Order Granting Plaintiff's Application for Ejectment

Dated January 31, 2018

LNJ, LLC
v.
Adams Outdoor Advertising
Case No. 2017cv1010701345
In the Magistrate Court

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SC Court of Appeals

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CIVIL CASE NUMBER
2017cv1010701345

IN THE MAGISTRATE'S COURT

LNJ, LLC,

PLAINTIFF,

vs.

ADAMS OUTDOOR ADVERTISING,

DEFENDANT.

ORDER GRANTING PLAINTIFF'S APPLICATION FOR EJECTMENT

FILED IN CHARLESTON COUNTY

JAN 31 2018

CITY SMALL CLAIMS COURT

The plaintiff LNJ, LLC ("LNJ") filed the above-captioned action seeking to eject the defendant, Adams Outdoor Advertising ("Adams"), which maintains a billboard on property owned by LNJ located at 289 Huger Street in Charleston. The Court held a bench trial on November 17, 2017, at which LNJ was represented by Merritt G. Abney, Esq., and Adams was represented by Jeffrey S. Tibbals, Esq. Having carefully considered the trial testimony and evidence, the applicable law, and the arguments of counsel, the Court hereby grants the application for ejectment and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Until September of 2015, Walter and Thomas Brooks (the "Brooks") were the owners, directly or through entities they controlled, of approximately 3 acres of real estate located at 287 Huger Street (the "Brooks Tract"), including the .5-acre parcel currently owned by LNJ and known as 289 Huger Street. (Tr. 56, 43-64.)

Adams' predecessor-in-interest, Infinity Outdoor Advertising, Inc. ("Infinity") approached the Brooks in 2000 about entering into a ground lease pursuant to which Infinity would place an advertising billboard on the Brooks Tract. (Tr. 56-57.) During negotiations with

Infinity over the terms of the ground lease, the Brooks insisted they be permitted to terminate the lease on 90 days' notice in the event the Brooks, or their assignees, decided to sell or lease the Brooks Tract or improve it by erecting a permanent structure on the property. (Tr. 58-60.)

The Brooks and Infinity subsequently executed a Ground Lease, effective November 12, 2000 (the "Ground Lease"). (Pls. Ex. 1.) The first page of the Ground Lease is a standard form contract prepared by Infinity, which provides for a 10-year term and contains no right to terminate early due to a sale, lease or improvement of the property. (*Id.*) An Addendum A to the Ground Lease, however, states the lessor may terminate the Ground Lease, upon 90 days' written notice, in the event the property is sold or leased or a bona fide residential or commercial structure is erected on the property. (*Id.*) Specifically, Addendum A provides as follows:

> In the event that the Property, occupied by Infinity Outdoor, Inc. structure (s) is to be leased, sold OR improved by erecting a bona fide permanent private commercial or residential building, LESSOR may terminate this Lease upon: i) giving Infinity Outdoor, Inc. ninety (90) days' written notice of termination; ii) LESSOR'S refunding to the rent previously paid for the unexpired portion of this Lease beyond the termination date. Infinity Outdoor, Inc. agrees to remove its advertising structures within the ninety (90) day period. Any right of termination stated herein in favor of the LESSOR or its successors and assigns shall not exist and cannot be exercised: I) if the Property shall be condemned or taken by power of eminent domain, ii) if the Property is conveyed to an entity having or delegated the power of eminent domain, iii) if the LESSOR's principal purpose in erecting an improvement is to terminate this Lease under this provision; or iv) if the purpose of the termination is to erect another outdoor advertising structure.

After the Ground Lease was executed, Infinity erected a billboard (the "Billboard") on the Brooks Tract. The Billboard stands immediately adjacent to, and above, a building located on the western edge of the Brooks Tract that has been occupied since the 1990s by Palmetto Brewery, which leased the building from the Brooks. (Pls. Ex. 8; Tr. 85).

