IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Of Which Anaptyx, LLC is the Appellant.

FINAL BRIEF OF APPELLANT
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STATEMENT OF THE ISSUES ON APPEAL

I. Whether the circuit court erred in dismissing the Appellant's claims from this case pursuant to Rule 56 of the South Carolina Rules of Civil Procedure:

   a. In four suits in which the Appellant filed multiple breach of contract actions pursuant to written agreements to provide wholesale bulk-wifi broadband internet to four homeowners' associations.

   b. In determining that New York's General Obligation Law, Article 5, § 903 was applicable to the case.

   c. In finding that the applicable contracts constituted "service, repair, or maintenance contracts" to real property.

   d. In relying on facts and allegations not in evidence in reaching his decision.

STATEMENT OF THE CASE

The actions were commenced by the filing of four (4) Summons and Complaints in Horry County on April 3, 2018. [Summons and Complaints.] The Plaintiff was captioned as Anaptyx, LLC (hereinafter "Anaptyx"). In the Complaints, Anaptyx sought damages for breach of contract against four separate homeowner's associations (hereinafter "Associations").

This matter is before the Court pursuant to a Notice of Appeal filed by Anaptyx, LLC (Appellant) on seeking review of four trial court orders. [R. at 311; 325; 339; 354.] These appeals were later consolidated under this case heading. [Consolidation Order.] The Honorable Larry B. Hyman, Circuit Court Judge, granted Summary Judgment against all of the Appellant's claims in each of the four lawsuits and entered Orders for each case to this effect on October 8, 2019. Judge Hyman denied the Appellant's Motion for Reconsideration by Orders dated January 29, 2020. [R. at 16; 24; 32; 40] [R. at 45; 48; 51; 54.] This appeal followed.

STANDARD OF REVIEW

In reviewing a trial court's decision granting Summary Judgment, this Court applies the same standard as the trial court applies under Rule 56(c) SCRCP. Brockbank v. Best Capitol Corp., 341 S.C. 372, 378-379, 534 S.E.2d 688, 692 (2000). The contours of the summary judgment standard are well established. Summary Judgment is appropriate only when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Calvert v. House Beautiful Paint and Decorating Center, Inc., 313 S.C. 494, 443 S.E.2d 398 (1994); Rule 56(c) SCRCP. In deciding whether there are any genuine issues of material fact, the court must construe all inferences arising from the evidence against the moving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corporation, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).

Even when there is no dispute as to evidentiary facts, but only as to the conclusions to be drawn from them, summary judgment should be denied. Redwend Limited Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). Moreover, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Middleborough Horizontal Property Regime Council of Co-owners v. Montedison, S.P.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).

In cases in which the burden of proof is the preponderance of the evidence, "the non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment." Hancock v Mid-South Management Co., Inc., 381 S.C. 326, 331 673 S.E.2d 326, 327 (2009). The scintilla of evidence standard is met "if there is any evidence at all

in a case ... tending to support a material issue ....” Henry C. Black Black’s Law Dictionary 1207 (5th ed. 1979) (emphasis added).

Summary judgment is a drastic remedy. Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003). Summary judgment should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues. 352 S.C. at 391, 575 S.E.2d at 552.

STATEMENT OF THE FACTS

The basic terms of the agreement stated that Anaptyx would provide wholesale bulk-WiFi access to the Associations, who would in turn charge a fee to their homeowners for the use of the Wi-Fi Bandwidth at a rate that was in the discretion of the associations. [*See* Complaints ¶ 3.] The effective date of each of the agreements was October 1, 2012 for and during a term of five years. [R. at 77; 106; 146; 170] The contracts had automatic renewal provisions that provided for renewal unless the Respondents gave notice to the Appellant prior to 121 days of the expiration of the agreement. [R. at 77; 106; 146; 170] Anaptyx alleges in its complaints that the associations failed to provide timely notice of cancellation, thereby extending that agreement for another term. [R. at 77; 106; 146; 170]

