

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough

Case No. 2018-CP-10-00749
Appellate Case No. 2019-002044

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SC Court of Appeals

CAHOC 8, LLC, Respondent,

v.

King and Calhoun, LLC a/k/a King and Calhoun, LLC a/k/a K&C, LLC, Curtis Corp., and
Werner Real Estate Holdings, LLC, and Thalhimer Charleston, LLC, Defendants,

Of which King and Calhoun, LLC a/k/a King and Calhoun, LLC a/k/a K&C, LLC, Curtis
Corp., and Werner Real Estate Holdings, LLC are the Appellants.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE ISSUES IN THE CASE

WHETHER THE ASSERTION OF A NEW, DISTINCT, UNPLED CLAIM, FOUR YEARS AFTER THE CLAIMANT KNEW OR SHOULD HAVE KNOWN THE CLAIM EXISTED, FIRST ASSERTED AFTER THE CLOSE OF DISCOVERY, ONE MONTH BEFORE TRIAL, IS PROPERLY DISMISSED AS TIME BARRED, UNPLED, OR BOTH.

STATEMENT OF THE CASE

On February 12, 2018, Respondent filed a Complaint naming Appellant Landlord and property manager, Thalhimer Charleston LLC, as Defendants. *Id.* The inaugural Complaint alleged Breach of Contract as to Landlord, Unfair Trade Practices to All Defendants, and Tortious Interference with a Contract as to Thalhimer. On March 29, 2018, Respondent amended its Complaint adding Curtis Corp. and Werner Holdings as Defendants and an additional cause of action of Veil Piercing/Joint Venture/Agent/Alter Ego/Amalgamation as to Landlord, Curtis Corp., and Werner Holdings. (R. p. ____).

On April 26, 2018, Appellants filed their Answer and Counterclaim against Respondent alleging Breach of Contract and Negligence. (R. p. ____). On May 9, 2018, Respondent filed its Answer to Appellants' Counterclaim setting forth the following affirmative defenses of Failure to State a Claim; Waiver, Laches and Estoppel; Intervening and Superseding Negligence; Costs and Attorney's Fees; Reservation and Non-Waiver of Defenses; Comparative Negligence and/or Fault; Negligence of Others; Failure to Properly Give Notice; Negligence of Landlord; Statute of Limitations; Economic Loss Rule; Prior Breach of Agreement; and Punitive Damages. (R. p. ____).

Several months later, all parties submitted a Consent Scheduling Order which was entered on July 6, 2018. Discovery requests and responses were exchanged, and the parties came to an impasse at mediation on November 30, 2018. A Stipulation of Dismissal of Thalhimer was filed on March 8, 2019.

On March 14, 2019, a Consent Order of Reference was filed by the parties referring the case to The Honorable Mikell R. Scarborough, Master-In-Equity for Charleston County. (R. p. ____). A Status Conference between the parties and Judge Scarborough was held on June 10, 2019, to establish deadlines. The Master's Scheduling Order filed on June 13, 2019, required the completion of discovery by or before November 11, 2019; all dispositive motions filed on or before November 15, 2019; pre-trial hearing scheduled on December 6, 2019; and trial scheduled on December 16 – 18, 2019. (R. p. ____).

On October 16, 2019, Respondent filed a Motion to Compel Discovery, Confirm Trial Schedule, and for an Expedited Hearing since Landlord repeatedly refused to cooperate in the scheduling of deposition and unilaterally announced that trial will have to be delayed. (R. p. ____). A hearing was held on Respondent's Motion on November 4, 2019. Judge Scarborough revised the scheduling order to reflect that all discovery was to be completed by November 15, 2019, and all dispositive motions were to be filed by November 25, 2019. (R. p. ____). The pretrial hearing and trial dates remained the same.

On November 15, 2019, Respondent filed its (first) Motion to Dismiss and/or Motion for Summary Judgment as to Landlord's Negligence Counterclaim noting that Landlord's negligence counterclaim sought recovery for damage to the leasehold interest and was therefore barred by the economic loss rule. (R. p. ____). Because the negligence claim was barred, the plea for punitive and statutory damages was also barred. *Id.*

Appellants filed their Motion for Summary Judgment on November 22, 2019, claiming Respondent occupied nearly 5,000 additional square feet of space beyond the original 11,644 square feet of space and, pursuant to the terms of the Lease Agreement, asserted that Respondent

was obligated to pay for the additional occupied space and additional rent, taxes, insurance, and all CAM charges. (R. p. ____).

On November 25, 2019, Respondent, with Appellants' consent, filed a Joint Stipulation withdrawing its Fourth Cause of Action: Veil Piercing, Joint Venture, Alter Ego, and Amalgamation as to Appellants.

