

STATE OF SOUTH CAROLINA)
)
COUNTY OF FAIRFIELD)
)
Broad River Campground, LLC,)
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Plaintiff,)
)
v.)
)
Jenkinsville Water Company, Inc.,)
)
)
Defendant.)
)
_____)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

C/A No. 2014-CP-20-00349

**ORDER GRANTING DEFENDANT’S
RENEWED MOTION FOR SUMMARY
JUDGMENT**

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Jul 10 2020

SC Court of Appeals

This matter comes before the Court on Defendant Jenkinsville Water Company’s (“JWC” or “Company”) Renewed Motion for Summary Judgment (“Motion”).

On January 29, 2020, the Court heard oral arguments regarding JWC’s Renewed Motion for Summary Judgment. At the hearing, Glenn E. Bowens of the Bowens Law Firm, P.C., and Jonathan Goode of the Law Office of Jonathan Goode, LLC, represented Plaintiff Broad River Campground, LLC (“Plaintiff” or “BRC”), and Reginald W. Belcher and Mark B. Goddard of Turner, Padget, Graham & Laney, P.A. represented Defendant JWC. After hearing oral arguments, the Court asked for further briefing on the issues raised in the Motion. The attorneys filed several memoranda, including exhibits, in support of their clients’ respective positions.

After carefully considering the memoranda submitted by the parties, the evidence presented, the arguments of counsel, and the applicable law, the Court hereby **GRANTS** Defendant JWC’s Renewed Motion, and dismisses this case **with prejudice**.

PROCEDURAL HISTORY¹

The procedural history of this case since February 2019 is as follows:

1) On February 27, 2019, the Court issued the Summary Judgment Order, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, granting Summary Judgment and dismissing with prejudice Plaintiff's cause of action for alleged violation of the South Carolina Unfair Trade Practices Act, South Carolina Code § 39-5-10, *et seq.*, in the above-captioned lawsuit and further dismissed with prejudice Defendants Gregory Ginyard and Defendant Joseph McBride in Civil Action Number 2016-CP-20-256.

2) The Court held a pretrial hearing on January 29, 2020, to consider all pretrial issues before the commencement of a jury trial that was scheduled to begin on February 3, 2020, for Plaintiff's remaining causes of action for breach of contract, breach of contract accompanied by a fraudulent act, and declaratory judgment. Both Parties timely submitted pretrial briefs and motions prior to the pretrial hearing.

3) At the pretrial hearing held on January 29, 2020, Plaintiff withdrew its demand for a jury trial with the consent of Defendant.

4) Among its pretrial motions, Defendant renewed its previous Motion for Summary Judgment, contending that the Parties never entered a valid and/or legally binding contract based, in part, on new evidence that emerged since the Court issued its Summary Judgment Order in February 2019.

¹ This case has a long and complex procedural history. The Court's previous Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment dated February 27, 2019 (the "Summary Judgment Order") fully outlined the case's procedural history through February 2019. In the interest of brevity, the Court fully incorporates the Procedural History from the Summary Judgment Order herein.

5) The Parties have thoroughly briefed and argued, and the Court has considered every issue through numerous hearings, briefs, and exhibits over the past years.

FINDINGS OF FACT²

1) Broad River Campground was constructed in phases over several years with the first phase constructed in 2009 containing 46 campsites.

2) On October 28, 2009, Defendant JWC wrote a letter to Plaintiff BRC's engineer outlining JWC's commitment to serve phase 1 or 46 campsites at 175 gallons per day ("gpd") for a total of 8,050 gpd, and outlining JWC's willingness to consider increasing its commitment to serve future phases ("October 2009 Letter").

3) Plaintiff BRC did not agree to the restrictions on future expansion outlined in the October 2009 Letter.

4) In 2014, Plaintiff BRC demanded that JWC approve another expansion of BRC's campground, which would have added approximately 50 additional campsites. This expansion request did not seek increase in the commitment of water from JWC, and instead, Plaintiff BRC requested JWC change the water usage rate from 175 gpd to 53 gpd per campsite.

5) Plaintiff filed its original Complaint on September 26, 2014, alleging that the October 2009 Letter was the only contract between the Parties.