Additionally, the Agreements contained a provision that stated “This agreement is governed by and shall be interpreted under the laws of the state of New York, without regard to its choice of law provisions.” [R. at 77; 106; 146; 170]

As an industry-standard bulk Wi-Fi provider, Anaptyx was responsible for providing its own equipment and broadband to create a Wi-Fi network that is accessible to the ultimate end user. Nothing contained in this particular agreement, or within the industry standard required,

any user to utilize the bulk Wi-Fi provided by Anaptyx as its primary source of internet connectivity. Simply put, Anaptyx created, through its own equipment, a broadband Wi-Fi signal to the Respondent Associations. In turn, the Associations would then provide, for a fee, this broadband Wi-Fi signal, to its homeowners. [R. at 81; 116; 141; 180]

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DISMISSING THE APPELLANTS CLAIMS FROM THIS CASE.

By virtue of the Circuit Court's appealed ruling, Appellant had been deprived of its right to assert its claims against the Respondents. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Adamson v. Richland Cnty. Sch. Dist. One, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998). "To determine if any genuine issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Further, "in cases applying the preponderance of the 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., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

A. The circuit court erred in finding that the New York's General Obligation Law, Article 5, § 903 was applicable to this case.

The Circuit Court erred in finding that Appellant's contracts should be governed by the New York's General Obligation Law, Article 5, § 903. While the contract between the parties invoked New York law, the Circuit Court should have determined whether the statute relied

upon by the Respondents is applicable to the matter. The statute, upon which the Circuit Court relied, requires notice be provided by registered mail between 15 and 30 days before the deadline for opting out of the renewal period under any automatic contract-renewal clause in such a service contract. The statute applies only to contracts for "service, repair or maintenance to or for any real or personal property." The Circuit Court erred in its application to this statute in making the assumption that the Appellant provides a service as contemplated by the statute. This is a contract for wholesale broadband Wi-Fi, not a contract for service, repair or maintenance as contemplated by NY GOL § 5-903. The agreements applicable in this appeal are akin to similar contracts in which the courts of the State of New York have rejected the argument that they are subject to NY GOL § 5-903.

The history and purpose of GOL § 5-903 has already been aptly summarized by the New York courts. As the Appellate Division's First Department explained in *Donald Rubin, Inc. vs. Schwartz,* 160 A.D.2d 53, 56, 559 N.Y.S.2d 307, 309 (N.Y. App. Div. 1990):

> Restrictions on automatic renewal clauses were first applied to leases of real property. Former RPL § 230. (L.1936, Ch. 702). Former Section 399 of the General Business Law ("GBL"), enacted in 1953 (L.1953, Ch. 701), extended this restriction to leases of personal property. [See, *Peerless Towel Supply Co. v Triton Press,* 3 A.D2d 249, 160 N.Y.S.2d. 163 (1st Dept. 1957) voiding renewal of towel and soap supply contract as within this remedial provision]. The provisions of GOL § 903 related to "contracts for service, maintenance or repair to or for any real or personal property" were first adopted in 1961 as GBL §399-a (L.1961, Ch. 507). A supporting memorandum by the Attorney General, who endorsed the bill, described the legislation as applying to "automatic renewal provisions, contained in service-type contracts" and to a "contractor furnishing maintenance, or repair services." The memorandum refers to the measure as one designed to protect "small businessmen" who unwittingly find themselves 'married' to contracts for sign maintenance, laundry and linen supplies and a variety of other services." *Telephone Secretarial Service v. Sherman,* 49 Misc2d 802, 804, 268 N.Y.S2d 453 (District Court of Nassua, 1966) (citing N.Y.Legis.Ann 1961 p. 52), *aff'd.,* 28 A.D.2d 1010, 284 N.Y.S.2d. 384 (1967).

Similarly, explaining the application and scope of "services" provided under NY GOL § 5-903, that same court observed that the Legislature never intended to extend them every type of contract.

