THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jocelyn Newman, Circuit Court Judge

RECEIVED
APR 29 2019
SC Court of Appeals

Civil Action No. 2016-CP-40-03478
Appellate Case No. 2018-001062

Cricket Store 17, LLC d/b/a Taboo,..Appellant,

v.

City of Columbia Board of Zoning Appeals,..Respondent.

And

City of Columbia Zoning Administrator,...Counterclaimant,

v.

Cricket Store 17, LLC d/b/a Taboo,...Counterdefendant.

RESPONDENT'S BRIEF OPPOSING APPELLANT'S MOTIONS CONCERNING THE RECORD ON APPEAL AND APPELLANT'S REPLY BRIEF DEADLINE

This appeal concerns a permanent injunction entered after a February 9, 2018 evidentiary hearing. Appellant Cricket Store 17, LLC d/b/a Taboo ("Taboo") designated many items to include in the Record on Appeal that do not satisfy the rules, and the Respondent City objected to those materials. Taboo has since moved for relief relative to the Record on Appeal and its reply brief deadline.

Respondent opposes the Appellant's recent motions[1] that (1) seek to supplement the record on appeal with an employment contract that was not presented to the trial court and has no relevance to the issue on appeal, and (2) seek to postpone the filing of Appellant's Reply Brief concerning the substance of this appeal.

I. Taboo's Motion to Supplement Record lacks merit and should be denied.

Under Rule 212(b), SCACR, "a party desiring to supplement the Record on Appeal must move the appellate court for leave to do so." Rule 210(c), SCACR, states that the Record on Appeal "shall not" include matter that "was not presented to the lower court or tribunal."

Taboo wants to add to the record an employment contract for Brian Cook, the long-time Zoning Administrator for the City. The employment contract shows that in mid-January 2018, Cook agreed to become Town Administrator for the Town of Blythewood effective March 1, 2018. Taboo concedes that "this information was not presented to" the lower court. (Supplementation Document at 2.) Under Rule 210(c), the Record on Appeal "shall not" include this matter, and nothing in Rule 212 changes that fact. This alone is reason to deny the motion.

But since Taboo's long-running *ad hominem* attacks have devolved into accusing Mr. Cook and the City's counsel of lying to the trial court and suborning perjury, the City must respond in greater detail.

Brian Cook was still the City's Zoning Administrator on February 9, 2018 (Feb. 9, 2018 Tr. 9:22-24) when he testified during the injunction hearing. He testified about his observations and

[1] Both of Taboo's documents served on April 17, 2019 constitute motions because each is an application to the Court for an order granting relief. *See generally* Rule 7(b), SCRCP. The first document, entitled "Return to Respondent's Objections to Appellant's Designations of Matter & Hold Reply Brief Deadline in Abeyance" (hereafter, "Objections Document") specifically "prays that the Court dismiss" the City's objections concerning Taboo's designations and prays that the Court "hold in abeyance the briefing deadline for Appellant's reply brief...." (Objections Document at 8.) The second document, entitled "Motion to Supplement Record Rule 212, South Carolina Appellate Court Rules & Hold Reply Brief Deadline in Abeyance" (hereafter, "Supplementation Document") specifically "prays for an Order of the Court" allowing supplementation, remanding the case, and holding Taboo's reply brief deadline in abeyance. (Supplementation Document at 4.)

photographs taken at the Taboo store that showed the store to be an unlawful sexual device shop in violation of the Zoning Code. (*Id.* 12-27.) Cook's observations at Taboo were directly relevant to the injunction the City was seeking at the hearing. The fact that Cook was, it turns out, in his last month as the City's Zoning Administrator was irrelevant to his prior observations at Taboo.

Taboo did not ask about Cook's future employment plans. Rather, at the end of cross-examination, Taboo's counsel asked about the possibility of meeting with City staff to discuss the Taboo store. (*Id.* 52:15-20.) Cook explained that the licensing ordinance and zoning ordinance were enforced by different people, but that "myself or anyone on our staff would be glad to sit down with Taboo['s] owner or any other business that wanted to locate in the City of Columbia and talk about how to legally establish a business in Columbia. And we're available every day of the week generally for that." (*Id.* 52:21-53:3.)

