ELECTRONICALLY FILED - 2019 Jul 10 2:45 PM - GREENVILLE - COMMON PLEAS - CASE#2012CP2302325

STATE OF SOUTH CAROLINA	IN THE BUSINESS COURT
COUNTY OF GREENVILLE	2012-CP-23-2325
Stop-A-Minit # 17, LLC, Plaintiff, vs. Beck Enterprises, Inc., Defendant.	**ORDER**

RECEIVED
NOV 15 2019
SC Court of Appeals

This action was tried before the undersigned judge of the Business Court for the County of Greenville on May 31, 2019.

This action was commenced by the filing of a Summons and Complaint by the plaintiff, Stop-A-Minit # 17, LLC ("SAM") on April 3, 2012. Defendant, Beck Enterprises, Inc. ("Beck") filed an Answer on June 15, 2012.

In the complaint, plaintiff sought a Declaratory Judgment pursuant to S.C. Code Ann. § 15-53-10 *et. seq.* Defendant joined in the relief sought by the plaintiff in its Answer.

The issue before the Court is the interpretation of an Indemnification and Hold Harmless Agreement ("Indemnification") executed by the parties as part of the negotiation and sale of a gas station, convenience store and its inventory located at 1398 North Pleasantburg Drive in Greenville County, South Carolina ("The Property"). The convenience store was owned and operated by Beck as an Exxon branded dealer under the provisions of a Motor Fuel Supply Agreement ("MFSA") with Cary Oil Co., Inc. ("Cary"). The MFSA was for a term of ten years beginning March 15, 2003 and ending March 14, 2013. Beck was obligated to keep the business as an Exxon branded station.

The MFSA provided that if the station did not remain branded as Exxon prior to its expiration, Beck was required to reimburse Cary for certain payments Beck received from Exxon.

As part of the sale of the business and its inventory, SAM agreed to indemnify Beck from a breach of the MFSA as set forth in the Indemnification.

Following the sale, SAM de-branded the station which triggered the payment of the reimbursement due Exxon for de-branding the station. Exxon drafted Forty-Eight Thousand Six Hundred and Forty-Eight and 00/100 ($48,648.00) from O'Dell Oil Company, who had been assigned Cary's rights and obligations in the MFSA, and SAM caused its parent company, Drake Convenience, LLC ("Drake") to pay O'Dell Oil Company the reimbursement due Exxon in the amount of Forty-Eight Thousand Six Hundred and Forty-Eight and 00/100 ($48,648.00). However, a dispute arose between Cary and SAM over other damages for early termination of the MFSA. Drake and SAM then sued Cary, who in turn filed a third-party action against Beck and its principals Mohamad Mereby and Shirley Mereby (Mereby) for breach of the MFSA. Mereby and Beck then filed a cross-complaint against SAM seeking indemnification from the damages claimed by Cary in the third-party action. This action (2011-CP-23-05746) ("the underlying action") was stayed by Order of the Honorable G. Edward Welmaker on May 24, 2012 in order for this Declaratory Judgment case to be resolved.

At trial, the parties stipulated to the admission into evidence of certain documents, including the following:

1. The Indemnification and Hold Harmless Agreement dated June 7, 2010 ("Indemnification").

ELECTRONICALLY FILED - 2019 Jul 10 2:45 PM - GREENVILLE - COMMON PLEAS - CASE#2012CP2302325

2. The Motor Fuel Supply Agreement between ("MFSA")

3. Bills of sale for the inventory, gasoline and other personal property between the parties

4. Checks written to Beck by SAM

The issue in this case is whether SAM has met all of its obligations pursuant to the Indemnification or whether SAM owes additional indemnification obligations including damages, attorney's fees and expenses incurred by Beck in defense of the third-party action by Cary in the underlying case. SAM contends that it has met all of its obligations pursuant to the Indemnification by paying Forty-Eight Thousand Six Hundred and Forty-Eight and 00/100 ($48,648.00) to Cary pursuant to Paragraph Numbered Two (2) of the Indemnification.