> We agree with the trial court that GOL § 5-903 is not applicable in the instant situation. That statute is addressed to contracts who furnish "services, maintenance or repair to or for any real or personal property . . . ", and provides that when such services are performed pursuant to a contract that contains an automatic renewel clause, the party receiving the service must be given a timely written notice calling his attention to the renewal provision in the contract. It was enacted to protect small businessmen who unwittingly find themselves "married" to self renewel maintanence or service-type contracts (N.Y. Legis.Ann., 1961, p. 52, 451), and may not reasonably be construed to encompass the personal service agreement at bar.

Prial v. Supreme Court Uniformed Officers Ass'n, 91 Misc. 2d 115, 117, 397 N.Y.S.2d 528, 530 (N.Y. App. Term. 1997) (agreement for legal services).

More recently, the Supreme Court of New York in *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) addressed the issue of whether or not a contract was subject to the NY GOL § 5-903. In this case, the Court held that the contract was not for services, repairs or maintenance contemplated under the statute. In this agreement, the contract was for software licensing, clinical and management of billing to insurance companies and patients, collection support services, denial management, consultative services, and supervision of Naturo-Medical's medical and administrative staff. Id. Page 11. The Supreme Court of New York rejected the idea that the agreement was subject to NY GOL §5-903. The Court went on to hold:

> Naturo-Medical also refers to "HCIQ's software" as "another form of property." This argument similarly lacks merit, as this was not Naturo-Medical's property; it was plaintiff's property, licensed to Naturo-Medical. In *Mobile Diagnostics Testing Servs. Inc. v. TLC Health Care Network,* 2004 WL 5452877 (Sup. Ct. Erie Cnty. 2004), *aff'd* 19 A.D.3d 1145 (4th Dep't 2005), a case remarkably similar to the one at bar, the defendant sought to avoid its obligation under an agreement by invoking GOL § 5-903. The court held that GOL § 5-903 did not control the matter because "the primary purpose of the agreement was for the provision of medical diagnostic services (echocardiograms)" and

noted that, "the equipment being serviced was at all times the property of the Plaintiff itself." *Id.* at * 1. The court denied the defendant's motion, which rested solely on GOL § 5-903, and granted the plaintiff's cross motion for summary judgment as to liability for breach of contract.

In reliance on *Mobile Diagnostics Testing Servs. Inc. v. TLC Health Care Network* the court found distinction in the fact that the service provided was for medical diagnostic services and further noted that the equipment being serviced was at all times the property of the Plaintiff.

The Circuit Court in this matter failed to make this distinction when it ruled that the agreements were subject to the NY GOL § 5-903. The service provided in this matter is solely broadband Wi-Fi internet access, and all of the equipment is the property of the Appellant. There is little distinction between the facts contained in *Healthcare I.Q., LLC* and *Mobile Diagnostics* and the facts in this case, where the New York courts held that the statute was not applicable.

B. The Circuit Court erred in finding that the services provided under the contracts here are "service, repair, or maintenance contracts" under New York's General Obligation Law, Article 5, § 903

The Circuit Court erred in placing the agreements in this case into the category of service contracts under NY GOL § 5-903 without looking to the scope and content of the agreement to determine if it was subject to statute.

There are three provisions of the agreement that the Circuit Court failed to recognized it its application to the NY GOL § 5-903. The first is Paragraph 1.3 of each of the contracts:

1.3 Maintenance of System; Restoration of Property.

> At ***Operator's*** (emphasis added) sole expense, the Operator will (a) maintain, repair and operate the System in accordance with industry standards and Laws and Regulations and (b) repair and restore all portions of the property damaged by Operator (Regardless of whether such damage occurred during installation, upgrading, repair, or removal of the System) to its condition immediately prior to such damage. [R. at 81; 116; 141; 180]

The key words here are "At Operators sole expense." The contract is explicit that the equipment used to provide the Wi-Fi signal were at all times required, at the Appellant's sole

expense, to be maintained, repaired and operated by the Appellant. The next two guiding provisions can be found in paragraph 3.