Also, on November 25, 2019, Respondent filed its Second Motion for Summary Judgment as to Portions of Both Parties' Contract Claims. (R. p. ____). This motion included a plea for summary judgment on two new, unnoticed, un-plead claims for change order compensation for a buildout on the property. Landlord had expressly conceded four days prior, during the November 21, 2019, deposition of Trent Watts, Landlord's property manager, that the buildout change order claims totaling \$100,503 had never previously been presented to Respondent (Watts pp. 457-458, 465-467)¹. On December 5, 2019, Appellants filed a single memorandum as to all motions. (R. p. ____).

During the pretrial hearing on December 6, 2019, the parties' cross motions for summary judgment were argued before Judge Scarborough and he struck the newly claimed buildout charges. (R. p. ____). Following the hearing on December 10, 2019, a Form 4 Order was executed confirming that: 1) Appellants' Motion for Summary Judgment was denied; and 2) Respondent's Motion for Summary Judgment was denied on all issues but granted as to Breach of Contract to the extent it excludes Landlord's claim for Buildout Costs for the Changes Orders in the amount of \$100,503. (R. p. ____).

¹ All references to Watts deposition are to his Rule 30(b)6 deposition which occurred in the Fall of 2019 (unless expressly indicated otherwise by "Watts – April p. ____").

Finally, on or about December 1, 2019, Appellants used their Notice of Appeal to block the trial of the remaining case – even though the rent and other lease claims are clearly different than Landlord’s new claim for buildout reimbursement.

ADDITIONAL FACTUAL BACKGROUND

Circa 2006, Landlord, an affiliate of Werner Real Estate Holdings, bought the old Millennium Music building at the corner of King and Calhoun Streets (hereinafter “King & Calhoun Building”) in downtown Charleston. Negotiations with Sullivan Management Co., on behalf of the new tenant entity being formed, Respondent/Cahoc 8 commenced in 2012. Respondent sought to open an additional Carolina Ale House location.²

(Lease and Landlord Buildout Deadline)

A fifteen (15) year Lease Agreement (with three 5-year extension options) was executed on November 21, 2013. (Ex. 2). (R. p. ____). The original agreement provided for the Landlord to complete a buildout of the exterior shell and certain interior components by October 1, 2014, so that the Leased Premises could be turned over to Respondent by October 1 for tenant’s buildout.

Id.

The Parties amended their agreement through a “Summary Agreement” dated September 30, 2014 (hereinafter, “Amendment or “Summary Agreement”), outlining several changes to the Lease Agreement. (Ex. 3). (R. p. ____). Among other things, the Amendment required the buildout of Tenant’s improvements to occur “simultaneously” with the remainder of Landlord’s shell work (*Id.* at para. 2). The Amendment dictated a new rent commencement date of March 1, 2015, and other details. (*Id.* at para. 1).

² Cahoc 8 is an acronym for **Carolina Ale House (Company)**, eighth location, affiliated with Sullivan Management. Eight (8) of the twenty-nine (29) Carolina Ale Houses in the Southeast are located throughout South Carolina.

(Early Difficulties)

In early 2015, Landlord began to insist that tenant acquiesce to a higher rent. On Feb. 11, 2015, Trevor Johrendt of Werner emailed:

Chris, Curt wants to move forward on an increase in rent at \$5.16 per square feet and he will cover the rest of the cost. I went ahead and did the analysis on the increase of rent on the \$300k over amortized periods of 5, 10, and 15 years with a finance charge of 7.5%. this is the some (sic) program we have with Walgreens. Call me and we can discuss after for 4 (sic) pm today.

(R. p. ____).

(Ex. 212). Later, Trevor texted Werner's further insistence:

Rent needs to increase by \$5.17 psf regardless. We can't take on the elevator. We already created the value needed and should never done any of this work with (sic) a massive increase in rent. We have a tenant willing to pay \$42 psf right now. You will be going from \$24.10 to \$29.27...

I would strongly advise you to take that deal... we can talk at 4pm.

(Ex. 224). (R. p. ____). Respondent did not acquiesce to a higher rent. On February 16, 2015, at 10:10 am Respondent reminded Landlord that "we currently have a lease which defines the rent."

(Ex. 226). (R. p. ____). Immediately thereafter, on February 17, 2015, Landlord issued a stop work order to the contractor for all work in Respondent's space, as Landlord had:

not officially turned the space over to [Respondent] yet and need to work though some issues with Carolina Ale House before work can continue.

(Ex. 120). (R. p. ____). This was obviously in contradiction of, and therefore in violation of, the Summary Agreement, which turned over Respondent's space to it to work "simultaneously." (Ex.

