THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2018-000906

Sea Island Food Group, LLC, d/b/a Squeeze..... Plaintiff,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Hilton Smith, East Bay Company, Ltd., Michael J. Quillen Family Limited Partnership ..... Defendants,

Michael J. Quillen Family Limited Partnership.....Third-Party Plaintiff,

v.

Top of the Bay, LLC..... Third-Party Defendant

Top of the Bay, LLC d/b/a Club Light ..... Fourth-Party Plaintiff, Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises .....Fourth-Party Defendant, Appellant.

REPLY BRIEF OF APPELLANT

E. Brandon Gaskins (S.C. Bar No. 72374)
MOORE & VAN ALLEN PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Telephone: 843-579-7032
Facsimile: 843-579-8719
brandongaskins@mvalaw.com

Attorneys for Appellant Yaschik Development Company, Inc., d/b/a Yaschik Enterprises

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Appellant Yaschik Development Company, Inc., d/b/a Yaschik Enterprises submits this Reply Brief in response to the Initial Brief of Respondent Top of the Bay, Inc. d/b/a Club Light ("Top of the Bay").

ARGUMENT

I. Top of the Bay has not addressed the trial court's legal error in failing to rule that there was no breach of the sublease.

The trial court's directed verdict in favor of FLP on Top of the Bay's claim for breach of contract made it legally impossible for Yaschik to have procured a breach of the sublease. The trial court found that the sublease terminated when Yaschik terminated the master lease and that it would have been impossible for FLP to restore the building to its pre-fire condition as required under the sublease. (Trial Tr. Vol. II, p. 789, line 1-p. 790, line 10, p. 806, lines 7-13.) Based on this finding, the trial court should have granted Yaschik directed verdict and JNOV on Top of the Bay's claim for tortious interference with the sublease under the well-established law that impossibility of performance renders the contract "dead" and discharges any duty to perform. *See White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 372-75, 601 S.E.2d 342, 345-47 (2004) (holding that impossibility of performance discharged duty to perform and invalidated the contract).

In failing to do so, the trial court committed an error of law. Top of the Bay does not address the trial court's error or the legal principles and authorities supporting Yaschik's argument. Instead, Top of the Bay claims that Yaschik's argument fails because the trial court claimed in the order on the post-trial motions that "it did not rule that there was no underlying breach by FLP." (Resp. Initial Br., p. 9.) Put simply, Top of the Bay argues that the trial court did not err because the trial court said it did not err. This circular reasoning cannot stand.

Contrary to Top of the Bay's suggestion, Yaschik does not contend that the trial court ruled that FLP did not breach the sublease. In fact, Yaschik argues the opposite: the trial court erred by failing to rule that FLP did not breach the sublease. If, as the trial court determined, the sublease terminated and FLP had no duty to restore the building under the sublease because of impossibility of performance, the law dictates that a breach of the sublease could not have occurred. *See Fonar Corp. v. Magnetic Resonance Plus, Inc.*, 957 F. Supp. 477, 480-81 (S.D.N.Y. 1997) (holding that a defendant's rendering performance of a contract impossible does not constitute tortious interference with contractual relations). Without a breach of the sublease, Top of the Bay's interference claim fails as a matter of law.

Because Top of the Bay cannot avoid this inescapable logic, it devotes seven pages of its initial brief arguing that the trial court erroneously granted FLP directed verdict on Top of the Bay's breach of contract claim. According to Top of the Bay, it was not impossible for FLP to restore the building to its pre-fire condition, and the trial court erroneously found that it was. (Resp. Initial Br., pp. 8-15.)

This argument is irrelevant and lacks merit. First, Top of the Bay has expressly abandoned that issue on appeal, and it is not before this Court. (Resp. Initial Br., p. 15.) Second, this argument does not support Top of the Bay's position on the issue that is actually before the Court. If, as Top of the Bay claims, FLP could have restored the building as required under the sublease regardless of Yaschik's termination of the master lease and it failed to do so, then Yaschik's termination of the master lease could not have procured FLP's breach of its contractual duty to restore the building under the sublease. In which event, Top of the Bay's interference claim against Yaschik fails. Either way, Top of the Bay's interference claim never should have been presented to the jury.