I find and conclude that SAM has not met all of its obligations pursuant to the Indemnification and SAM owes Beck further indemnification for, at a minimum, the damages sought by Cary in the underlying action, reasonable attorney's fees and costs incurred by Beck in the underlying action.

The Indemnification contains two indemnification sections which are the heart of the matter before the court:

> 1. Indemnification by the Purchaser. Subject to the limitations below, the Purchaser covenants and agrees that it will indemnify, defend, protect, and hold harmless the Seller harmless at all times from and after the date of this Agreement from and against all claims, damages, actions, suits, proceedings, demands, assessments, adjustments, costs and expenses (***including specifically, but without limitation, reasonable attorneys' fees***) incurred by such Indemnitee as a result of or incident to the Fuel Agreement. (emphasis added).
>
> 2. Limitation on Responsibility to Indemnify. Notwithstanding anything to the contrary herein, the obligation of the Owners to indemnify the Buyer is limited to transactions occurring on or after the date of this Agreement. Costs related to fuel purchases entered into prior to the date of this Agreement are the responsibility of

ELECTRONICALLY FILED - 2019 Jul 10 2:45 PM - GREENVILLE - COMMON PLEAS - CASE#2012CP2302325

the Seller. Further, if the Purchaser should terminate the Fuel Agreement prior to its full term, then the Purchaser's maximum liability ***for such early termination*** shall be as follows:
A. $72,972.00 if such early termination occurs and is effective before September 1, 2010, and
B. $48,468.00 if such early termination occurs and is effective on or after September 1, 2010. (emphasis added).

The parties agree that the early termination fee of $48,468.00 was paid by SAM's parent company, Drake, and that SAM has indemnified Beck for that liability under the MFSA. SAM contends that it has met all of its obligations pursuant to the Indemnification by paying this amount, and that paragraph numbered Two (2) of the Indemnification limits its obligation to indemnify Beck absolutely to $48,648.00. However, this interpretation of the Indemnification ignores paragraph numbered One (1) of the Indemnification altogether.

A plain reading of the Indemnification leads this Court to conclude that Paragraph numbered One (1) explicitly requires SAM to indemnify Beck from "all claims, damages, actions, suits, proceedings, demands, assessments, adjustments, costs and expenses **(including specifically, but without limitation, reasonable attorneys' fees)**." Cary's third-party claim against Beck is unquestionably, at a minimum, a claim, action, suit and proceeding in which it is seeking damages and in which Beck has incurred attorney's fees. Accordingly, Cary's third-party claim triggers Paragraph Numbered One (1) of the Indemnification.

Furthermore, the express language used in the Indemnification states that the limitations in Paragraphs 2 (A) and 2 (B) are for <u>early termination</u> of the MFSA, but do not include other matters such as damages sought by Cary Oil, reasonable attorney's and costs related to the defense of the underlying suit. The amounts listed as limitations are

ELECTRONICALLY FILED - 2019 Jul 10 2:45 PM - GREENVILLE - COMMON PLEAS - CASE#2012CP2302325

derived directly from the penalty provisions for early termination of the MFSA found in the MFSA itself.

SAM essentially asks the Court to insert language into the Indemnification that would include attorney's fees in the limitations provision for early termination. That language is not present in Paragraph Numbered Two (2). In fact, the converse is true, as Paragraph Numbered One (1) expressly states that SAM must indemnify Beck from damages and reasonable attorney's fees incurred as a result of or incident to the MFSA, "*without limitation.*"

Reading both Paragraphs Numbered One (1) and Two (2) together, it is clear that the parties intended that SAM indemnify Beck for precisely the type of suit, damages and attorney's fees brought by Cary against Beck and that they did not intend for Paragraph Numbered Two (2) to act as an absolute limitation of SAM's indemnification liability to Beck.

