THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Eugene P. Warr, Jr., Special Referee

Appellate Case No. 2019-001062

Vincent C. Carter d/b/a Elite Construction Co., Respondent,

v.

Eagles Landing Restaurants, LLC, Appellant.

REPLY BRIEF OF APPELLANT

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OVERVIEW

Respondent Contractor's Initial Brief effectively concedes the Special Referee made an error in Contractor's favor for tens of thousands of dollars. Contractor has only guesses as to the Referee's reasoning on the other issues.

Background

This is a dispute regarding the retrofitting of a former Ruby Tuesday's restaurant to make it suitable for use as an IHOP restaurant. That work was done under a written contract between the parties, and the Special Referee held that alleged change orders modified the contract.

ARGUMENT

I. The Electricians

Appellant Restaurateur argued in its principal brief that if the Referee is to require Restaurateur to pay the additional cost of hiring more expensive replacement workers, the orders erred in requiring Restaurateur to pay for the replacement workers in addition to, rather than in place of, the amount that had been budgeted for that work. (Init. Br., pp. 9-11; *see also id.* pp. 7-8 (presenting the facts)).

Contractor's Brief of Respondent does not significantly dispute that the Order erred in this regard. It focuses instead on the amount.

A. The Merits

Contractor does not significantly dispute that the Special Referee's orders below were overly generous to Contractor. Contractor simply argues that the written contract between the parties contemplated there would be change orders. (Init. Br. of Resp't., pp. 7-8). That is not in dispute. However, it would make no sense for the Restaurateur to agree that he would pay both for the originally-contemplated work that was not done and for the work that was done in its stead. Contractor cannot point to anything in the Record showing such an absurd agreement.

Contractor's proposed reading of the contract is absurd.

B. The Amount

In its Initial Brief, Restaurateur identified $57,258.38 as the amount of overcompensation directed by the orders below on this issue. (Init. Br. of Appellant, p. 11). Contractor argues that the amount of the overcompensation is $43,724.67. (Init. Br. of Resp't, p. 9). To get there, Contractor refers, in a footnote, to a document that supposedly

identifies additional amounts that Contractor paid of $12,750 and $786.71. (Init. Br. of Resp't, n.2 on p. 5 (referencing Pl.'s Ex. 13)). Neither of those amounts is in that document. Contractor does not provide his math.[1] The Court should not consider such unsupported claims.

Conclusion to Section. The Court should remand with instructions that the award is to be adjusted in Restaurateur's favor in the amount of $57,258.38.

II. The Math Error

Contractor does not dispute that, on the face of the October 2018 order, there is a mathematical error in Contractor's favor of $81,085.33. "As the Appellant correctly points out, this creates a discrepancy of $81,085.33 for payments made by the Appellant that were unaccounted for." (Init. Br. of Resp't, p. 10). Contractor argues for four pages that if one were to take certain select items from certain exhibits, and add them to certain select testimony, and implicitly exclude other testimony and other information in those same exhibits and in other exhibits, one can jerry-rig an analysis that would almost support the Referee's math.

[1] Nor has Restaurateur's counsel been able to identify entries in that Exhibit that would add up to the amount Contractor claims.

(*Id.*, pp. 10-13). In fact, according to Contractor, there is actually a one hundred dollar error in Restaurateur's favor. (*Id.*, pp. 12-13). Contractor asks that any remand the Court issues should include instructions to address this error. (*Id.*, p. 13).

If the Court is not inclined to correct the $81,085.33 error itself, it should remand with instructions that the Special Referee provide his math.

III. The Lost Profits

A. The Law

The parties agree that the award of lost profits is not a matter for the discretion of the trial court, but is rather a matter of law. "South Carolina, as a matter of law, permits the recovery of lost profits for a new business as a result of the breach of a contract claim." (Init. Br. of Resp't, p. 13; *see also* Init. Br. of Appellant, p. 13 (similar)).