3). (R. p. ____). The Landlord was clearly bullying the tenant for his own gain. The foregoing pretext was revised twice in the next seventy-two (72) hours.

Portions of the stoppage continued for a period of six weeks. (Watts p. 74). (R. p. ____). Tenant did not capitulate to these demands and Landlord gradually yielded possession for Tenant's

built out. The stoppage of Respondent's construction and failure to "turn-over" the Leased Premises resulted in a delayed opening and lost profits. (R. p. ____).

(Rent Commencement, Opening, and Other Problems)

Respondent commenced paying rent in March 2015 (per the Summary Agreement) and opened in the last week of May 2015. (R. p. ____). Carolina Ale House operates on the third floor, partially inside, and partially outside. Part of its draw is that the outside patio overlooks Calhoun Street. Carolina Ale House is currently in its sixth (6th) year of operation.

New conflicts arose between the parties, including responsibility for elevator breakdowns and a defectively installed exterior deck. Later, in retaliatory response, Landlord raised issues regarding a grease spill in parking lot and a grease spill on roof.

Dialogue as to high common area maintenance ("CAM") components, notably trash, started by early 2016. This dialogue was followed by disagreements as to the Landlord's calculation of CAM for 2016, then for 2017. (R. p. ____). In June 2017, while the 2016 CAM inquiry was pending, Landlord tried to implement a shocking thirty (30) percent CAM increase for 2017 (from \$2.64/sq. ft. to \$3.44/sq. ft.). (R. p. ____). Respondent pointed out that the lease had a five (5) percent annual cap on CAM increases per Article 17 of the Lease. (Ex. 2). (R. p. ____). The Landlord eventually conceded to the proper five (5) percent annual cap (\$2.91/sq. ft.) (Ex. 21) (R. p. ____), as it turns out, because it decided it could increase square footage of the Leased Premises to make up the money. (Ex. 67). (R. p. ____).

When the Landlord was forced to concede a substantially lower 2017 CAM charge, due to the five (5) percent cap, Landlord's agent and bodyguard, Trent Watts, wrote to Curt Werner and said, essentially, don't worry, we will remeasure the space and the CAM won't matter:

CAH is still disputing the CAM reconciliation...This will not be an issue either way once we get the Survey of SQ FT done.

(Ex. 67). (R. p. _____).

And, remeasure they did. Landlord increased Plaintiffs space measurement by forty-nine (49) percent, resulting in an overwhelming increase in “Additional Rent:” CAM, Taxes, and Insurance.³ Respondent was thereafter blindsided by the August 11, 2017 notice of survey and increased Additional Rent rates. (Ex. 265). (R. p. _____). Respondent had met with Landlord earlier in the summer on elevator and CAM issues and was still awaiting Landlord’s response to that meeting when the remeasurement was received. (Ex. 266). (R. p. _____). The remeasurement increased the square footage of the Leased Premises by a whopping forty-nine (49) percent. (Ex. 265). (R. p. ____). This resulted in a significant increase in extra Additional Rent, which was estimated⁴ by the Tenant to be approximately \$5,000 per month or \$60,000 per year. (Sullivan p. 211-212). (R. p. _____). This would amount to a unilateral addition of \$780,000 for the then thirteen (13) years remaining on the lease (not to mention the fifteen (15) years of renewal options).

Seeing matters escalating, Respondent returned to the law firm it had previously consulted for assistance on the lease. On October 4, 2017, Frank Robinson of Richardson Plowden wrote Landlord and requested a meeting on the remeasurement dispute. (Ex. 266). (R. p. _____). Receipt of his communication was acknowledged but no further response was received. (Ex. 267). (R. p. _____). On November 16, 2017, Attorney Robinson again wrote Landlord regarding the remeasurement and included more detail on the history of the square footage and requested a meeting. (Ex. 268). (R. p. _____). Again, receipt was acknowledged. (Ex. 269). (R. p. _____). However, the response received was an “Official Delinquency Notice” dated December 6, 2017.

³ This did not result in an increase in base “rent,” as the Lease provided for a sum certain for base rent of \$275,000 per year.

⁴ Tenant can only estimate this number, because Landlord has changed its CAM charges several times.

(Ex. 270) (Sullivan pp. 87, 180-181). (R. p. ____). Thereafter, Respondent hired the undersigned as local litigation counsel. Again, Respondent's counsel wrote Landlord to engage in a dialogue in lieu of litigation. (Ex. 271). (R. p. ____). No substantive response was timely received. Respondent offered a tolling agreement to permit time for dialogue, but no timely response was received. (Ex. 272). (R. p. ____). This suit necessarily followed.