6) Plaintiff filed its Second Amended Complaint on June 29, 2018, alleging for the first time that JWC's By-Laws, Water Usage Agreement, and/or an alleged oral agreement (that

² The Court fully incorporates herein by reference the Findings of Fact from the Summary Judgment Order that are now the law of the case. *See Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 754 S.E.2d 486 (2014); *see also In re Morrison*, 321 S.C. 370, 372, 468 S.E.2d 651, 652 (1996) (an unappealed ruling becomes the law of the case and precludes further consideration of the issue).

was purportedly formed in 2009) also constituted contracts between the Parties, in addition to the October 2009 Letter.

7) The Second Amended Complaint alleged that Plaintiff intended to expand its campground via a five-year project, beginning in 2009, and that Plaintiff's alleged contracts with JWC were part of that five-year expansion plan.

8) Dee Melton, co-owner of Plaintiff BRC, testified in a deposition in December 2015, that the October 2009 Letter was the only alleged contract between Plaintiff BRC and JWC, and he was not aware of any other contracts between Plaintiff BRC and JWC.

9) When Melton testified in December 2015 that the October 2009 Letter was the only alleged contract between the Parties, he knew of the existence of the By-Laws and the Water Usage Agreement because BRC produced those documents to JWC, in pre-trial discovery, months before Melton testified.

10) Similarly, when Melton testified in December 2015 that the October 2009 Letter was the only alleged contract between the Parties, he was fully aware of the discussions that supposedly formed the alleged 2009 oral contract, as he directly was involved in those discussions in 2009.

11) Plaintiff BRC's expert witness, Larry Umberger, also testified, during his deposition in December 2019, that he was unaware of any contracts between the parties.

During pre-trial discovery, the Parties produced only a generic, unsigned copy of a Water Usage Agreement. The Parties never produced an executed copy of any Water Usage Agreement during pre-trial discovery and likewise never produced a signed copy to the Court. Plaintiff never produced any evidence proving that JWC agreed to the terms and conditions of and/or intended to be bound by the generic, unsigned Water Usage Agreement. Likewise,

Plaintiff produced no evidence establishing the material terms and conditions of any legally binding verbal agreement between the Parties regarding water usage. Accordingly, the Court finds that the Parties never entered into a valid, legally binding contract regarding water usage.

SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *See George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

“[I]n cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

“Summary judgment should be granted when plain, palpable and undisputable facts exist on which reasonable minds cannot differ.” *NationsBank v. Scott Farm*, 320 S.C. 299, 302-03, 465 S.E.2d 98, 100 (Ct. App. 1995). “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” *Id.* at 303, 465 S.E.2d at 100. “In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial.” *Id.* “Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party’s case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings.” *Id.*

The nonmoving party’s “evidence must amount to more than speculation and conjecture” to survive summary judgment. *McKnight v. South Carolina Dept. of Corrections*, 385 S.C. 380,

684 S.E.2d 566, 570 (Ct. App. 2009); *see also Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009) (addressing summary judgment and ruling that a “jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror. . . . ‘However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation.’”) (citation omitted).

LEGAL CONCLUSIONS

October 2009 Letter Was Not a Valid and Enforceable Contract.

Defendant JWC is entitled to summary judgment and a dismissal with prejudice as to the breach of contract claim because there was no meeting of the minds as to the essential terms of the October 2009 Letter.

To prove the existence of a valid and enforceable contract, “there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement.” *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1969).

The right to expand Plaintiff’s campground, which could not occur if JWC continued to estimate Plaintiff’s water usage at 175 gallons per day per campsite, is the primary subject at issue in this litigation.

The October 2009 Letter stated that:

At this time all [JWC] can commit to serve is...46 campsites. Average daily demand for each of the travel trailer sites is estimated to be 175 gallons per day (‘gpd’) per site for a total of 8,050 gallons per day. Water consumption is not to exceed this amount on an average day, nor are the number of campsites connected to the water system to exceed 46 without prior written

approval of the Jenkinsville Water Company. Should you wish to expand the campground, the Water Company will consider increasing our commitment, but only if that can be done without negatively impacting other customers on the water system.

Plaintiff asserted, through its admissions in its Pre-Trial Brief and through the deposition testimony of its expert witness, Larry Umberger, that it never agreed to any restrictions being placed on Plaintiff BRC's right to expand the campground. Therefore, since the Parties never agreed to all of the material terms of the October 2009 Letter, there was no meeting of the minds, and the October 2009 Letter is not a valid and enforceable contract. *See Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978).