II. Yaschik had an absolute right to terminate the master lease regardless of whether it acted in good faith.

In defending the trial court's failure to grant directed verdict and JNOV as to the fourth element of the interference claim, i.e., that Yaschik lacked justification for terminating the master lease, Top of the Bay argues that Yaschik acted in bad faith by declaring the building totally destroyed. This Court, however, has expressly rejected Top of the Bay's argument equating good faith with justification.

Specifically, in *S. Contracting, Inc. v. H.C. Brown Constr. Co.*, 317 S.C. 95, 450 S.E.2d 602 (Ct. App. 1994), the plaintiff argued similarly to Top of the Bay that a defendant's bad faith exercise of its contractual rights is evidence that it lacked justification in procuring a breach of the plaintiff's contract. Yet, this Court ruled that any inquiry into the manner or uniformity with which a defendant chooses to enforce its contractual rights with a third-party is irrelevant in a plaintiff's claim for interference against the defendant. *Id.* at 101, 450 S.E.2d at 605. According to the Court, the plaintiff in *S. Contracting* "was not a party to [the defendant's] contract and had no contractual right to require good faith and fair dealing by [the defendant]." *Id.*

The same circumstances exist here. Top of the Bay was not a party to the master lease, and it has no right to insist on Yacshik's good faith performance of the master lease. Thus, the question presented to this Court is not whether evidence existed to demonstrate that Yaschik was acting in bad faith when it terminated the master lease. Instead, the issue is whether there is evidence that Yaschik lacked justification in terminating the master lease.

On this issue, the evidence is undisputed that Yaschik terminated the master lease because it was in its economic interest to do so.[1] Regardless of whether the building was totally destroyed and whether Yaschik reached the conclusion that it was totally destroyed in good faith, the termination of the master lease for economic reasons was a legitimate business purpose and therefore justified. *See Gailliard v. Fleet Mortg. Corp.*, 880 F. Supp. 1085, 1089 (D.S.C. 1995) (stating that "[i]nterference with a contract is justified when it is motivated by legitimate business purposes[]").

To avoid this result, Top of the Bay argues that termination of the master lease was not justified because Yaschik did not have an absolute right to terminate it. Contract law refutes that position as it is well-established that contracting parties have an inherent right to terminate a contract that is no longer advantageous. *See Tri Cnty. Wholesale Distribs. v. Labatt USA Operating Co.*, 828 F.3d 421, 429 (6th Cir. 2016) (stating that "contracting parties also have an inherent right to breach a contract that is no longer advantageous, committing what economists call an efficient breach[]"); *Cf. Lewis v. L.B. Dynasty*, 411 S.C. 637, 645, 770 S.E.2d 393, 397 (2015) (stating that "in any relationship there exists some right to terminate the arrangement[]").

Fundamental principles of contract law allow a party to breach a contract if it is economically efficient as long as the non-breaching party is made whole. The efficient breach doctrine holds that "if a party breaches, and is still better off paying damages to compensate the

---

[1] Yaschik terminated the master lease under a good faith belief that the building was totally destroyed. Yet Yaschik's analysis of whether the building was totally destroyed was based, in part, on considerations of economic factors regarding the building's value and the cost to restore the building under new building codes. (Trial Tr. Vol. I, p. 474, lines 5-12, p. 480, line 20-p. 482, line 10, p. 525, lines 4-15, p. 634, line 24-p. 635, line 18.) Yaschik's consideration of economic factors is consistent with the law as the trial court instructed the jury. (Trial Tr. Vol. II, p. 935, line 13-p. 936, line 22.) Thus, even though the parties dispute whether the Yaschik believed that the building was totally destroyed, they do not dispute that the master lease was terminated based on economic considerations.

victim of the breach, the result is *pareto superior*, that is considered as a unit, the parties are better off because of the breach and the breach makes no party worse off." 11 *Corbin on Contracts* § 55.15. The efficient breach doctrine accords with South Carolina law providing that a plaintiff in a breach of contract action "is only entitled to actual damages sufficient to put him in the same position as he would have been if the contract had been fulfilled." *Jones v. Bates*, 241 S.C. 189, 194, 127 S.E.2d 618, 620 (1962). In fact, efficient breaches are actually encouraged and the doctrine has been uniformly adopted among the jurisdictions. *Allapattah Servs. v. Exxon Corp.*, 61 F. Supp. 2d 1326, 1329 (S.D. Fla. 1999) (collecting cases).