Although Tenant surmised that the increase was due to the Landlord counting some common areas as Leased Premises (see, e.g., Ex. 268), Landlord refused to expressly acknowledge that until late 2019. (Watts p. 89). On October 29, 2019, that Landlord clearly acknowledged that it had *unilaterally* added the common areas that had been negotiated *out* of the Lease Premises back *into* the Leased Premises, *without notice, warning, or discussion*, which is simply not in compliance with the Lease Agreement; and therefore a breach of the Lease Agreement, and its implied covenant of good faith and fair dealing. (R. p. ____). (Watts pp. 25-33; 89-90; 310-313).

(Additional Rent Disputes)

Thereafter, Tenant heard nothing further from Landlord regarding CAM matters. Tenant justifiably believed that the Landlord was maintaining the status quo pending Court resolution. However, unknown to Respondent, Landlord was continuing to impose new charges on Tenant, but *sending the notices to an outdated address*. Tenant had provided Landlord with the updated address, as evidenced by the correct address on the Deficiency Notice, dated December 6, 2017. (Ex. 270; see also, Ex. 242). (R. p. ____). However, late discovery produced by Landlord in this litigation indicated that the new charges – and late charges for not paying the new charges – were being sent to a very old, unused address. (Defendant's Ex. 31 to Sullivan Deposition (Aug. 2018 Bill)). (R. p. ____).

One such increase was a March 2018 rent increase, which was in violation of the Lease. (Ex. 252). (R. p. ____). This 2018 increase was first communicated to Tenant on November 15, 2019, the last day of discovery. (R. p. ____). Landlord admitted the violation on November 21, 2019 (Watts pp. 499-500). (R. p. ____). Similarly, all other new charges and late charges thereon were sent to the wrong address.⁵ (See, e.g., Watts pp. 446-447). (R. p. ____).

Also, on November 21, 2019: 1) Landlord attempted to impose additional 2015 CAM charges, which make no sense and are time barred (Watts pp. 412-414). (R. p. ____); and, 2) Landlord attempted to present two new, unnoticed, unrepresented, un-plead claims for change order compensation for buildout (Watts pp. 457-458, 465-467) (R. p. ____). Landlord expressly conceded that the 2015 CAM charges and the buildout change order claims had never previously been presented to Respondent. *Id.*

(Remeasurement Pretextual Explanation)

In 2019, for the first time ever, Landlord pretextually justified its unilateral, undisclosed decision to add the common areas back into Respondent's "Leased Premises," by claiming that Respondent took over the space with temporary posters/advertising. (Watts pp. 89-90). (R. p. ____).

The evidence that the foregoing was pretextual is overwhelming. Not only was there no warning that this would occur; not only did bodyguard Watts indicate the remeasurement would solve the CAM/trash problems; but this explanation was never previously given. Recall that Respondent had its attorneys write Landlord four (4) or more times to attempt to work through the square footage dispute. (R. p. ____). No answer was ever received – except a notice of default.

⁵ Of course, since Landlord never noticed Respondent of any additional charges, Respondent has never had the opportunity to vet the charges or review the backup documentation.

It was not until 2019 that Landlord first articulated its “advertising” theory as to increased square footage.

Moreover, Landlord does not deny that its management company gave permission for the posters to be hung for decoration. (Watts pp. 310-311). (R. p. ____). Landlord concedes it never asked Respondent to take the posters down. (Watts pp. 311-314). (R. p. ____). Landlord concedes it never warned Respondent it would add the space to its “Leased Premises” if Respondent continued to “occupy” the space with advertising. (Watts pp. 312-313). (R. p. ____). This pretextual excuse by Landlord would be amusing if it did not have such serious consequences.

Landlord also attempted to claim that the common area became uncommon, because Respondent was the only tenant using it. However, that probability, if not certainty, was known at the time the original lease was signed. Please note the wording of the executed Letter of Intent: “dedicated stairwell and elevator area.” (Ex. 1). (R. p. ____). That probability was known when Landlord first tried to include the common areas in the Leased Premises, and again when Landlord agreed that the common areas would not be included in the Leased Premises. Landlord concedes it agreed to grant atrium access to Walgreens in 2016. (Watts p. 313). (R. p. ____). While Walgreens abandoned this access, the important point is that Landlord had the right to grant this access as the atrium had been treated as a common area.

Importantly, all the events which Landlord utilizes to justify the change in Leased Premises in the remeasurement occurred after the remeasurement was supposed to occur pursuant to the express lease terms. The signs complained of by Landlord were posted in 2018; Landlord was unable to identify any being posted in 2016 or 2017. (Watts p. 307). (R. p. ____). Stated differently, none of the later events would have been in existence – or could have been considered – had the remeasurement occurred when it was supposed to.