Plaintiff offered additional evidence and testimony attempting to raise matters not included in the pleadings, including issues related to the consideration for the Indemnification and other matters. Defendant timely objected to the introduction of this evidence as not relevant and outside the scope of the pleadings. Plaintiff's Complaint, paragraph Eight (8), states as follows: "SAM believes it has met all its indemnification obligations under the Indemnification and Hold Harmless Agreement by ensuring that Forty Eight Thousand Six Hundred and Forty Eight and 00/100 ($48,648.00) was paid to Exxon, while Beck believes it is owed further indemnification against claims made by Cary and costs incurred therefor. The parties to this suit disagree over applications of Paragraphs 1 and 2 of the Indemnification and Hold Harmless Agreement and whether

ELECTRONICALLY FILED - 2019 Jul 10 2:45 PM - GREENVILLE - COMMON PLEAS - CASE#2012CP2302325

and how it applies to the underlying lawsuit. A determination of the rights of the parties in this lawsuit will impact the outcome of the underlying suit and may enable the parties to resolve the underlying suit." Paragraph Eight (8) was admitted by the Defendant in its Answer.

The Court is constrained by the parties' pleadings and therefore I find and conclude that the additional matters Plaintiff attempted to raise at trial and referred to in its closing argument brief are not properly before the Court and are thus excluded from consideration.

Additionally, Plaintiff contends that the Indemnification is ambiguous and thus parol evidence should be admitted and considered by the Court. Plaintiff's primary contention in this regard is that Paragraph Numbered Two (2) of the Indemnification used the undefined terms "Owner" and "Buyer," rather than "Purchaser" and "Seller." The Court finds and concludes that the use of these terms is a mere clerical error and one that none of the parties was prejudiced by. At trial, Brent Drake, who testified on behalf of plaintiff, admitted that there was no intent for Beck to indemnify SAM for any matter. Furthermore, it is this very paragraph that SAM has already performed by paying Forty-Eight Thousand Six Hundred and Forty-Eight and 00/100 ($48,648.00) on behalf of Beck for early termination of the MFSA. The issue before the Court is primarily resolved by reference to Paragraph Numbered One (1), which uses the defined terms of "Purchaser" and "Seller." I find that "Owner" clearly refers to SAM and "Buyer" clearly refers to Beck and that no ambiguity exists in the Indemnification.

The Court permitted the plaintiff to introduce parol evidence over Defendant's objections to explain plaintiff's intentions with respect to the Indemnification.

ELECTRONICALLY FILED - 2019 Jul 10 2:45 PM - GREENVILLE - COMMON PLEAS - CASE#2012CP2302325

However, because I find that the Indemnification is unambiguous and capable of construction without resort to parol evidence, the parol evidence admitted at trial is excluded from my consideration of the issues before the Court.

After careful consideration of the facts in evidence and argument of counsel, I find and conclude that the Indemnification is a valid and enforceable agreement between the parties, that the Indemnification is unambiguous and capable of interpretation on its own terms, that SAM has not met all of its obligations pursuant to the Indemnification, and that SAM must indemnify and hold Beck harmless from, at a minimum, damages, costs and reasonable attorney's fees in the underlying action.

Pursuant to Rule 52(a) of the South Carolina Rules of Civil Procedure, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff is a domestic business entity, and previously owned a convenience store and gas station property located at 1398 North Pleasantburg Drive in Greenville County, South Carolina.
2. Defendant Beck Enterprises, Inc. is a domestic business entity owned by Shirley Mereby and Mohammad Mereby and has its principal offices in Greenville County, South Carolina.
3. Plaintiff and Defendant entered into the Indemnification dated June 7, 2010 as part of the negotiation and sale of the Property, gas station, convenience store and its inventory .
4. Plaintiff paid Forty-Eight Thousand Six Hundred and Forty-Eight and 00/100 ($48,648.00) Dollars on behalf of Defendant pursuant to the Indemnification.