Here, Top of the Bay based its claim on allegations that Yaschik terminated the master lease and thereby caused the termination of the sublease to obtain a higher sales price for the building. Assuming that such termination was a breach of the master lease, Yaschik's conduct meets the precise definition of an efficient breach. Thus, Top of the Bay's interference claim is based on conduct that is actually encouraged under contract law.

Because contract law encourages efficient breaches, Yaschik enjoyed an absolute right to terminate the master lease for economic reasons, and it was legally justified in so doing. Therefore, there was no evidence to support the jury's finding that Yaschik lacked justification, and the trial court should have granted directed verdict and JNOV on Top of the Bay's interference claim. *See Celtig, LLC v. Patey*, 347 F. Supp. 3d 976, 987-88 (D. Utah 2018) (holding that defendant's efficient breach of its own contract cannot support a tortious interference with economic relations action).

III. Top of the Bay has presented no evidence in the record to support the jury's award of punitive damages.

In attempting to justify the punitive damages award, Top of the Bay relies solely on unsupported arguments to depict Yaschik's conduct in terminating the master lease as

reprehensible without identifying any evidence in the record that supports that depiction. In fact, Top of the Bay's initial brief includes no citations to trial testimony or exhibits that support a finding of willful, wanton, reckless, or reprehensible conduct by Yaschik. Without such evidence, this Court should not uphold the jury's award of punitive damages.

Moreover, the arguments that Top of the Bay makes to defend the jury's award of punitive damages are actually contradicted by the evidence in the record. First, Top of the Bay states that Yaschik led the subtenants to believe that the building would be restored. That claim is belied by the fact that FLP was solely responsible for the restoration efforts until September of 2013 when FLP concluded that there were insufficient insurance proceeds to restore the building. (Trial Tr. Vol. I, p. 470, lines 5-16, p. 596, lines 1-25; Vol. II, p. 234, line 2-p. 235, line 23.) When Yaschik took over the restoration efforts, it promptly determined that the building was totally destroyed and terminated the master lease. (Trial Tr. Vol. I, p. 632, line 7-p. 634, line 9.) As such, Yaschik did nothing to lead Top of the Bay on about any intent to restore the building.

Second, Top of the Bay claims in conclusory fashion that Yaschik acted with trickery and deceit. But, Yaschik never communicated with the subtenants, including Top of the Bay, because it had no contractual relationship with them. (Trial Tr. Vol. I, p. 276, lines 3-5, p. 644, lines 10-19, p. 803, lines 6-18.) Instead, Yaschik communicated only with FLP about the restoration efforts, and FLP's managing partner testified that Yaschik made a business decision to terminate the master lease and did not defraud him. (Trial Tr. Vol. II, p. 263, line 23-p. 264, line 6.) Most significantly, the jury expressly found that Yaschik's breach of the master lease was not accompanied by a fraudulent act. (Verdict Form.)

Third, Top of the Bay alleges that Yaschik "surreptitiously ma[de] plans with East Bay Company to oust the tenant and subtenants so that East Bay could buy the building . . . ." (Resp.

Initial Br., p. 24.) That is false. Yaschik informed FLP of its discussions with East Bay Company, and it expressly conditioned the sale of the building on East Bay Company leasing the premises to the subtenants. (Trial Tr. Vol. I, p. 407, line 4-p. 411, line 13, p. 640, lines 5-24, p. 642, line 16-p. 647, line 17.) Rather than acting to harm the subtenants, Yaschik actually took steps to protect them and ensure they would have space in the restored building if they desired. (Trial Tr. Vol. I, p. 408, line 22-p. 409, line 12, p. 640, lines 5-24, p. 642, line 16-p. 647, line 17; Trial Ex., FLP 93; Trial Ex., Squeeze 20.)

Fourth, Top of the Bay tries to portray itself as financially vulnerable in conclusory fashion by arguing that its owner, Kelley Tant, relied on income from her bars to support herself and her family. But Ms. Tant is not a party, and Top of the Bay presented evidence at trial demonstrating that it earned considerable income. (Trial Tr. Vol. 1 p. 786, line 3- p.795, line 4.)