All the foregoing is before one even considers the obvious import of the remeasurement clause – as it was to occur upon the completion of the tenant’s improvements. The obvious focus is the change in square footage, if any, that results from Tenant’s improvements; not whether the Tenant hangs a third-floor directional sign in the elevator.

Lastly, of course, the reassessment of CAM resulting from the remeasurement violates the five (5) percent annual CAM cap.⁶

(On the Eve of Trial)

Plaintiff noted a Rule 30(b)6 deposition on Landlord to occur prior to the November 15, 2019 end of the discovery period to get the Landlord’s final position on all matters. The Rule 30(b)6, SCRCP deposition of King and Calhoun began on October 29, 2019, and continued on November 6, 2019. (R. p. ____). However, as the proffered witness was unprepared to address damages, the damage portion of deposition occurred on November 21, 2019. (R. p. ____). Prior to this, after close of business on November 15, 2019, Appellants produced a cryptic list of damages. (Hearing Trans. p. 30/16-22). (R. p. ____).

During the November 21, 2019 damage deposition, for the first time ever and after the close of discovery, the Landlord claimed it was owed buildout reimbursement from 2015. Landlord admitted it had just realized this claim the prior week – and it had never previously been asserted against Respondents. (R. p. ____). This claim had never been pled, and therefore had not been the subject of discovery; it was patent that Landlord should have realized this alleged claim over four years ago. Therefore, Respondent moved for summary judgment on the buildout claim in Respondent’s second motion for summary judgment filed on November 25, 2019.

⁶ Respondent will spare this Court from further discussion of the failure to perform patio deck repairs, the baseless grease staining claims, and the extensive conflicts over the elevator break downs and repairs.

On December 6, 2019, after the parties had argued the principal issues in the case, and Judge Scarborough indicated he would wait on the evidence, Respondent asked for an express ruling on the Landlord's new, unpled claim. (R. p. ____). As evidenced by the transcript, when that occurred, the Judge pulled out Landlord's breach of contract allegations, in Landlord's counterclaim, and reviewed them. (R. p. ____.) Noting the omission of a claim for reimbursement of buildout costs, the Court inquired of Landlord counsel if he had anything to offer in response. (R. p. ____). Counsel's only response was that he would have to discuss it with his client. (R. p. ____). Appellant expressly conceded that the buildout claims were not pled. (R. p. ____). Appellant proffered no evidence. *Id.* In light of the Respondent's well supported position, and the rules of civil procedure, and the lack of opposition, let alone supported opposition, by the Appellants, the Trial Court properly ruled out the unpled, stale claim.

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRPC." *Zurich Am. Ins. Co. v. Tolbert*, 378 S.C. 493, 496, 662 S.E.2d 606, 607 (Ct. App. 2008), *aff'd*, 387 S.C. 280, 692 S.E.2d 523 (2010). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56, SCRPC. The non-moving party bears the burden of demonstrating that there is a genuine issue; and, can satisfy this burden only through proof of specific facts developed through competent documents and testimony. *McGill v. University of South Carolina*, 310 S.C. 224, 226, 423 S.E.2d 109, 111 (1992). A non-moving party's beliefs, allegations, or speculations is not enough to defeat a summary judgment motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 319 (1986).

ARGUMENT

Appellant Landlord has clearly violated the Lease in many ways. The related and most significant violations are the CAM overcharges and the 50% square footage increase. However, although Appellants expend most of their briefing on these issues, they are not on appeal.

There is a single issue on appeal. Did the Trial Court properly grant summary judgment on the buildout claim when:

- 1) Appellants counterclaim evidenced that a claim for 2015 buildout costs had never been pled;
- 2) Appellants admitted at Landlord's November 2019 deposition that it had just discovered the debt the prior week;
- 3) Appellants admitted at Landlord's deposition that since the claim was just discovered, it had never been presented to the Respondent;
- 4) It is evident from the record that Appellants always had all of its buildout cost information; and no reason is proffered for a delay in discovering the alleged amount owed;
- 5) No facts are offered to put the application of the statute of limitations at issue;
- 6) No effort is made to move to amend and cure the pleadings; and,
- 7) The Court invited Landlord counsel to provide contrary information – and none was offered or proffered.

The question answers itself – summary judgment was properly granted.

