THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY

The Honorable Larry B. Hyman, Circuit Court Judge

Civil Action No.: 2018-CP-26-2183; 2018-CP-26-2184; 2018-CP-26-2185; 2018-CP-26-2187
Appellate Case No.: 2020-000391

Anaptyx, LLC, — Appellant

v.

Golf Colony Resort II at Deer Track Homeowners' Association, Inc., — Respondent

AND

Anaptyx, LLC, — Appellant

v.

Golf Colony Resort IV at Deer Track Homeowners' Association, Inc., — Respondent

AND

Anaptyx, LLC — Appellant

v.

Deerfield Plantation Community Services Association, Inc. — Respondent

AND

Anaptyx, LLC — Appellant

v.

Tradewinds Homeowners' Association, Inc., — Respondent

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

1. Should this Court affirm the Circuit Court's decision that the contracts, which are the subject of this appeal, are contracts for "services, maintenance, or repair to or for any real or personal property" and therefore fall under the purview of N.Y. General Obligations Law § 5-903?

STATEMENT OF FACTS

On October 1, 2012, Appellant and Respondent Associations entered into four (4) separate contracts, each with an initial term of five (5) years from the date of execution. [Complaint ¶ 3.] The contracts each contained in their recitals that the Appellant and Respondents "desire to make the Service available to occupants at the Property in accordance with the terms and conditions of this agreement." [*See* Exhibit A to Complaint p. 1.] Further, each contract detailed the Appellant's service obligations, which included making the Wi-Fi service available to the occupants during the term of the contract, installing the system at the property, and maintaining the system at the sole expense of the Appellant. [*See* Exhibit A to Complaint ¶¶ 1.1, 1.2 and 1.3.]

The contracts provided that the initial term would be automatically extended for another five (5) year term unless either party notified the other at least one hundred twenty-one (121) days before the expiration of the initial term. [Complaint ¶ 4, Exhibit A to Complaint ¶ 5.] Each contract contained a provision which stated the agreements would be "governed by and shall be interpreted under the laws of the state of New York, without regard to its choice of law provisions." [Exhibit A to Complaint ¶ 14.3.] Under New York General Obligations Law § 5-903, companies furnishing services under a contract "for service, maintenance or repair to or for any real or personal property" are required to provide written notice, served personally or by certified mail, of an automatic renewal provision at least fifteen (15) days and not more than thirty (30) days prior to the time specified for the person receiving such services to serve such notice upon the person providing such services, requesting a termination of service. [Order Granting Defendant's Motion for

Summary Judgment ¶ 4, New York General Obligations Law § 5-903.] The Appellant provided no such written notice to Respondents and therefore the contract would not automatically renew. [Order Granting Defendant's Motion for Summary Judgment ¶ 5.]

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DISMISSED THE APPELLANT'S CLAIMS UNDER NEW YORK GENERAL OBLIGATIONS LAW § 5-903.

A. The circuit court correctly applied New York's General Obligation Law § 5-903 to the contract between Appellant and Respondent Associations.

The Circuit Court correctly determined that New York General Obligations Law Article 5 § 903 applied to the contracts between the Appellant and the Respondent Associations. The statute in question applies to contracts for "service, repair or maintenance to or for any real or personal property." Not only does the Appellant provide a service for the property in the form of Wi-Fi broadband, but the contract details how the Respondent, as the Operator under the contract, is responsible for providing maintenance, at the Respondent's sole expense.

Appellant relies on *Healthcare I.Q., LLC vs. Dr. Tsai Chung, d/b/a Naturo-Medical Health Care P.C.* 2013 NY Slip Op 32144 (N.Y. Sup Ct. 2013) in attempting to determine whether NY General Obligations Law § 5-903 would apply to the services rendered under the contract between the Appellant and Respondents. However, the Appellant's reliance on this case is misplaced in that this decision was overturned in *Healthcare I.Q., LLC v. Chao*, 2014 NY Slip Op 3216, 118 A.D.3d 98, 986 N.Y.S.2d 42 (N.Y. App. Div. 2014). In overturning the decision, the Court found that the "agreement was 'for service ... to or for ... personal property' within the meaning of the General Obligations Law." Id. At 118. The New York Court of Appeals, in *Healthcare I.Q., LLC* further goes on to state that the purpose of the notice required under General Obligations Law is to protect

service recipients from the harm of unintended automatic renewals of contracts for consecutive periods and that the law is to be construed broadly because it is remedial in nature. Id.