B. Application of the Law to the Facts

Contractor's Initial Brief argues for six pages about various reasons on which, in Contractor's view, the Referee could have denied Restaurateur the lost profits. (Init. Br. of Resp't, pp. 14-20). However, the point is that we do not know the grounds on which the Referee did

base his decision. As argued in Restaurateur's principal brief, the orders below are devoid of any explanation of the reasons behind that decision. (Init. Br. of Appellant, pp. 18-20). The Appellate Court, and Restaurateur as Appellant, are entitled to an order more detailed than that. *See, e.g., In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 131-34, 568 S.E.2d 338, 342-44 (2002); Rule 52(a) of the South Carolina Rules of Civil Procedure.

If the Court is not inclined to direct that the Referee award Restaurateur his lost profits, then, because the orders' discussion of the issue fails to comply with Rule 52(a), the Court should remand and direct that the Referee issue an order compliant with Rule 52(a) and *Luckabaugh*.

IV. The Motion to Reconsider

Respondent Contractor does not deny that the Special Referee applied the wrong standard in ruling on the Rule 59 motions.[2]

Instead, Contractor argues that Restaurateur was required to file a successive Rule 59 motion and that Contractor believes it would have prevailed even under a proper standard (Contractor's Arguments IV and V).

Contractor misunderstands the preservation rules. Successive Rule 59 motions are not required. Successive Rule 59 motions are disfavored. The Supreme Court in *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004), favorably cited *Gassaway v. Patty*, 604 S.W.2d 60 (Tenn. App. Ct. 1980) for the proposition that "in [a] case involving successive written motions, appeal was untimely where a party filed second post-judgment motion seeking reconsideration of order denying first post-judgment motion;

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[2] Rather, Contractor agrees with Restaurateur on this point.

> The Special Referee applied federal case law when ruling on the Appellant and Respondent's Rule 59 Motions. (Supp. Order, pp. 3-4). Federal law, which provides that a Rule 59(e) motion may not be used to converse old matters, is antithetical to South Carolina law which permits a court to reconsider a decision "even if it means rehashing all or part of an argument previously presented[,]".

Initial Brief of Respondent, at 20 (emphasis added) (citation omitted).

rules are meant to prevent filing of repetitive post-trial motions and avoid undue delays."[3] And it makes no sense to argue, as Contractor does, that the same results would have been reached under the proper standard, when the Special Referee clearly and erroneously thought he was precluded from considering Restaurateur's arguments.

The Court should, at a minimum, remand for reconsideration under the proper standard.

Conclusion

The Court should direct that the Special Referee credit Restaurateur $57,258 against the electrical work that was not done by Contractor, credit Restaurateur with $81,085.33 that was erroneously removed from the credits to Restaurateur, and direct that he award Restaurateur $71,784.52 in lost income. These total $210,128.23.

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[3]Contractor relies on *I'On, LLC, v. Town of Mount Pleasant,* 338 S.C. 406, 526, S.E.2d 716 (2000) to argue that Restaurateur was required to file a successive Rule 59 motion. To the extent, if any, that *I'On* might conflict with the *Elam* holding that Restaurateur cited above, *Elam*, as the more recent pronouncement on the issue, trumps. *Cf. State v. Giles*, 407 S.C. 14, 20, 754 S.E.2d 261, 264 (2014) (following the most recent of three decisions by the United States Supreme Court on an issue.)

Moreover, to the extent there might be any question as to whether a successive Rule 59 motion was required, the Supreme Court has also taught that appellate courts should "avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place." *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 25, 602 S.E.2d 772, 781 (2004).

Applying these to the final order below, which held that Restaurateur owes Contractor $176,794.99 (plus interest), the Court should remand with instructions that Contractor owes Restaurateur $33,333.24 (plus interest).

In the alternative, the Court should remand with instructions that the Special Referee (I) credit Restaurateur $57,258.38 as a setoff against the electrical work that was done by "extra" electricians in place of the original electricians; (II) correct its math error or provide reasoning for the result; (III) revisit the issue of lost profits; and (IV) reconsider Restaurateur's Rule 59 motion in light of the proper standard.

[Signature block follows]

Respectfully Submitted,

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s/Brooks R. Fudenberg

August 8, 2020

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CERTIFICATE PURSUANT TO RULE 211, SCACR

I certify that the final Brief of Appellant and Reply Brief of Appellant comply with Rule 211(b), SCACR.

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