The evidence in the record demonstrates that every single factor in the reprehensibility analysis supports Yaschik. Yaschik did not cause any physical harm to anyone. In fact, Yaschik did not even cause economic harm to Top of the Bay as evidenced by the jury's award of one dollar in nominal damages. Yaschik's conduct did not evince an indifference or reckless disregard to anyone's health or safety. Top of the Bay was not financially vulnerable. Yaschik's alleged misconduct was not repeated, and Top of the Bay's action arises from a single act of terminating the master lease after FLP abandoned restoration efforts. And, Yaschik did not act with malice, trickery, or deceit.

Overall, there is no evidence that Yaschik acted reprehensibly or in willful, wanton, or reckless disregard of Top of the Bay's rights. Yaschik, through no fault of its own, was the victim of a devastating fire that substantially damaged its building, which was underinsured by its tenant. At worst, Yaschik incidentally harmed other businesses when it terminated the master lease to

minimize significant financial losses from the fire. It had no good options and did not intentionally or recklessly harm anyone, including Top of the Bay. It should not be punished for making a tough business decision, and the Court should overturn the jury's award of punitive damages.

CONCLUSION

For the foregoing reasons, Yaschik requests that the Court reverse and remand the case to the trial court for further proceedings.

E. Brandon Gaskins (S.C. Bar No. 72374)
MOORE & VAN ALLEN PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Telephone: 843-579-7032
Facsimile: 843-579-8719
brandongaskins@mvalaw.com

Attorneys for Appellant/Respondent Yaschik Development Company, Inc., d/b/a Yaschik Enterprises

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2018-000906

Sea Island Food Group, LLC, d/b/a Squeeze ..... Plaintiff,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Hilton Smith, East Bay Company, Ltd., Michael J. Quillen Family Limited Partnership ..... Defendants,

Michael J. Quillen Family Limited Partnership ..... Third-Party Plaintiff,

v.

Top of the Bay, LLC ..... Third-Party Defendant

Top of the Bay, LLC d/b/a Club Light ..... Fourth-Party Plaintiff, Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises ..... Fourth-Party Defendant, Appellant.

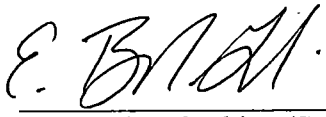
PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the foregoing **REPLY BRIEF OF APPELLANT** and **AMENDED DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** by depositing the same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

William K. Swope, Esquire
The Swope Law Firm, PA
1525 Sam Rittenburg Blvd., Ste. 208
Charleston, SC 29407

W. Tracy Brown, Esquire
The Brown Law Firm
110 N. Main Street
Summerville, SC 29483

Attorneys for Respondent/Appellant Top of the Bay, Inc. d/b/a Club Light



E. Brandon Gaskins (S.C. Bar No. 72374)
MOORE & VAN ALLEN PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
Telephone: 843-579-7032
Facsimile: 843-579-8719
brandongaskins@mvalaw.com

Attorney for Appellant Yaschik Development Company, Inc., d/b/a Yaschik Enterprises

August 5, 2019

Charleston, SC

Moore&VanAllen

August 5, 2019

E. Brandon Gaskins
Attorney at Law

T 843 579 7038
F 843 579 8738
brandongaskins@mvalaw.com

Moore & Van Allen PLLC

78 Wentworth St.
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Post Office Box 11629
Columbia, South Carolina 29211

Re: Sea Island Food Group, LLC doing business as SQUEEZE v. Yaschik Development Company, Inc., doing business as Yaschik Enterprises, et al.
Case No.: 2013-CP-10-7107
Appellate Case No.: 2018-000906
MVA File No.: 029018.23

Dear Madame Clerk:

Enclosed for filing, please find an original and one (1) copy of each of the following:

1. Appellant's Initial Reply Brief;
2. Appellant's Amended Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service.

Please return a filed copy of each to this office in the enclosed stamped, self-addressed envelope.

Thank you for your assistance in this matter and please call me with any questions.