Taboo asked whether it could make an appointment to meet with Mr. Cook, and Cook responded, "Certainly" and "We can set it up today if you like." (*Id.* 53:14-19.) Taboo's counsel then asked, "Well, before you leave, are you agreeable to giving us a date and time to come to your office to discuss that?" (*Id.* 53:20-22.) Cook replied: "We're specifically talking about how to establish a business that meets the zoning ordinance and not anything related to any open court cases, absolutely." (*Id.* 53:23-25.) Taboo's counsel agreed: "Sure. Absolutely." (*Id.* 54:1.)

Taboo's discussion with Mr. Cook at the end of cross-examination has nothing to do with the issue that was before the trial court, namely, whether Taboo was continuing to violate the zoning ordinance (the undisputed evidence showed that it was) such that the trial court should enter a permanent injunction. And the trial court understood that, as it later explained: "[F]rankly, the issue in the last motion hearing is whether your client continued to operate in violation of City ordinance and not whether you've been able to communicate, or your client has

been able to communicate, with the City to obtain some other sort of license. That is not before me." (May 14, 2018 Tr. 15:1-6.)

Taboo apparently assumed that Mr. Cook would be the City's Zoning Administrator indefinitely. At some point after the February 9 hearing, Taboo learned that Cook was no longer employed by the City. But instead of being content to meet with other City staff (as Cook mentioned in his testimony), Taboo accuses that "Mr. Cook did not testify truthfully" and asks this Court to authorize further judicial proceedings (in this appeal, or by remand) to determine whether "the City is acting reasonably." (Supplementation Document at 3.)

But as the trial court stated during argument on Taboo's reconsideration motion in May 2018, Taboo's complaint about communications with the City (about a general business license) was not the issue before the trial court when the court took up the permanent injunction. The City was not seeking injunctive relief against Taboo for operating without a general business license, but for operating a sexually oriented business in violation of the Zoning Code. Taboo's (unfounded) frustrations about a general business license are irrelevant to whether Taboo was violating the Zoning Code.

More fundamentally, however, because Taboo acquired the employment contract after the permanent injunction hearing, and because the document was not presented to the trial court, Taboo's motion to supplement the Record on Appeal with that document is without merit.

II. Taboo's arguments concerning the Record on Appeal are misleading, and its request to postpone its reply brief deadline should be denied.

Taboo misleads the Court in several ways relative to the proceedings below and how that affects the appropriate contents for the Record on Appeal.

First, although the City filed a motion (without affidavits) seeking a permanent injunction to be granted after an evidentiary hearing, Taboo assumed it could oppose the injunction by

simply filing documents with the clerk of court. But "a permanent injunction, constituting the final disposition of a case on its merits, can ordinarily be granted only after a hearing on its merits." *Latham v. Town of York*, 210 S.C. 565, 571, 43 S.E.2d 467, 469 (1947); *see also Chambron v. Lost Colony Homeowners Ass'n*, 317 S.C. 43, 45, 451 S.E.2d 410, 411 (Ct. App. 1994) ("[A] permanent injunction is issued only after a full adjudication.").

The trial court held an evidentiary hearing and considered the evidence presented during the hearing to decide whether to issue the permanent injunction; it also properly rejected out-of-court factual statements as hearsay. Taboo did not object to the evidentiary hearing going forward, did not request a continuance, and did not make an evidentiary proffer during the hearing. Nor does Taboo challenge any evidentiary ruling on appeal. Where a party fails to make a proffer of evidence that is not admitted at the hearing, the lack of proffer will preclude review on appeal. *Jamison v. Ford Motor Co.*, 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct. App. 2007). Evidence that was not admitted or proffered at the hearing was not properly before the trial court and cannot be reviewed on appeal. On this basis, Taboo should not be allowed to litter the Record on Appeal with evidence it did not proffer, or succeed in having admitted, at the evidentiary hearing on the permanent injunction.[2]

Second, Taboo improperly suggests that the trial court allowed unlimited additional evidence to be submitted after the February 9, 2018 evidentiary hearing. Not so. The trial court allowed Taboo to submit only a single affidavit, limited to the sole purpose of authenticating 15 photographs—*from a store other than Taboo*—that Taboo brought to the evidentiary hearing. Taboo's counsel explained:

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[2] Taboo's reliance on *Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009), is misplaced because the case did not involve a permanent injunction, but rather oral argument on a motion for summary judgment.