Respondents would agree with Appellant that the services under the contract between the Appellant and Respondents and the contracts contained in *Healthcare I.Q., LLC* have little distinction between them. However, because *Healthcare I.Q., LLC* was overturned, as set forth above, the Appellant's assessment that the New York General Obligations Law does not apply in this case is in error. In both cases, the contracts contemplate services to or for real property within the meaning of the New York General Obligations Law. The Court in *Healthcare I.Q., LLC* found that the agreement provided for HCIQ to take dominion over the records and service them on an ongoing basis, and those records files and documents, regardless of who they belonged to, were personal property which HCIQ serviced and maintained. Id. Similarly, Appellant was responsible, under each contract, for ensuring that their services were available to end-users 24 hours per day, 7 days per week, and that the Appellant would be solely responsible for maintenance and repair. Given the broad construction of the New York General Obligations Law and the similar nature of the contracts between the Appellant and Respondents and the contract under *Healthcare I.Q., LLC*, the Circuit Court correctly applied New York General Obligations Law § 5-903 to the contracts here.

B. New York General Obligations Law § 5-903 is to be broadly construed and the services, maintenance and repair contained within this contract subject it to the statute.

The New York Court of Appeals has held that New York General Obligations Law § 5-903 is remedial in nature, and therefore, broadly construed. Id. South Carolina courts have similarly held that remedial statutes are to be broadly interpreted. (*South Carolina Dep't of Corr. v. Cartrette*, 387 S.C. 640, 694 S.E.2d 18 (S.C. App. 2010), broadly interpreting FLSA as a

remedial statute; *Evening Post Publ'g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 745, 267 Ed. Law Rep. 381 (S.C. 2011) broadly interpreting FOIA as a remedial statute). Because the contracts between the Appellant and Respondents, at a minimum, require the Appellant to provide Wi-Fi and Internet access services over its system, and make the services available 24 hours per day, 7 days per week, the remedial nature of the New York General Obligations Law, broadly interpreted, applies to these contracts.

The Appellant relies on three provisions contained within the contracts in an attempt to exclude the service contract from the purview of the New York General Obligations Law. The first provision, contained in Section 1.3 (entitled "Maintenance of System; Restoration of Property"), lays out the obligations of the Appellant in its maintenance of the Wi-Fi service provided to the Respondents' property. The second provision the Appellant relies upon refers to the Appellant's ownership of the System providing Wi-Fi service to the Respondents' property. The third provision the Appellant relies on refers to the Appellant's ability to allow access to the System providing Wi-Fi service to the Respondent's property. The Respondents fail to see how any of these provisions, taken by themselves or all together, would take the contracts outside the purview of the New York General Obligations Law § 5-903.

The New York Court of Appeals, in relying on *Telephone Secretarial Serv. v. Sherman*, 28 A.D.2d 1010 1011, 284 N.Y.S.2d 384, held "that '(t)he words 'service, maintenance or repair' in section 5--903 are to be generously read in order that their scope will engage the variegated evil the statute was intended to meet'." *Mount Vernon Amusement Co. v. Georgian Restaurant Corp.*, 292 N.Y.S.2d 568, 30 A.D.2d 823 (N.Y. App. Div. 1968). In *Mount Vernon Amusement Co.*, the Defendant entered into a written contract with the Plaintiff to 'install, operate and service a vending machine' for the sale of cigarettes at the defendant's restaurant. Id. The Court found that there was

"clearly a 'service' to personal property in that plaintiff was obligated to service, maintain, and stock the vending machine…" and therefore, "the service supplied by plaintiff was 'to or for real or personal property' (General Obligations Law § 5--903), to wit: defendant's restaurant." Id. at 568-569. Because the Plaintiff was obligated to provide these services to personal property at the Defendant's restaurant, the Court found the contract was "of the type encompassed by the statute." Id. at 569.

Under the contracts between the Appellant and Respondents, the Appellant was similarly under an ongoing obligation to maintain, repair and operate the System located at the Respondents' properties. The System is defined under the contract in section 1.2 as the "Operators wi-fi System, that is comprised of all equipment, wiring (including internal building wiring and other external distribution wiring), conduit, molding and other facilities that the Operator owns or installs or that Operator otherwise uses to deliver the services to the property." [Exhibit A to Complaint ¶ 1.2.] As Appellants have admitted, the Appellant was responsible, as the Operator, for maintenance, repair and operation of the system, just as the plaintiff was responsible for the maintenance, serving and stocking of the cigarette machines in *Mount Vernon Amusement Co.* Id. at 568.