Sincerely,

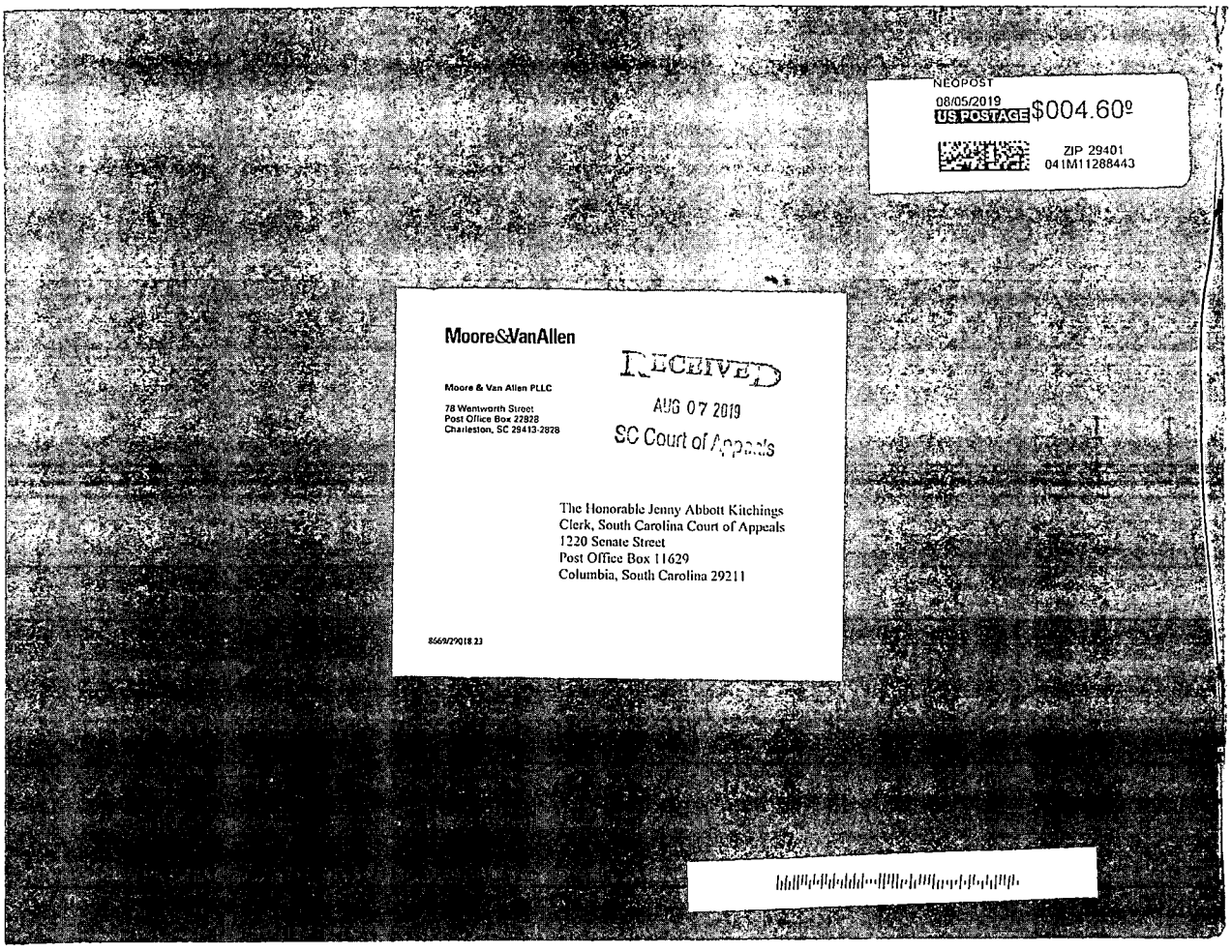
Moore & Van Allen PLLC

E. Brandon Gaskins

EBG/ws

Enclosures as stated.

cc w/enc.: W. Tracy Brown, Esquire
William K. Swope, Esquire



NEOPOST
08/05/2019
US POSTAGE $004.60º
ZIP 29401
041M11288443

Moore&VanAllen

Moore & Van Allen PLLC
78 Wentworth Street
Post Office Box 22828
Charleston, SC 29413-2828

RECEIVED
AUG 07 2019
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Post Office Box 11629
Columbia, South Carolina 29211

8669/29018.23