THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2010-CP-39-00-405

John Walton ..... **Respondent,**

vs.

Mitchell L. Bagwell ..... **Appellant.**

RESPONDENT'S FINAL BRIEF

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STANDARD OF REVIEW

This case is an action at law seeking money damages for breach of a Lease Agreement between Respondent Walton, as Lessor, and Appellant Bagwell, as Lessee. It was tried without a jury before the Honorable Edward Miller on February 20, 2013, and judgment was entered for Walton against Bagwell in the amount of Fifty One Thousand Six Hundred Sixty and No/100 ($51,660.00) Dollars; therefore, the Findings of Fact of the Trial Judge are not to be disturbed on appeal unless there is no evidence to reasonably support the Trial Judge's findings. **Eldeco, Inc. v. Charleston County School District, et. al., 372 S.C. 470, 642 S.E.2d 726 (S.C. 2007); Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004)**

DISCUSSION

In this case, the evidence is not only more than ample to support Judge Miller's Findings of Facts, but they are so strongly in support of Walton's claims for breach that Judge Miller had no choice but rule as he did and, accordingly, his decision must be affirmed.

Judge Miller's written Order succinctly sets forth his specific Findings of Facts upon which he decided the case and his application of the law in regards to those facts is correct in each and every respect. Judge Miller, on the record at the close of all evidence, explained his calculation of damages in a very reasonable and logical way and his ruling in regards to the arbitration issue raised by Appellant

Bagwell is clearly correct in accordance with South Carolina law. **(R.,p.184, l.16-p.186, l.9; p.178, l.25-p.182, l.3)** In fact, a review of Appellant's own testimony **(R., pp.139-164)** is all that is needed for this Court to affirm Judge Miller's decision and the testimony of Dee Bauknight **(R.,pp.165-177)**, the realtor who was engaged by Bagwell to assist and advise him throughout the negotiations leading up to the Lease Agreement, further shows that Bagwell's defenses and his appeal are totally without merit.

Reviewing Bagwell's testimony, we find the following:

(1) Walton did not make any representations to Bagwell in regard to Bagwell's intended use of the premises. **(R.,p.155, ll.18-19)**

(2) Bagwell did not rely upon any representations made by Nelson Garrison, the realtor with whom Walton listed the property and through whom the Lease was negotiated. **(R.,p.142, ll.5-8; p.143, ll.15-19; p.157, ll.1-4)**

(3) Bagwell read the Lease **(Pl. Exh. # 1 - R.,p.189-194)** before signing it. **(R.,p. 141, ll.11-18; p.144, ll.20-21)**

(4) Bagwell was, at all times from the beginning of the negotiations to the time he signed the Lease, fully aware of the Reciprocal Easement Agreement (REA) which restricted the sale of alcohol to be incidental to the serving of food. **(R.,p. 141, ll.11-18; p.155, l.20-p.156, l.25; p.161, ll.11-25; Pl. Exh. #7 - R.,pp.209-222)**

(5) Bagwell does not believe that his intended use violates the REA. **(R.,p.161, ll.11-25)**

(6) Bagwell did not seek legal advice from his legal counsel concerning the REA prior to signing the Lease. **(R.,p.162, ll.6-9)**

(7) Bagwell was represented and counselled throughout the Lease negotiations and the signing of same by his own realtor, Dee Bauknight. **(R.,p.139,. l.25-p.140, l.9; p.141, l.8-p.142, l.22; p.144, l.13-p.145, l.3)**

(8) Dee Bauknight, Bagwell's retained representative, told him early on that she believed his intended use would be ok but he had reservations so he met with Wes Nalley to be sure. **(R.,p.142, l.4-p.143, l.19)**

(9) Bagwell admitted that he did not trust what Nelson Garrison was telling him so he, along with his realtor, Dee Bauknight, met with Wes Nalley to explain his intended use to him and to obtain Wes Nalley's approval. At that meeting he says Wes Nalley approved the use of the premises as he explained it. **(R.,p.141; p.143, ll.7-19; p.144, ll.13-25; p.157, ll.1-4)**

(10) Bagwell admitted that Walton did not breach the agreement or terminate it but, rather claimed that Wes Nalley breached it and/or that Wes Nalley's actions were justification for his refusal to abide by the Lease even though Wes Nalley was not a party to the agreement nor a representative of Walton's. **(R.,p.148, ll.9-13; p.154, ll.2-8; p.159, ll.11-12; p.160, ll.5-8)**

(11) Bagwell has a college education having majored in business and finance. **(R.,p.154, ll.20-23)**

(12) Bagwell does not claim that Walton conspired with Nalley in anyway as he believes Nalley "changed" his mind after the meeting and did a 180 degree reversal because he disliked Walton. **(R.,p.148, l.25-p.149, l.4; p.163, ll.11-13)**

(13) Bagwell admits that he knew early on in the negotiations that the ultimate approval of his intended use of the premises as being within the REA Agreement would have to be made by Wes Nalley, but he never submitted his plan in writing to Nalley nor did he seek Nalley's written approval. **(R.,p.142, l.21-p.143, l.19; p.151, ll.18-21; p.161, l.11-p.162, l.5)**

Reviewing the testimony of Dee Bauknight, Bagwell's realtor agent who was called as a witness by Bagwell, the issues argued by Bagwell become even more absurd.