ELECTRONICALLY FILED - 2019 Jul 10 2:45 PM - GREENVILLE - COMMON PLEAS - CASE#2012CP2302325

5. Cary filed a third-party complaint against Beck in civil action 2011-CP-23-05746 for breach of the MFSA.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter within this case and venue is proper.
2. One cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties." S.C. Dep't of Transp. v. M & T Enters. of Mount Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 12 (Ct. App. 2008) (citation omitted). "To determine the intention of the parties, the court must first look at the language of the contract." Id. at 655, 667 S.E.2d at 12-13 (citation and quotation marks omitted). "The construction of a clear and unambiguous contract presents a question of law for the court." Id. at 655, 667 S.E.2d at 13 (citation omitted). "It is also a question of law whether the language of a contract is ambiguous." Id. at 655, 667 S.E.2d at 13 (citation omitted). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense." Id. "Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it." Id. (citation omitted). "A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Id.

ELECTRONICALLY FILED - 2019 Jul 10 2:45 PM - GREENVILLE - COMMON PLEAS - CASE#2012CP2302325

3. Courts should construe contracts liberally to give them effect and carry out the intention of the parties. When construing terms in a contract, a court must first look at the language of the contract to determine the intentions of the parties. Furthermore, a court must gather the parties' intention from the contents of the entire agreement, not from any particular clause therein. If practical, a court should interpret the agreement so as to give effect to all of its provisions. It is fundamental that, in the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning. Generally, a contract is interpreted according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense. Bluffton Towne Ctr., LLC v. Gilleland-Prince, 412 S.C. 554, 559, 772 S.E.2d 882, 885, 2015 (Ct. App. 2015).
4. The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument. Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties. Under the parol evidence rule, the terms of the writing are controlling, even if extrinsic evidence is admitted without objection or admitted over appropriate objection. Bluffton Towne Ctr., LLC v. Gilleland-Prince, 412 S.C. 554, 559, 772 S.E.2d 882, 885, (Ct. App. 2015).

ELECTRONICALLY FILED - 2019 Jul 10 2:45 PM - GREENVILLE - COMMON PLEAS - CASE#2012CP2302325

5. Due process requires notice. Therefore, the pleading limits the areas into which the court may allow the parties to go, given proper objections. Bass v. Bass, 272 S.C. 177, 2249 S.E. 2d 903 (1978). A matter is not in issue if it has not been pled. State v. Bailey, 226 S.C. 612, 86, S.E. 2d 472 (1955).
6. The Indemnification is a valid, enforceable contract.
7. The Indemnification is unambiguous and capable of interpretation without resort to or consideration of parol evidence.
8. Plaintiff has not met all of its obligations pursuant to the Indemnification.
9. The Indemnification requires Plaintiff to further indemnify and hold Beck harmless from, at a minimum, damages, costs and reasonable attorney's fees in the underlying action.

THEREFORE, IT IS ORDERED, ADJUDGED, DECREED AND DECLARED:

1. That the Indemnification and Hold Harmless Agreement dated June 7, 2010 executed by plaintiff and defendant is a valid, enforceable contract.
2. That Plaintiff has not met all of its obligations pursuant to the Indemnification.
3. That Plaintiff shall further indemnify and hold Beck harmless from, at a minimum, damages, costs and reasonable attorney's fees in civil action 2011-CP-23-05746.

AND IT IS SO ORDERED.

____
Greenville, South Carolina

____
The Honorable Edward W. Miller
Circuit Court Judge
Thirteenth Judicial Circuit

ELECTRONICALLY FILED - 2019 Jul 10 2:45 PM - GREENVILLE - COMMON PLEAS - CASE#2012CP2302325

Greenville Common Pleas

Case Caption: Stop A Minit 17 Llc vs. Beck Enterprises Inc

Case Number: 2012CP2302325

Type: Order/Other

So Ordered

s/ Edward W. Miller

ELECTRONICALLY FILED - 2019 Jul 10 2:45 PM - GREENVILLE - COMMON PLEAS - CASE#2012CP2302325