A) Respondent Properly and Clearly Moved for Summary Judgment on Buildout Costs

Appellants' Brief implies that this summary judgment relief was not requested. This is false. Plaintiff's Second Motion for Summary Judgment expressly, succinctly, and separately set forth a specific request for summary judgement on the claim for buildout costs which had never been asserted or pled or raised until the close of discovery, four years after the Landlord knew or

should have known of his alleged claim for unreimbursed buildout costs. The motion on the buildout issue reads as follows:

COMES NOW Plaintiff, above named, and files this second motion for summary judgment as to portions of both Plaintiff's contract claims and Defendant King and Calhoun, LLC's (hereinafter, "Landlord") counterclaims.⁷ The primary bases of this motion for summary judgment are as follows:

.....

2. 2014-2015 Buildout Allocations: On November 15, 2019, Landlord first ever presented two claims for two pre-opening buildout items. These new and unpled claims are barred by the Statute of Limitations;

a. On November 21, 2019, Landlord admitted these claims had never previously been made upon Plaintiff.

(Respondent's Motion for Summary Judgment at 2.) (R. p. __).

Respondent's assertions on this issue were well supported – by the absence of the issue in Appellants counterclaim and by deposition testimony. Upon inquiry by the Judge, Appellants proffered no argument or evidence in opposition and conceded that the claim was not pled (and did not move to amend its pleadings). Partial summary judgment was properly granted by the Trial Court.

B) Respondent Properly Supported its Motion for Summary Judgment on Buildout Costs

Appellants' Brief argues that the grounds for this relief were unsupported. This is false. The factual assertions are clearly supported by the absence of this claim in the counterclaim and the deposition testimony of the Landlord that was cited in Respondent's Memorandum and submitted to the Court.⁸ Appellants admitted during deposition that it had just computed the amount due the prior week, and that the claim had never been asserted against Respondent.

⁷ The first Motion for Summary Judgment being that the economic loss rule bars the negligence counterclaim.

⁸ Respondent submitted extracted deposition testimony at the hearing; Appellant submitted the entirety of all deposition transcripts in the case.

Counsel admitted the claim was not pled and failed to proffer any opposing evidence or issues of fact. Landlord testified as follows:

Q. All right. And what will I see on COP 59?⁹

A. It says deck extension for \$88,099.

Q. Has this bill ever been presented to CAHOC before, the tenant before?

A. We were believed that it had been paid by the tenant and was identified that, in fact, it had not been paid by the tenant and the landlord had paid the bill.

Q. Why did you believe the tenant had paid for it?

A. It was his responsibility. He was responsible for 100 percent of the deck extension buildout. It had always been on the tenant's invoices, and it had got transferred to ours.

Q. You're saying Choate [the builder] transferred it to yours?

A. Somehow it got transferred to ours, and we paid it, yes.

Q. All right. When was the first time that you learned that you paid it instead of Chris Sullivan?

A. Sometime in the last two months.

Q. So you never asked Chris Sullivan for this money, this \$88,000?

A. Prior to this, no.

(Watts pp. 457-458).

.....

Q. Okay. Now, line 16, it is COP 32/87, \$12,000. Tell me about that, please.

A. Yes. \$12,404. On that list, as we've discussed, COP 32 was a credit.

Q. Hold on one second. Just so we only do this once. When you say, "that list we discussed," you're talking about the final COP list from late 2015, correct?

A. Correct.

⁹ "COP" stands for Change Order Proposal. There were two change order proposals that Appellant referenced in attempting to back charge Respondent for \$100,000.00, COP 59 and COP 32.

Q. All right. And as I understand it, just to keep our transcript clear, there had been two sets of COP lists given to Carolina Ale House. There is one in 2014 shortly after the September 30th amendment or summary agreement, which eventually got paid in the amount of a hundred thousand odd dollars or so roughly, maybe 124-. Do you recall that being the first list?

A. *So do you want to reference it as the final COP list? Is that what you're saying?*

Q. Well, no. First, I want to --

A. *Well --*

Q. -- separate it out. There was a 2014 list that got paid in early 2015, correct?

A. *I, again, specifically the timeline for those lists and the pace of them, I don't know. There was the list that was correct and sent out, and there was a payment made on the original list for some COPs.*

Q. And then there was a second different list that you were involved in, which was one of the final lists?

A. *The final -- we'll call it the final list with the corrections for COP 12 and the roof drains.*

Q. Okay. So I apologize for interrupting, but I want us to have a clear transcript.

A. *Absolutely.*

Q. You were explaining to me line 16 in Plaintiff's Exhibit 257, please.

A. *Absolutely. In the final COP list, the COP 32 was for the deletion of the second and third floor storefront. The tenant took a credit of \$12,404 on that final COP list. The -- as part of our original scope of work, we were going to provide the storefront for the second and third floor. The tenant requested that we allow him to do that. He wanted to add in a completely different storefront. It required BAR approval. We agreed, and we gave him the credit in COP 32 of 12,404, which was applied to the final COP list. Ultimately, the tenant did not install the second floor storefront, and the landlord was responsible for installing that at a cost of over \$13,000, which is COP 87.*

(Watts pp. 465-467). (R. p. ___). As seen by the earlier testimony, all the relevant buildout was completed in 2014 and early 2015. This attempt to reverse a credit on the buildout accounting occurred over four years after the buildout – clearly time barred.