Judicial Estoppel

Defendant also is entitled to summary judgment and a dismissal with prejudice as to the breach of contract claim because the October 2009 Letter was not a valid and enforceable contract and Plaintiff is judicially estopped from asserting that any other alleged agreements serve as the basis for its breach of contract claim.

The October 2009 Letter was not a valid and enforceable contract because there was not a meeting of the minds as to all material terms of the contract. Plaintiff's Second Amended Complaint alleged that the parties entered into three other contracts: (1) JWC By-Laws; (2) a Water User agreement; and (3) a 2009 oral promise by JWC to provide 35,000 - 40,000 gallons of water per day for up to 200 campsites, in phases to occur in 2009, 2012, and 2014.

In December 2015, Plaintiff's co-owner, Dee Melton, testified as follows:

Q. [Referencing the October 2009 Letter] Is this document the basis for the campground's claim that the campground and water company had a contract?

A. I see this document as our contract.

....

Q. Is there any other document that the campground believes constitutes a contract between the water company and the campground?

A. I would have to check with my attorney on that.

Q. Well, based on your knowledge, do you think there is? Is this, in other words, is this the only written contract you're aware of?

A. I'm not sure. A lot of things can be implied as contracts. I would refer that to my attorney. I do recognize this as our contract, for sure.

...

Q. Are there any verbal or oral promises that the campground believes constitutes a contract between the water company and the campground?

A. I'm not sure about that. No.

Q. If so, would you have alleged that in the Complaint?

A. I think I would have.

Q. If there were any other written contracts besides [the October 2009 Letter] would you have referenced that in the complaint?

A. I think we would have.

(Melton Tr. pp. 34-35).

In April 2015, in response to Defendant JWC's discovery requests, Plaintiff produced a copy of JWC's By-laws, which expressly and repeatedly referenced a "water user agreement." Further, Plaintiff alleges it engaged in oral negotiations in July 2009 for JWC to serve all phases on the campground. At the time of his deposition, Plaintiff's co-owner, Dee Melton, should have been aware of the alleged existence of these three purported contracts, yet he did not identify any of them in response to direct questions from Defendant's counsel.

Judicial estoppel “precludes a party from adopting a position in conflict with one earlier taken in the same litigation.” *Commerce Ctr. Of Greenville, Inc. v. W. Powers McElveen & Assocs.*, 347 S.C. 545, 554 n. 6, 556 S.E.2d 718, 723, n.6 (Ct. App. 2001). “Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, via its pleadings, statements or contentions made under oath, is prohibited from adopting an inconsistent posture.” *Quinn v. The Sharon Corp.*, 343 S.C. 411, 416, 540 S.E.2d 474, 476 (Ct. App. 2000) (Anderson, J., concurring).

“When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him....The truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly discovered evidence.” *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997).

Plaintiff’s change in its position as to the underlying contract between the parties was not the result of newly-discovered evidence, as this information was readily available and known to Plaintiff prior to the December 2015 deposition. Therefore, Plaintiff is judicially estopped from asserting any other contracts as the basis of its breach of contract claim.

Statute of Limitations

Defendant also is entitled to summary judgment and a dismissal with prejudice as to the breach of contract claims because the applicable statute of limitations barred Plaintiff’s claims for breach of contract and breach of contract accompanied by a fraudulent act based on the By-Laws, Water-User Agreement, and/or the alleged 2009 oral contract.

Breach of contract claims are governed by a three year statute of limitations. *See* S.C. Code § 15-3-530(1). The three -year statute of limitations applicable to a breach of contract

claim also governs a claim for breach of contract accompanied by a fraudulent act. *Wilson Group v. Quorum Health Resources*, 880 F. Supp. 416, 424, n.6 (D.S.C. 1995).

Plaintiff filed its original Complaint on September 26, 2014. Plaintiff filed its Second Amended Complaint on June 29, 2018, alleging the By-Laws, Water User Agreement, and/or an oral agreement constitute the operative contract for its breach of contract and breach of contract accompanied by fraud claims.