(1) Bagwell did not rely upon anything Nelson Garrison said in deciding to enter into the Lease Agreement with Walton. **(R.,p.172, ll.5-25)**

(2) Accordng to Dee Bauknight who has known Bagwell for years, Bagwell is a person with *"serious business experience"* and has *"the smarts of four 90 year olds."* She further described him as a person who was/is *"financially aware and risk averse" and one who could "sniff out something not right."* **(R.,p.171, ll.17-23)**

(3) Wes Nalley, at the meeting which she attended with Bagwell, approved the use of the premises as described by Bagwell and even stated in the meeting that *"we need something like this."* **(R.,p.169, ll.14-20)**

(4) Bauknight told Bagwell not to believe Nelson Garrison's representations that his intended use complied with the REA as Garrison's statement to just *"cover it with sheets"* was a *"red flag."* She even told him directly not to do that. **(R.,p.172, ll.5-15; p.175, l.24-p.176, l.9)**

(5) Bauknight said it was Nalley, not Walton, that caused Bagwell to stop payment on the check and refuse to honor the Lease. **(R.,p.174, ll.1-4)**

(6) Bauknight testified that she did not think Bagwell's intended use violated REA. **(R.,p.175, ll.5-9)**

(7) Bauknight was *"shocked"* that Nalley changed his mind. **(R.,p.169, ll.21-25)**

(8) Bauknight testified that the only fault of Walton's was hiring Nelson Garrison to list the property although no reliance was placed on anything Garrison said because neither she nor Bagwell believed him and they relied on Nalley's representations at the meeting where Bagwell described his

intended use to Nalley. **(R., p.177, ll.9-11; p.174, ll.1-4; p.172, ll.5-15; p.175, l.24-p.176, l.9)**

Based upon the above, it is respectfully submitted that the only decision that Judge Miller could have made was the one he made in regards to the breach and Walton's entitlement to damages. Of course, the amount of damages which he awarded is always subject to debate, but the damages were determined in a reasonable and logical way and well within Judge Miller's discretion. **(Pl. Exh. #10 - R.,p.241; R.,p.185, l.24-p.186, l.10)**

As for Bagwell's arguments as to Garrison's representations, it is submitted that he did not have a fiduciary relationship with Garrison or any other type of relationship with him to put fraud or negligent representation in play. **Carlson v. South Carolina State Plastering, LLC, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013); Nine v. Henderson, 313 S.C. 309, 437 S.E.2d 182 (Ct. App. 1993); Hendricks v. Hicks, 374 S.C. 616, 649 S.E.2d 151 (Ct. App. 2007)** Furthermore, it is clear that Bagwell did not rely nor have a right to rely on anything Garrison may have told him and Walton never made any representations to him at all.

Bagwell raises the issue of arbitration but, again, without merit. The law of South Carolina is that arbitration may be waived and that in order to establish waiver, a party seeking arbitration has to show that he was prejudiced through an undue burden caused by delay in the failure to arbitrate. Bagwell did not and cannot do this. Walton offered to arbitrate the claim initially **(Pl. Exh. #5 - R.,p.207)** but Bagwell's attorney refused and invited the lawsuit. **(Pl. Exh. #6 - R.,p.208)**

Bagwell thereafter exercised discovery through Interrogatories and Requests for Admissions and Walton did the same. **(Pl. Exh. #9 - Sup.R.,p.240(a)-252(a); Def. Exh. #10 - R.,p.254-263)** Neither party moved to compel arbitration and it was only when the case was called for trial that Bagwell began to complain. At that time, significant delay had occurred and arbitration, if it had then been ordered, would have caused even further delay. Furthermore, the case was heard by a Judge without a jury which is basically what an arbitrator would have done and, had arbitration occurred, Bagwell would not have had a right to appeal as he has done. Clearly, under the facts of this situation, arbitration was waived by the parties and Judge Miller's ruling on that issue was correct. **Carlson v. South Carolina State Plastering, LLC, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013)**

As for Bagwell's ambiguity claim, it is clearly a question of law whether an ambiguity exists. Once a Court decides the language of the contract is ambiguous evidence may be admitted to show the intent of the parties but intent is a question of fact. **Wallace v. Day, 390 S.C. 69, 700 S.E.2d 446 (Ct. App. 2010)** Judge Miller ruled that no ambiguity existed but, notwithstanding his ruling, Bagwell's own testimony defeats his argument that Judge Miller erred. The Lease is unambiguous in stating the premises was to be used as a restaurant and the REA was clear that the sale of alcohol had to be incidental to the serving of food -i.e., a restaurant. According to Bagwell's testimony, that is what he intended to use the premises for -i.e., a restaurant, that his intended use was described to Nalley and Nalley approved. How then can ambiguity be claimed or that Bagwell was prejudiced by

Judge Miller's findings? Clearly, the intentions of the parties - Bagwell and Walton - were fully disclosed by the evidence and nothing was overlooked.

CONCLUSION

Based upon the above, it is respectfully submitted that Appellant Bagwell's appeal is totally without merit and that Judge Miller's decision is correct in law and fact. Accordingly, Judge Miller's Order dated, March 18, 2013, granting judgment to Respondent Walton in the amount of Fifty One Thousand Six Hundred Sixty and No/100 ($51,660.00) Dollars should be affirmed.

Respectfully submitted,

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June 3, 2014

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CERTIFICATE OF COUNSEL
(Respondent's Final Brief)

The undersigned certifies that ***RESPONDENTS' BRIEF*** complies with Rule 211(b), SCACR.

June 3, 2014

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PROOF OF SERVICE
(RESPONDENT'S FINAL BRIEF)

I certify that I have served ***RESPONDENT'S FINAL BRIEF*** upon the ***Appellant, by and through his attorney of record,*** by depositing a copy of it in the United States Mail, postage prepaid, on ***June 4th, 2014,*** addressed as follows:

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