Finally, Respondent's Memorandum in support of its second summary judgment motion specifically concluded in relevant part:

Based upon the foregoing law and evidence, Plaintiff is entitled to an Order granting summary judgment as follows:

.....

6) That the two new buildout change order claims are time barred;

(R. p. _____).

C) Respondent Properly asked for a Specific Ruling on the Separately Stated Ground, and the Trial Court Reviewed the Counterclaim and Invited any Opposing Evidence or Argument; None was Presented or Proffered

On December 6, 2019, after the parties had argued the principal issues in the case, and Judge Scarborough indicated he would wait on the trial evidence, Respondent asked for an express ruling on the Landlord's new, unpled claim. (Trans 62/22-23). (R. p. _____). As evidenced by the transcript, when that occurred, the Judge pulled out Landlord's breach of contract allegations, with Landlord's counterclaim, reviewed them. (Hearing Trans. p. 65/1-10) (Trial Court Reading from paragraph __ of counterclaim). (R. p. _____) Noting the omission of a claim for reimbursement of buildout costs, the Court inquired of Landlord counsel if he had anything to offer in response: "I don't see anything on construction costs. Is that what you are alleging?" (Hearing Trans. p. 65/11-2) (R. p. _____) Counsel's only response was that he would have to discuss it with his client: "Your Honor, again, I need to talk to my client about it." (Hearing Trans. p. 65/13-14). (R. p. _____). Appellant expressly conceded that the buildout claims was not pled; "It's not pled in Paragraph 54." (Hearing Trans. p. 65/17). (R. p. _____). Appellant proffered no evidence. *Id.* In light of the Respondent's well-supported position, and the South Carolina Rules of Civil Procedure, and the lack of opposition, let alone supported opposition, by the Appellants, the Trial Court properly ruled out the unpled, time barred claim.

D) Legal Precedent Mandates that the Trial Court's Grant of Summary Judgment be Sustained – for a Multitude of Reasons

This Court should sustain the Trial Court's ruling because our judicial system requires notice, to avoid prejudice to litigants; Appellant failed to plead buildout costs; Appellant failed to

move to amend its pleadings at any point in the underlying case; even if Appellant had so moved, its late assertion of the claim after discovery closed would work a substantial prejudice on Respondent; and, even a conservative calculation makes clear that the buildout claim was time barred under the statute of limitations.

i. The claim was unpled

“[T]he principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial.” *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 574, 743 S.E.2d 778, 785 (2013) quoting *S.C. Nat'l Bank v. Joyner*, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct.App.1986). “The purpose of pleadings is to place the adversary on notice as to what the issues are.” *Langston v. Niles*, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975) Unpled damage claims may not be recovered. *Norwest Properties, LLC v. Strebler*, 424 S.C. 617, 627, 819 S.E.2d 154, 160 (Ct. App. 2018), *reh'g denied* (Oct. 18, 2018), *cert. denied* (June 28, 2019) (reversing damage award where Seller failed to amend his pleadings to add unpled special damages claims). Failure to move to amend the pleadings is fatal. *Id.* at 626, 159 (“Because Buyer objected to the special damages and Seller did not move to amend, the Master was powerless to ... consider the issue of special damages.”).

In this case, even a motion to amend would likely have been futile. “However, if late amendment of the pleadings would cause prejudice to the opposing party, the court should either deny the amendment or grant a continuance reasonably necessary to allow the opposing party to meet the amendment.” *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) citing *National Time Share Sales, Inc. v. Maritime Ltd. Partnership*, 297 S.C. 43, 374 S.E.2d 678 (1988). “Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in

the amended action.” *Id.*; see also *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2005) (“The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it.”).