On September 1, 2015, LNJ's immediate predecessor-in-interest, Huger Street Holdings, LLC ("HSH"), acquired the Brooks Tract and received an assignment of the Ground Lease. (Pls. Ex. 5.) HSH is a special purpose entity, which was created by its members for the sole purpose

of acquiring the Brooks Tract and developing residential apartment units on the property. (Tr. 63.) After HSH acquired the Brooks Tract, it obtained the necessary approvals and permits from the Charleston Board of Architectural Review and the City of Charleston to erect a building containing 198 apartment units, along with various amenities, on the Brooks Tract. (Tr. 64-65; Pls. Ex. 6; Pls Ex. 7). As of the date of trial, construction of the project was underway. (Tr. 65; *compare* Pls. Ex. 8 *with* Pls. Ex. 9).

In January of 2017, HSH approached the owner of Palmetto Brewery, Larry Lipov ("Lipov"), about selling the .5 acre portion of Brooks Tract on which the building is located to the Brewery. (Tr. 84-85.)[1] The parties subsequently entered into a purchase and sale agreement the following month. (*Id.*)

Via letter dated January 18, 2017, and delivered via Federal Express and electronic mail, HSH's counsel notified Adams in writing that it was terminating the Ground Lease, pursuant to Addendum A, effective 90 days after the date of the notice. (Pls. Ex. 10.) HSH directed Adams to remove the Billboard within the 90-day period as required by Addendum A. (*Id.*) Adams received the notice, and, on January 25, 2017, representatives of Adams and HSH exchanged email correspondence regarding the termination in which HSH indicated it was willing to allow the Billboard to remain until construction on the apartment building began and Adams assured HSH it could remove the Billboard within 30 days once HSH instructed Adams to remove it. (Pls. Ex. 11.)

Meanwhile, Lipov and his wife formed LNJ for the purpose of acquiring from HSH the .5-acre portion of the Brooks Tract on which the Palmetto Brewery is located. (Tr. 84-85.) The

[1] HSH's project does not require demolition of the Palmetto Brewery building. (Pls. Ex. 6.)

.5-acre parcel was subdivided from the Brooks Tract and became known as 289 Huger Street ("289 Huger Street").[2]

On April 20, 2017, as HSH and LNJ were preparing to close on the sale of 289 Huger Street, HSH sent Adams a proposed estoppel certificate, which would have required Adams to confirm that HSH validly terminated the Ground Lease. (Pls. Ex. 13.) On April 26, Adams responded to HSH that Addendum A required erection of a permanent structure on the specific portion of the Brooks Tract where the Billboard is located and that, unless HSH intended to erect a structure on that portion of the Brooks Tract, HSH had no right to terminate the Ground Lease. (*Id.*) HGH responded and made additional demands for Adams to remove the Billboard via letters dated April 26, 2017 and May 17, 2017. (Pls. Ex. 14; Pls. Ex. 16).

On April 28, 2017, HSH and LNJ closed on the sale of 289 Huger Street to LNJ. (Pls. Ex. 18). Because Adams had not removed the Billboard from 289 Huger Street by the date of closing, LNJ took an assignment of the Ground Lease. (Tr. 102-106; Pls. Ex. 19.) After Adams continued to refuse to remove the Billboard, LNJ commenced this action for ejectment.

CONCLUSIONS OF LAW

As the current owner of 289 Huger Street, LNJ seeks to evict Adams and require it to remove the Billboard. LNJ argues HSH had the right to terminate the Ground Lease based upon two separate grounds: 1) HSH is erecting a multi-family residential structure—a "bona fide permanent private residential building"—on the Brooks Tract and 2) HSH sold the specific portion of the Brooks Tract on which the Billboard is located—289 Huger Street—to LNJ. LNJ also argues HSH exercised its right to terminate in substantial compliance with the terms of the Ground Lease. Adams argues the termination was ineffective on several grounds. The Court addresses each of these arguments below.