An amendment to a pleading relates back to the original pleading only if “the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings.” *Whitfield Constr. Co. v. Bank of Tokyo Trust Co.*, 338 SC. 207, 222, 525 S.E.2d 888, 897 (Ct. App. 1999). To properly relate back to the date of the original filing, the new claim must be “logically related to the matters originally pleaded so that the defendant is not prejudiced by the new claim asserted after the statute of limitations has expired.” *Id.*

The By-Laws, Water User Agreement, and the alleged oral contract were separate and distinct allegations with completely different terms and conditions from the October 2009 Letter. By originally only pleading the October 2009 Letter as the operative contract, Plaintiff did not place Defendant on notice that these three additional alleged agreements could serve as the operative contracts for the Plaintiff’s contractual claims. Therefore, these three additional alleged contracts did not relate back to the initial Company that Plaintiff filed on September 26, 2014.

Plaintiff alleged the breach of any alleged contract occurred in the Summer of 2014 when Defendant JWC denied Plaintiff BRC’s request to expand its campground. Plaintiff BRC was required to file its claims for breach of contract and breach of contract accompanied by

fraudulent act based on the By-Laws, Water User Agreement, or the alleged oral contract within three years of the alleged breach. Plaintiff did not file the Second Amended Complaint alleging these new contracts within three years of the alleged breach, and therefore, the applicable statute of limitations barred those claims.

No Valid Contracts or Breaches

Defendant is also entitled to summary judgment and a dismissal with prejudice as to the breach of contract claims since there were no valid and enforceable contracts between the parties and/or no breaches of any alleged contract.

“The elements for a breach of contract are the existence of the contract, its breach, and damages caused by such a breach.” *Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015). Plaintiff has not presented evidence to support each of these required elements for its breach of contract claim.

Oral Contract – Defendant is entitled to summary judgment on Plaintiff BRC’s allegation that the Parties entered into an oral contract in July 2009 because the Statute of Frauds prohibits any such contract.

The Statute of Frauds prohibits lawsuits based on a contract “not to be performed within the space of one year” unless the contract is “signed by the party to be charged.” S.C. Code Ann. § 32-3-10(5). Parties may not orally modify a contract required to be in writing by the South Carolina Statute of Frauds. *See Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989).

There is no evidence of a writing signed by JWC wherein it agreed to provide the 35,000 – 40,000 gpd to all phases of the campground through five plus years of construction. Therefore,

this alleged oral contract, which purportedly was to be performed throughout Plaintiff's five-year expansion project, failed to satisfy the Statute of Frauds and is void and unenforceable.

By-Laws - Defendant is entitled to summary judgment on and dismissal with prejudice of Plaintiff BRC's breach of contract claim based on Defendant JWC's By-laws because, as a matter of law, the By-Laws did not constitute a valid, binding contract between the Parties.

Moreover, Defendant JWC followed and did not breach its By-laws. The relevant portion of JWC's By-Laws states:

Each member shall be entitled to purchase from the corporation pursuant to such agreements as may time to time be provided and required, such service as he may desire, subject to the provisions of these bylaws and to such rules and regulations as may be prescribed by the Board of Directors.

Plaintiff BRC alleged that this provision provides it the right to unlimited water usage, and Defendant JWC's denial of its expansion request breached this provision.

Plaintiff BRC's erroneous interpretation of the By-Laws disregarded the By-Laws' plain, unambiguous language indicating that member's water usage was subject to the limitations imposed by JWC. The October 2009 Letter, though not a legally binding contract, imposed strict daily water usage limitations on Plaintiff, which fully complied with the By-Laws and JWC's legal rights, per the statutory and common law application of the business judgment rule.

Likewise, the Summary Judgment Order, the Court previously ruled that: (1) Defendant JWC's actions in considering and denying Plaintiff's requested expansion in 2014 were consistent with its By-laws; and (2) JWC's Board's determination to continue to use the 175 gpd usage calculation for Plaintiff's 2014 expansion request followed JWC's third party engineers' advice and was a reasonable and appropriate approach. These factual findings are the law of the case and the Court must apply these findings of fact when considering this Motion. *See Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015).

“The doctrine of the law of the case prohibits issues that have been decided....from being relitigated in the trial court in the same case.” *Ross v. Medical Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997).

Defendant’s actions were consistent with its By-Laws, which did not constitute a legally binding contract, thereby entitling JWC to summary judgment and a dismissal with prejudice as to the breach of contract claim.

Water User Agreement – Defendant is entitled to summary judgment and a dismissal with prejudice as to Plaintiff’s allegation that Defendant JWC breached its Water Usage Agreement based on the Statute of Frauds and based on Plaintiff BRC’s failure to allege a specific breach.