Because the Appellant was responsible for all maintenance, repair, and operation of the System used to deliver Wi-Fi services to the Respondents' properties and the New York Court of Appeal's liberal construction and application of the remedial New York General Obligations Law, this Court should find that the contracts between the Appellant and Respondents are of the type encompassed by New York General Obligations Law § 5-903.

C. The contracts between the Appellant and Respondents contemplate that the parties desire to make the service available to occupants at the Property and therefore each contract should be considered, on its face, a contract for services to or for real property.

Each contract between the Appellant and the Respondents desires to make the Wi-Fi service available to occupants at the property, listing the address of the property, the number of units at the location of the property and laying out the Appellant's obligations in operating, maintaining and repairing the System in order to deliver the services to the property. The Appellant argues that the contracts are distinct because the individual property owners did not contract individually with the Appellant, therefore excluding these contracts from New York General Obligations Law § 5-903. The contracts specifically lay out the duties that are required of the Appellant in order to make the services available to the property, and the court need not look beyond the four corners of the contracts to determine the applicability of New York General Obligations Law § 5-903.

It is well established, under South Carolina law, that where a contract's language is clear and unambiguous, the language alone determines the contract's force and effect and that any ambiguity in a contract will be construed in favor of the non-drafting party. *McGill v. Moore*, 672 S.E.2d 571, 381 S.C. 179 (S.C. 2009).

As previously stated above, under the contracts, the Appellant is responsible for the maintenance, repair and operation of the System, the purpose of which is to deliver the Wi-Fi services to the properties. Whether the property owners, individually, or as members of the association itself contracted with the Appellant is a non-issue. The only evidence in the record pertinent to a determination of whether the contracts should be considered contracts for the service, maintenance, or repair to or for any real or personal property as contemplated by the New York General Obligations statute is the four corners of the contracts. The contracts not only set out the desire for the Appellant to make the "service available to the occupants at the Property", but also, make it clear and unambiguous that the Appellant is responsible for repair, maintenance, and

operation of the System to deliver services to the property under Section 1 of the contracts entitled "Operator's Service Obligations."

The terms of the contracts between the Appellant and Respondents are clear in the duties and obligations of the Appellant. Even if the terms of the contract were ambiguous, which they are not, the Court should construe them in favor of the Respondents. Pursuant to the terms of the contract, the Appellant is obligated to service, maintain, repair and operate the System to deliver Wi-Fi services to the Respondents' properties, regardless of whether the Respondents were entitled to charge occupants for use of that service. Because the terms of the contracts are clear and unambiguous as to the obligations of the Appellant to maintain, repair and operate the System to deliver Wi-Fi services to the property, the contracts are subject to New York General Obligations Law § 5-903 even under a narrow reading of the statute.

CONCLUSION

For all the foregoing reasons, the Circuit Court's decision granting summary judgment in favor of the Respondents should be affirmed.

Respectfully submitted,

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August 10, 2020

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Proof of Service

Pursuant to the Supreme Court's Order "Operation of the Appellate Courts During the Coronavirus Emergency" dated March 20, 2020, I certify that on this 10th day of August, 2020, a copy of the Initial Brief of Respondents was served on Appellant by electronic mail "using the lawyer's primary e-mail address listed in the Attorney Information System (AIS)" and by depositing same in the United States Mail, first-class postage prepaid, and addressed as follows:

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August 10, 2020

Via Electronic Filing Only

The Honorable Jenny Abbott Kitchings
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Re: Anaptyx, LLC vs. Golf Colony Resort II
Anaptyx, LLC vs. Golf Colony Resort IV
Anaptyx, LLC vs. Deerfield Plantation
Anaptyx, LLC vs. Tradewinds HOA, Inc.
Appellate Case No.: 2020-000391

Dear Mrs. Kitchings:

Please find enclosed herewith the Initial Brief of Respondents and Proof of Service for the above-referenced matters. Please return a clocked copy to this office.

With kindest regards, I am

Sincerely,

Jonathan Patrick Hanna

JPH
Enclosure(s) as stated