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[2] The remaining approximately 2.5 acres of the Brooks Tract owned by HSH is known as 287 Huger Street.

HSH's Right to Terminate

Adams argues HSH had no right to terminate the Ground Lease. According to Adams, the right of termination under Addendum A arises only if the lessor erects a permanent structure on the specific portion of the property where the Billboard arises from the ground. More specifically, Adams contends that the phrase "by erecting a bona fide permanent private commercial or residential building" modifies the words "leased", "sold" and "improved," rather than only the word "improved." Thus, Adams contends a lease or sale, standing alone, is insufficient to trigger the right to terminate. Instead, the lessor must *also* erect a structure on the property before the right to terminate will arise in connection with a lease or sale. The Court disagrees.

Adams' interpretation is contrary to the plain terms of Addendum A and settled rules of contract construction. "The general rule of contract construction requires that language used in a contract must be interpreted in its natural and ordinary sense... [and, therefore] a contract should receive [a] sensible and reasonable construction and not such [a] construction as will lead to absurd consequences." *Twenty Ninth Avenue Corp. v. Great Atlantic & Pacific Tea Co., Inc.*, 311 S.C. 275, 277, 428 S.E.2d 734, 735 (Ct. App. 1993). The only sensible reading of Addendum A is that the phrase "by erecting a bona fide permanent private commercial or residential building" modifies *only* the word "improved" and does not also modify "leased" and "sold." A property can be "improved" by erecting a structure upon it. Property cannot be "sold" or "leased" by erecting a structure upon it. Adams' interpretation makes no sense.

Moreover, Adams' interpretation violates the grammatical "rule of the last antecedent," which provides that "a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows." *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); see also *Black's Law Dictionary* 1532–1533 (10th ed. 2014) ("[Q]ualifying words or

phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire { "pageset": "S7d writing"). In this case, the rule requires that the qualifying phrase—"by erecting a bona fide permanent private commercial or residential building"—modifies only the last antecedent—"improved"—and does not also modify the remote words in the series—"leased" and "sold."

Furthermore, Adams' interpretation would render the words "leased" and "sold" superfluous. The South Carolina Supreme Court has held that "[a]n interpretation that gives meaning to all parts of [a] contract is preferable to one which renders provisions in [a] contract meaningless or superfluous." *Stevens Aviation, Inc. v. DynCorp Intern*, LLC, 407 S.C. 407, 417 756 S.E.2d 148, 153 (2014). In this case, if the phrase "by erecting a bona fide permanent private commercial or residential building" is read as modifying "leased" and "sold," as well as "improved" then the terms leased and sold are superfluous because termination would require improvement of the property by erection of structure whether or not the property is being sold or leased.

Adams also argues the right of termination provided for in Addendum A applies only when improvements will be made to the specific portion of the Brooks Tract where the Billboard arises from the ground, as opposed to anywhere on the Brooks Tract. The Court disagrees. Addendum A expressly defines the "Property" as 287 Huger Street (i.e. the entire Brooks Tract prior to the sale of 289 Huger Street to LNJ). The right to terminate arises when "the Property, occupied by Infinity Outdoor, Inc. structure (s) is to be leased, sold OR improved . . . ." An owner would not sell or lease *only* the specific portion of the property where the Billboard arises from the ground. Thus, the most sensible interpretation of this provision is that the right to terminate applies when any portion of the Property to be leased, sold or improved, not merely

when the specific portion of the Property where the Billboard arises out of the ground is leased, sold or improved.

The Court finds the relevant provisions of Addendum A discussed above are unambiguous. The only natural, sensible, and reasonable construction of Addendum A is that a sale of the property, a lease of the property, or improvement of any portion of the Property by erection of a bona fide commercial or residential structure are each independently sufficient to trigger the right to terminate.

In the alternative, the Court finds that any ambiguity regarding the meaning of Addendum A is resolved in LNJ's favor by the testimony of Walter Brooks. Brooks testified he was directly involved in the negotiations over the Ground Lease and that he and his brother proposed the termination provisions contained in Addendum A. (Tr. 58-59.) Brooks testified his intention was that "if we sold the property, leased the property, or in any way that that structure was going to interfere with the plans of ours or anybody that we sold it to or leased it to, we could have (sic) 90 days' notice to have the sign taken down." (Tr. 59-60.) Brooks agreed that HSH's plans for the Brooks Tract are precisely the circumstances in which the Brooks intended the right to terminate would apply. (Tr. 60.)

The only evidence Adams introduced regarding the intention of the parties with respect to Addendum A was the testimony of Randall Romig, a former Infinity and Adams executive who executed the Ground Lease on behalf of Infinity. Romig testified Infinity's intention was that the termination right would be triggered only by construction on the portion of the property where the Billboard is located. (Tr. 33.) However, Romig admitted he was not involved in the negotiation or drafting of Addendum A, that he did not communicate with the Brooks regarding the termination right, and that the Brooks would know more than Romig regarding the intention of the parties with respect to Addendum A. (Tr. 34, 44, 48-49.) Thus, even if the Court were to

find Addendum A to be ambiguous (and it does not), the Court would find the parol evidence introduced at trial demonstrates LNJ's interpretation of the agreement is most consistent with the intention of the parties.

Next, the Court finds none of the circumstances under which Addendum A prohibits the lessor from terminating the Ground Lease apply. HSH does not have the power of eminent domain, it does not plan to erect a new billboard on the property, and it has not undertaken construction on the Brooks Tract solely for the purpose of terminating the Ground Lease. (Tr. 70.)

In light the above, the Court agrees with LNJ that HSH had the right to terminate the Ground Lease. Two events occurred which were each independently sufficient to trigger HSH's right to terminate: 1) HSH is pursuing plans erect a multi-family residential structure—a "bona fide permanent private residential building"—on the Brooks Tract and 2) HSH sold the specific portion of the Brooks Tract on which the Billboard is located, to LNJ.

Manner of Termination

Adams next argues HSH's notice of termination was deficient in several respects, each of which the Court addresses below. As an initial matter, however, the Court will address Adams' contention that termination of the Ground Lease would result in forfeiture and, therefore, strict compliance with the notice provision in the Ground Lease is required. As support for this argument, Adams relies upon *Litchfield Co. of South Carolina, Inc. v. Kiriakides*, 290 S.C. 220, 226, 349 S.E.2d 344, 347 (Ct. App. 1986). In *Kiriakides*, the Court of Appeals held that termination of a commercial lease following tenant's failure to timely pay two month's rent would work a forfeiture of more than $1,500,000 in improvements made by the lessee to the property and loss of a lease that did not expire for another 30 years. The Court stated that forfeiture provisions of a lease are strictly construed and "when a forfeiture depends upon giving

a written notice of default, it must appear that the notice was given in strict compliance with the contract both as to time and content." *Id.* The Court concluded that, because the lessor failed to prove it mailed a notice of termination before the lessee tendered the past-due rent, the lessor was precluded from terminating the lease. *Id.* at 226, 349 S.E.2d at 348.

Kiriakides is readily distinguishable from the instant case. First, unlike the default provision at issue in *Kiriakides*, Addendum A is not a forfeiture provision. A "forfeiture" is a the "loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." *Black's Law Dictionary* 661 (7th ed. 1999). The lessor's right to terminate the Ground Lease under Addendum A, however, is not dependent upon a breach or default on the part of the lessee. Rather, the parties to the Ground Lease specifically agreed the lessor had the right to terminate upon occurrence of any of the events specified in Addendum A, none of which relate to any breach or failure to perform by the lessee. Because Addendum A is not a forfeiture provision, *Kiriakides* does not apply.

Moreover, unlike the lessee in *Kiriakedes*, Adams presented no evidence that removal of the Billboard would result in forfeiture. In *Kiriakedes*, the lessee stood to lose $1,500,000 in improvements to the property and lease with 30 years remaining. In this case, by contrast, the Billboard has stood on the Brooks Tract for 17 years and the current term expires in 2020. Adams presented no evidence that it would lose any investment as a result of early termination of the Ground Lease. And Adams plainly would not lose the benefit of prepaid rent because Addendum A expressly requires a refund to the lessee of any pre-paid rent for the period beyond the termination date.

Finally, the primary holding of *Kiriakedes* was that the lessors failed to prove they delivered notice of termination <u>*at all*</u> before the lessees tendered the past-due rent. In this case, by contrast, there is no dispute that Adams received the notice of termination. Adams merely

contends that HSH failed to satisfy certain technical requirements related to notice. *Kiriakides* did not address these issues and therefore Adams' reliance on *Kiriakides* is misplaced.

Turning to the specific deficiencies alleged by Adams, it first argues the Ground Lease required notices to be sent via certified mail. Because HSH sent the notice of termination via Federal Express, Adams argues, the notice was ineffective. Addendum A requires only "written notice of termination." However, the first page of the Ground Lease states "[a]ll notices sent under this lease shall be by certified mail, return receipt requested." (Pls. Ex. 1.) Because Adams did not send the notice of termination via certified mail, it did not strictly comply with this provision.

Nevertheless, the Court concludes HSH's failure to send the notice via certified mail did not render it ineffective because HSH substantially complied with the notice provision by sending it via Federal Express. Delivery via Federal Express sufficiently served the purpose of the notice provision because Federal Express is the functional equivalent of certified mail.

In addition, there is no dispute Adams received actual notice of termination. Under South Carolina law, strict compliance with a prescribed manner of notice is not required if the other party receives actual notice. *Hammond v. Tilghman Lakes, Inc.*, 295 S.C. 152, 154, 367 S.E.2d 446, 447 (Ct. App. 1988) ("[n]otice in a prescribed manner is not required where a party has actual notice and has not suffered prejudice by the other's failure strictly to follow the contract.") There is no dispute in this case that Adams received the January 18, 2017 notice of termination within days of the letter, and the Court finds Adams was not prejudiced by HSH's delivery of the notice via Federal Express. Representatives of Adams and HSH corresponded via email regarding the notice on January 25, 2017. Because there is no question Adams received the notice, the failure to deliver it via certified mail was immaterial.

Next, Adams argues the notice of termination was ineffective because HSH did not tender a refund of unearned rent with the notice. Addendum A requires the lessor to refund any prepaid rent for the period beyond the date of termination. Because Adams prepaid rent for 2017, Adams would be entitled to a refund of any portion of the rent it prepaid for the period beyond the termination date. HSH offered to refund Adams the applicable prorated portion of the prepaid rent as soon as it removed the Billboard. (Pls. Ex. 14.) Adams argues, however, that HSH was required to tender the refund *with the notice of termination*. The Court disagrees.

Addendum A required Adams to remove the Billboard within the 90-day notice period. The amount of the refund remains unknown until Adams actually removes the Billboard. HSH informed Adams in writing that it was ready and willing to refund the applicable prorated portion as soon as Adams removed the structure, but Adams informed HSH it would not remove the Billboard because it believed HSH had no right to terminate. Thus, HSH's failure to tender a refund with the initial notice of termination does not render the notice ineffective.

Finally, Adams argues the notice was ineffective because HSH failed to identify which of the termination "triggers" in Addendum A it was relying upon to terminate the Ground Lease. But Addendum A does not require the notice to specify the basis for termination. In any event, email correspondence dated January 25, 2017, between representatives of Adams and HSH reveal Adams understood HSH was terminating based upon its development of the property. (Pls. Ex. 11.) Thus, HSH's failure to identify the specific basis for termination in the January 18, 2017 notice does not render the notice ineffective.