Since there is no tangible evidence of an executed Water Usage Agreement or any allegation of a verbal water usage agreement, this alleged contract does not satisfy the requirements for South Carolina’s Statute of Frauds. S.C. Code Ann. § 32-3-10(5). Therefore, the alleged Water Usage Agreement is non-existent, void and not enforceable.

Even if a signed copy of the Water Usage Agreement was found in order to satisfy the Statute of Frauds, this Agreement cannot serve as the basis for Plaintiff’s contractual claims.

To survive a motion for summary judgment, Plaintiff must provide evidence to support each element of its cause of action. Plaintiff cannot rely merely on its allegations from the Complaint. *See Eadie v. Krause*, 381 S.C. 55, 64, n.5, 671 S.E.2d 389, 393, n. 5 (Ct. App. 2008). Plaintiff BRC has provided no specific evidence of the alleged breach beyond the vague allegations that the Agreement was breached. Plaintiff’s vague allegations of a breach do not create the necessary question of fact to survive Defendant BRC’s Motion.

Breach of Contract Accompanied by Fraud

Defendant is entitled to summary judgment and a dismissal with prejudice as to Plaintiff's claim for breach of contract accompanied by fraudulent act.

The elements for a breach of contract accompanied by a fraudulent act are: (1) breach of contract; (2) fraudulent intent relating to the breach of the contract and not merely its makings; and (3) fraudulent act accompanying the breach. *Conner v. City of Forest Acres*, 348 S.C. 454, 465-466, 560 S.E.2d 606, 612 (2002). Plaintiff has failed to show the existence of a valid and enforceable contract and/or its breach for the reasons outlined above. Without a valid and enforceable contract and its subsequent breach, Plaintiff's claim for breach of contract accompanied by a fraudulent act fails as a matter of law.

Declaratory Judgment Action

Defendant is also entitled to summary judgment and a dismissal with prejudice as to Plaintiff's request for a declaratory judgment because the declarations have either already been addressed by the Summary Judgment Order or are simply impermissible requests for advisory opinions from the Court.

Plaintiff's Second Amended Complaint requests declarations that: (1) JWC may refuse to issue the requested willing and able letter to DHEC; (2) JWC may refuse to approve the 49 campsites if there is no negative impact on existing customers, and (3) JWC can limit the amount of water a customer can purchase. Each of these declaration requests were addressed in the Factual Findings from the Summary Judgment Order. These Factual Findings are the law of the case and the issues cannot be relitigated at this time. *See Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015); *see also Ross v. Medical Univ. of S.C.*, 328 S.C. 51, 492 S.E.2d 62, 68 (1997).

Plaintiff BRC's Second Amended Complaint also seeks additional declarations that: (1) JWC may provide preferential treatment to residential customers over commercial customers in the provision of water service; (2) JWC is a residential water company; (3) if JWC is determined to be a residential water company, then the rights of its business customers to water service; and (4) JWC can cut back on the volume of water or turn off the water to a commercial customer.

The relief a party seeks is beyond the scope of a declaratory judgment when the issue is abstract rather than ripe for adjudication, and presents a court with nothing more than a vehicle rendering an advisory opinion. *Hitter v. McLeod*, 274 S.C. 616, 619, 266 S.E.2d 418, 420 (1980). Because Plaintiff's claims for breach of contract and breach of contract accompanied by a fraudulent act fail as a matter of law and are dismissed with prejudice for the reasons outlined above, there are no remaining issues between the parties that make these requested declarations ripe for adjudication. The requested declarations would settle no legal rights of the parties. As a matter of law, this Court declines to extend the declaratory judgment statute beyond its intended purpose to give the parties advisory opinions on these declarations.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED
as follows:

Defendant JWC is entitled to summary judgment and/or judgment as a matter of law. Accordingly, the Court **GRANTS** Defendant JWC's Renewed Motion for Summary Judgment on Plaintiff BRC's remaining claims for Breach of Contract, Breach of Contract Accompanied by a Fraudulent Act, and Declaratory Judgment, and dismisses this case **with prejudice**.

AND IT IS SO ORDERED.

Winnsboro, South Carolina

Dated: _____

Brian M. Gibbons, Chief Administrative Judge
Sixth Judicial Circuit

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Jul 10 2020

SC Court of Appeals



Fairfield Common Pleas

Case Caption: Broad River Campground Llc VS Jenkinsville Water Co Inc

Case Number: 2014CP2000349

Type: Order/Summary Judgment

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge