complained of by Plaintiffs.

ABANDONMENT, WAIVER, ESTOPPEL, LACHES AND UNCLEAR HANDS

Plaintiffs make a multitude of claims on events ongoing for more than a year and Defendants may respond to the same with any defense supported by the facts as determined by the fact finder. To rule upon said defenses prior to discovery is premature.

DEFAULT

Plaintiffs request to dismiss the Defendants defense of default is denied because the Lease was validly entered, and the Plaintiffs have waived the right to challenge it and are estopped from the same due to their actions availing themselves of the benefits of the Lease.

MITIGATION OF DAMAGES

Plaintiffs allege that Defendants have failed to mitigate damages by not reletting the property. However, Defendants allege they have been unable to relet the property due to Plaintiffs' failure to cooperate in the removal of personal property. These allegations are directly

contrary and present a factual dispute unripe for dismissal under SCRCP 12(b)(6) or summary judgment. Therefore, this claim must remain.

MOTION TO STRIKE PARAGRAPHS

Plaintiffs Second Amended Complaint includes multiple paragraphs. Defendants have denied the allegations of Plaintiffs, and Plaintiffs cannot re-characterize such denials. Plaintiffs must now proceed with Defendants response. Motion is denied.

CONCLUSION

Plaintiffs' arguments for summary judgment are premature. Defendants cannot be denied their defenses, and the Court will not dismiss Defendants Answer. Plaintiffs have brought multiple, redundant claims on what should be a simple case, and have filed lengthy pleadings with alternative arguments necessitating the complex defenses by Defendants. Plaintiff cannot now object to Defendants actions to defend themselves against such a Complaint. Therefore, Plaintiffs' Motion to dismiss and for partial summary judgment is denied.

Therefore, the Court orders as follows:

- 1) Plaintiffs Motion for Summary Judgment is denied.
- 2) Plaintiffs Motion to dismiss the counterclaims and defenses of Defendants is denied.
- 3) Defendants Motion to amend their counterclaims is granted.
- 4) The written Lease between Blackstone and Chase, LLC and The Margaret H. Durham Living Trust is valid and enforceable.

IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Circuit Court Judge

October ____, 2018
Greenville, South Carolina



Greenville Common Pleas

Case Caption: Blackstone And Chase Llc , plaintiff, et al vs. Margaret H Durham Living Trust , defendant, et al
Case Number: 2017CP2307837
Type: Order/Summary Judgment

So Ordered

s/ Honorable G. Thomas Cooper, Jr. Circuit
Judge 2126



DICKSON DAVIS LAW FIRM

NOTICE OF APPEAL DEFICIENCY COVER LETTER

November 27, 2018

Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
P.O. Box 11629
Columbia, SC 29211

VIA CERTIFIED MAIL

Re : *Blackstone and Chase, LLC et al. v. Margaret H. Durham Living Trust et al.*
Case No. : 2017-CP-23-07837
File Id. : 2017-01-104

Dear Clerk of Court:

This letter is to inform you I represent Appellants Blackstone and Chase, LLC et al. in this matter. Included is the following noted deficiency to include the court order issued by the Honorable G. Thomas Cooper, Jr., on October 03, 2018, as requested by the Appellate Clerk of Court on November 9, 2018, with the deadline for submission being November 27, 2018. As discussed, the Appellate Clerk of Court will receive a faxed copy of the same along with receiving a copy via certified mail.

Please do not hesitate to contact me with respect to any ministerial issues related to this matter. Thank you for your assistance in this matter.

Respectfully submitted this 27 day of November, 2018.

Deborah D. Davis, Esq.
SC Bar No.: 102942
Attorney for Appellants

cc: Robert K. Merting, Joshua Hudson

/ddd

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FAX COVER SHEET

TO	Shelby
COMPANY	S.C. Appellate Clerk of Court
FAX NUMBER	18037341839
FROM	Deborah Davis
DATE	2018-11-27 18:17:37 GMT
RE	Appellate Case No. 2018-001976

COVER MESSAGE

Shelby,

As discussed, please see the attached cover letter and order required to cure the deficiency per the notice on November 9, 2018.

Best Regards,

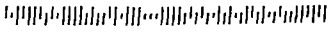
Deborah D. Davis, Esq.
Attorney at Law

Dickson Davis Law Firm, LLC
439 Congaree Road
Mailbox 6
Greenville, SC 29607
www.dicksondavislaw.com

864.729.3424 tel
864.752.1424 fax
d.davis@dicksondavislaw.com

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Attn: Shelby
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