In light of the above, the Court concludes HSH effectively terminated the Ground Lease via the January 18, 2017 notice of termination.

Next, Adams argues the notice of termination was ineffective because HSH did not tender a refund of unearned rent with the notice. Addendum A requires the lessor to refund any prepaid rent for the period beyond the date of termination. Because Adams prepaid rent for 2017, Adams would be entitled to a refund of any portion of the rent it prepaid for the period beyond the termination date. HSH offered to refund Adams the applicable prorated portion of the prepaid rent as soon as it removed the Billboard. (Pls. Ex. 14.) Adams argues, however, that HSH was required to tender the refund *with the notice of termination*. The Court disagrees.

Addendum A required Adams to remove the Billboard within the 90-day notice period. The amount of the refund remains unknown until Adams actually removes the Billboard. HSH informed Adams in writing that it was ready and willing to refund the applicable prorated portion as soon as Adams removed the structure, but Adams informed HSH it would not remove the Billboard because it believed HSH had no right to terminate. Thus, HSH's failure to tender a refund with the initial notice of termination does not render the notice ineffective.

Finally, Adams argues the notice was ineffective because HSH failed to identify which of the termination "triggers" in Addendum A it was relying upon to terminate the Ground Lease. But Addendum A does not require the notice to specify the basis for termination. In any event, email correspondence dated January 25, 2017, between representatives of Adams and HSH reveal Adams understood HSH was terminating based upon its development of the property. (Pls. Ex. 11.) Thus, HSH's failure to identify the specific basis for termination in the January 18, 2017 notice does not render the notice ineffective.

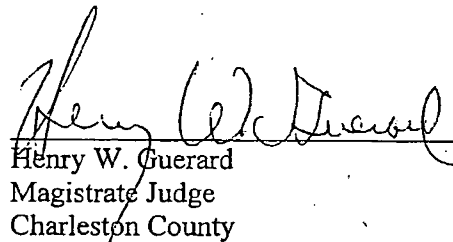
In light of the above, the Court concludes HSH effectively terminated the Ground Lease via the January 18, 2017 notice of termination.

Therefore, **IT IS HEREBY ORDERED** that LNJ's Application for Ejectment is granted and Adams is hereby evicted from the property located at 289 Huger Street, Charleston, South Carolina.

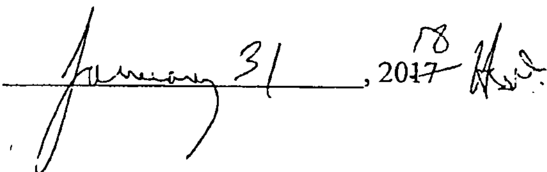
IT IS FURTHER ORDERED that Adams shall remove the Billboard, along with its foundation and footing, within thirty (30) days of the date of this order. Arrangements for entry onto the property by Adams personnel should be made in advance through counsel for LNJ, and removal activities should be scheduled to avoid business disruption to Palmetto Brewery. Care should be taken during removal to avoid damage the Palmetto Brewery building and its foundation

IT IS FURTHER ORDERED that, if Adams removes the Billboard before January 1, 2018, LNJ shall pay to Adams the prorated portion of rent Adams prepaid for 2017 for the period from the date of removal through the end of the year. If Adams removes the Billboard after January 1, 2018, no refund of rent paid under the Ground Lease for 2017 will be due to Adams from LNJ, but Adams shall pay to LNJ the prorated portion of the annual rental amount for the period beginning January 1, 2018 through the date of removal.

AND IT IS SO ORDERED.



Henry W. Guerard
Magistrate Judge
Charleston County



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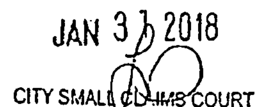

CITY SMALL CLAIMS COURT