MR. GOLDSTEIN: I -- I don't have any witness. I would like to do my -- like I said, I didn't know this was -- I didn't know we were going to have a trial. I thought this was a motion hearing.

I would like to move Exhibits 1 through -- and I already forgot the number.

THE COURT: 15

MR. GOLDSTEIN: 15? -- 15 into evidence. If Your Honor requires testimony to establish those, I'm happy -- I didn't bring a witness with me today. Again, I thought this was a motion hearing. I didn't know we were going to have a trial. I'll be happy to bring a witness with me to attest as to those photos. But my defense to the application for injunction is a legal defense, not -- not a factual defense.

THE COURT: Okay. Yes, sir.

(Feb. 9, 2018 Tr. 63:15 -64:15.)

The City objected because there was no foundation for the photographs, but the court decided to take the matter under advisement (*id.* 64:16-65:5), explaining:

But what I was going to say as to the pictures, I will allow time to supplement the record of this hearing in writing by way of affidavit. If there is **an affidavit as to -- you know, that lays some foundation as to the photographs** and they are attached as an exhibit to the affidavit, perhaps that would be proper.

(*Id.* 65:6-11 (emphasis added).)

After further discussion, the trial court added:

I don't intend for the affidavit or supplement to be a free-for-all; and I was thinking about what that affidavit might look like. Of course, I can't tell you what to do, but I wouldn't expect that affidavit to contain much fodder for substantive cross-examination. It would -- it really, in my mind, be: "I took these pictures, at this location, on this date; and I attest to that," not offering some lengthy opinion testimony or expert testimony.

(*Id.* 67:1-9.)

A week later, on February 16, 2018, Taboo filed the affidavit of Larry Boyer, who took the photographs Taboo had at the hearing. That was the lone affidavit that the trial court said Taboo could submit after the conclusion of the permanent injunction hearing.

On March 8, 2018, the trial court entered the permanent injunction. Then on March 16,

Taboo filed *eight* additional exhibits with its motion for reconsideration. That evidence was not presented at the injunction hearing or authorized for late to submission to the trial court. Given that the permanent injunction was entered on March 8 before those exhibits were filed, Taboo's March 16 exhibits could not have been presented to or considered by the trial court in issuing its ruling. Thus, it is improper for Taboo to include such "unilaterally add[ed] after-created evidence to the record." *Williamsburg Rural Water & Sewer Co, Inc. v. Williamsburg Cty. Water & Sewer Auth.*, 367 S.C. 566, 571, 627 S.E.2d 690, 693 (2006). The same is true of the motion itself, as the belated exhibits are discussed throughout the document.

Next, Taboo argues about a 2014 email that Taboo's counsel sent to the City's counsel that was referenced at the May 15, 2018 hearing on Taboo's motion for reconsideration of the permanent injunction order. The record shows Taboo's counsel asking if he can have a copy of the email, and the City's counsel responding, "Certainly." (May 15, 2018 Tr. 19:20-21.) The record then shows a "pause" in the proceedings. (*Id.* at 19:22.) The argument then continued, without further comment or objection about providing a copy of the email. Later, Taboo's counsel requested that the email be marked for the record, and it was marked. (*Id.* 21:24-22:18.)

The email was one that Taboo's counsel, Mr. Goldstein, sent to Mr. Bergthold, the City's counsel, during the prior federal litigation. The City had no duty to supply an additional, unmarked and unofficial copy of the email to Taboo many months after the reconsideration hearing. Nevertheless, before Mr. Goldstein submitted his April 17, 2018 documents, Mr. Bergthold called Mr. Goldstein and explained that he had looked for a copy of the marked email in his files, and was unable to locate one. Hence, Mr. Bergthold explained that regardless of the parties' differing positions about whether the email itself would be proper for inclusion in the Record on Appeal, Mr. Goldstein and the City's attorneys (Mr. Bergthold and Mr. Balthazor)

were in the same position concerning obtaining documents: both would need to obtain copies from the trial court clerk. Taboo's motion reflects that Mr. Goldstein did in fact obtain a copy of the official document from the clerk's office. (Objections Document at 5 n.1.) Of course, Taboo had the ability to obtain this document in this manner at any time in the eleven months since the motion for reconsideration hearing was held on May 14, 2018. Taboo needed no consent or assistance from the City to simply obtain a copy of the official exhibit from the clerk's office.