Here, where the Appellant admitted that it did not plead buildout costs and Appellant attempted to assert the claim at the close of discovery, there is no question that Respondent was entitled to summary judgment in its favor.

ii. The claim was time barred by the statute of limitations

The November 21, 2019, Landlord claim for reimbursement for Spring 2015 buildout costs allegedly paid by Landlord in Tenant’s (Respondent’s) behalf was patently stale at the time it was brought. (Watts p. 67/13-20). The statute of limitations for a breach of contract claim in South Carolina is 3 years. S.C. Code Ann. § 15-3-530. The record indicates Landlord always had all of the buildout accounting in its possession since buildout was completed in early 2015; therefore, any claim for buildout costs should have been asserted by May 25, 2018, three years after Respondent opened for business. Here, buildout costs were first asserted more than four- and one-half years beyond the statute’s expiration. Appellant has failed to proffer any issue of genuine fact to the contrary because none exist.

In fact, the evidence is overwhelming that change order proposals/change orders (buildout costs) were closely scrutinized by the parties before and as they occurred in late 2014/early 2015; and the allocation of these costs were closely tracked and debated before and after the changes were completed in early 2015. (Ex. 232, 194, 228, 227, 6, 112, 160, 138, 140, 7, and 144). (R. p. __). Differences in COPs appear to have contributed to the stop work order/conflict that occurred in February of 2015. (Ex. 211). (R. p. __). Landlord’s final revisions in COP invoicing took place in the fourth quarter of 2015; and final payment was made by Respondent in early

February 2016. (Ex. 149). (R. p. __). Not only is there a lack of facts supporting a later claim accrual, there does not appear to be any room for such facts as the 2014-5 record is exhaustive.

Summary judgment was proper; Appellant failed to timely bring its buildout claim.

iii. Curtis Corp. and Werner have no standing on this claim

Regardless of, and in addition to the foregoing, there is no evidence that Curtis Corp. or Werner have any standing on this claim or in this appeal. The Appellants' claim is that King and Calhoun, LLC, had the buildout performed, not its affiliates.

CONCLUSION

Respondent's motion for summary judgment was specific and well supported. Appellant's opposition was non-existent. Summary judgment was properly granted.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

/s/Justin Lucey _____

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July 27, 2020
Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough

Case No. 2018-CP-10-00749
Appellate Case No. 2019-002044

RECEIVED

Jul 27 2020

SC Court of Appeals

CAHOC 8, LLC, Respondent,

v.

King and Calhoun, LLC a/k/a King and Calhoun, LLC a/k/a K&C, LLC, Curtis Corp., and
Werner Real Estate Holdings, LLC, and Thalhimer Charleston, LLC, Defendants,

Of which King and Calhoun, LLC a/k/a King and Calhoun, LLC a/k/a K&C, LLC, Curtis Corp.,
and Werner Real Estate Holdings, LLC are the Appellants.

PROOF OF SERVICE

I, Justin O'Toole Lucey, counsel for Respondent CAHOC 8, LLC, certify that the **RESPONDENT'S INITIAL BRIEF** was served on all other parties to this appeal on July 27, 2020, via email and by copy thereof deposited in the U.S. Mail properly posted for delivery to G. Hamlin O'Kelley, III, Esq., Buist, Byars & Taylor, LLC, 652 Coleman Blvd., Suite 200, Mt. Pleasant, SC 29464.

Respectfully submitted,

By: /s/Justin O'Toole Lucey
Justin O. Lucey (SC Bar No. 15438)
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
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(843) 849-8400

Dated: July 27, 2020
Mt. Pleasant, South Carolina

From: [Lee Weiland](#)
To: [G. Hamlin O'Kelley](#); [Amanda Taylor](#)
Cc: [Justin Lucey](#); [Sohayla Townes](#); [Collin Fuller](#); [Jennifer Zambriczki](#); [Lee Weiland](#)
Subject: CAHOC 8 v King & Calhoun et al. (Appellate Case No. 2019-002044) / Respondent's Initial Brief, Designation of Matter, and Proofs of Service
Date: Monday, July 27, 2020 1:35:34 PM
Attachments: [CAHOC 8, LLC v. King & Calhoun, LLC, et al. - Respondent's Initial Brief \(Appellate Case No. 2019-002044\).pdf](#)
[CAHOC 8, LLC v. King & Calhoun, LLC, et al. - Respondent's Proof of Service of Initial Brief \(Appellate Case No. 2019-002044\).pdf](#)
[CAHOC 8, LLC v. King & Calhoun, LLC, et al. - Respondent's Designation of Matter \(Appellate Case No. 2019-002044\).pdf](#)
[CAHOC 8, LLC v. King & Calhoun, LLC, et al. - Respondent's Proof of Service for Designation of Matter \(Appellate Case No. 2019-002044\).pdf](#)

Mr. O'Kelley,

Attached please find and hereby served upon you Respondent's Initial Brief, Designation of Matter, and Proofs of Service in the above-referenced Appellate matter, which will be filed following this email.

Thank you,
Lee

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Jul 27 2020

SC Court of Appeals