But placing all that aside, the email was not offered at the February 9, 2018 permanent injunction hearing, thus it was not before the trial court when it issued its ruling, and it has nothing to do with Taboo's violations of the Zoning Code. Moreover, the only reason that the City quoted from the May 14, 2018 hearing transcript—which Taboo itself designated to be in the Record on Appeal—is to defend against Taboo's unrelenting and unprofessional *ad hominem* attacks, which continue on appeal. And Taboo's counsel does not dispute the accuracy of the quotation, but simply argues that his Auschwitz comment was followed by a claimed desire to have lunch. In any event, the trial court rejected the document itself as irrelevant, so it does not belong in the Record on Appeal, regardless of who referenced it.

Taboo also argues about including certain extraneous ordinances in the Record on Appeal. As to the ordinances that Taboo designated, the City agrees (and did not object) that zoning ordinance sections 17-732 and 17-734 ought to be in the Record on Appeal. Those ordinances are being applied in the permanent injunction, and they *were presented to* the trial court at the February 9, 2018 hearing (as Defendants' Exhibit D-1), so they *should* be in the Record on Appeal. The City objected only to Municipal Ordinance 17-82 and 17-111, sections that relate *not* to the permanent injunction against Taboo's zoning ordinance violations, but rather to post-hearing arguments that Taboo has offered against the permanent injunction. Because those

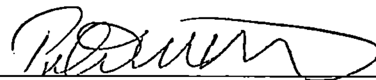
ordinances were not presented to the trial court during its consideration of, and prior to entry of, the permanent injunction, they should not be in the Record on Appeal.

Conclusion

The City has explained the reasons why many of Taboo's designations of matter should not be included in the Record on Appeal. The trial court conducted an evidentiary hearing on the permanent injunction, but Taboo elected to offer only a legal defense (not a factual one). (Feb. 9, 2018 Tr. 64:13-14.) This Court should review the trial court's permanent injunction based on the evidence properly admitted into the trial court record before the injunction issued.

But after the permanent injunction issued, Taboo improperly submitted many additional exhibits and affidavits, and it now aims to fill the Record on Appeal with that improper evidence. Because such irrelevant and unpresented material should not be designated or included in the Record on Appeal (per Rule 210(c), SCACR, and Rule 209(b), SCACR), the City's objections are proper. Taboo opposes them because it does not want to be restricted by the rules that govern the proceedings below and the record for this appeal. Taboo's requests to deviate from these rules and to have its briefing deadline held in abeyance should be denied.

Respectfully submitted,



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Columbia, South Carolina
April 29, 2019

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PROOF OF SERVICE

I certify that on April 29, 2019, I have served all counsel in this action with a copy of Respondent's Brief Opposing Appellant's Motions Concerning the Record on Appeal and Appellant's Reply Brief Deadline by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

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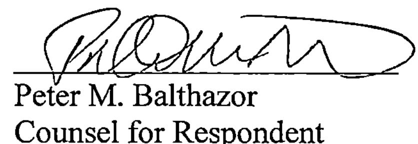
Dated: April 29, 2019



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VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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Re: Cricket Store 17, LLC d/b/a Taboo v. City of Columbia Board of Zoning Appeals AND City of Columbia Zoning Administrator v. Cricket Store 17, LLC d/b/a Taboo
Civil Action No.: 2016-CP-40-03478
Appellate Case No.: 2018-001062
Our File No.: 5253.00114

Dear Ms. Kitchings:

Please find enclosed the original and one copy of the Respondent's Brief Opposing Appellant's Motions Concerning the Record on Appeal and Appellant's Reply Brief Deadline, with proof of service attached in connection with the above-referenced matter. Please file same and return the filed copy with my runner.

Thank you for your kind assistance in this matter.

Sincerely,

Kimberly R. Bickford
Paralegal

/krb

Enclosures

Cc: Thomas R. Goldstein, Esquire
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