> **3. Ownership and Use of System During Term.**
>
> During the Term, ***Operator will own*** (emphasis added) and have the exclusive right to access, control and operate the System, except for any wiring, equipment, or other facilities owned by Owner or a third party, in which case (as between Owner and Operator) Owner shall own such items and Owner hereby grants Operator the exclusive right to access, use, maintain and upgrade such items during the term; provided that the Owner grants the Operator exclusive rights to use any conduit, risers, spacers or other common areas within the building owned by Owner or a third party. Owner shall not, and Owner shall not permit any third party to access, move, use or interfere with any part of the System. Additionally, the Owner shall not permit any third party to use any wiring, riser, conduit or other common areas for provision, or future provision of the wireless internet (or similar) service while the contract is in effect. That is, Operator is to be the exclusive wireless internet provider on site, and no third party shall be allowed to install, construct, prepare or otherwise operate a wireless internet System intended for bulk service offering to the property. The ***Operator shall be allowed, at its sole discretion, to offer "paid" access to the network to third parties within "range"*** (emphasis added) of the equipment operated on site by Operator. Owner, at its sole cost, will provide the power necessary to operate any of Operators equipment that is located on the property. [R. at 81; 116; 141; 180]

The first part of paragraph 3 specifically deals with the ownership of the broadband Wi-Fi system. Again, the contracts are clear that the Appellant owns the broadband Wi-Fi system. Of course, this makes complete sense inasmuch as the Appellant was required, at their own expense, to repair and maintain the system as shown in paragraph 1.3 of the contract. If this was a contract appurtenant to personal or real property, the Appellant would not have been required to repair and maintain the system at its own expense.

The last portion of paragraph 3 allows the Appellant to offer the broadband Wi-Fi network, at its sole discretion, to allow access to the network to third parties that may be in range of the equipment that is owned and operated by the Appellant. Again, this does make sense in that the broadband Wi-Fi internet access is distributed by the Appellant's equipment, and it is

simply the broadband Wi-Fi signal that is being used by the ultimate consumer. The fact that the agreement allows the Appellant to sell its broadband Wi-Fi to any other third party is evidence that the agreement falls outside the application to the NY GOL § 5-903.

C. The Circuit Court erred in finding that the contract between the parties was for services to or for real property contemplated by New York's General Obligation Law, Article 5, § 903 without any evidence to support its decision.

The Circuit Court made the following specific finding in his Order granting summary judgment: "I hereby find that the contract for services to or for real property as contemplated by NY GOL § 5-903." This distinction is important. Under the statute the only contracts that are subject to the law are contracts that are for "service, repair or maintenance to or for any real or personal property". See NY GOL §5-903 For purposes of this argument, there is no reason to make any determination as to whether or not these agreements are for service, repair or maintenance to personal property, because the Circuit Court made the specific finding that it was a contract to or for real property.

In order to make such a finding, the court had in evidence, the verified complaints filed by the Appellant as well as four (4) Affidavits from the property manager of each of the associations. [R. at 218; 230; 242; 254] The affidavits were almost identical.

In each of the four (4) Affidavits, the manager of the association made four statements: (1) that he was the property manager of the Associations; (2) that pursuant to the contract, the required contact address was his office; (3) he thoroughly reviewed his office records; and (4) that he had no knowledge of any notice of automatic renewal provision of the contract. [See Affidavits is Support of Summary Judgment.] The affidavits do not contain a statement as to the nature of the services provided and whether or not that the contract was for the services contemplated under New York's General Obligation Law, Article 5, § 5-903. The record is

absent of any evidence that this contract was a contract for services to or for real property owned by the Respondents.

The contracts between the Appellant and the Respondents provided that Appellant would provide broadband Wi-Fi signal for the Respondents. The Respondents would then, in turn, be able to offer the broadband Wi-Fi signal to its property owners at whatever fee it deemed appropriate. The Court failed to recognize that the Appellant was simply a wholesaler of broadband Wi-Fi to the Respondent associations. There was no contractual relationship between the Appellant and the end user of the broadband Wi-Fi. Additionally, the broadband Wi-Fi was not exclusive to the Respondents, but was exclusive to the Appellant. While the contract provided that the Appellant would provide broadband signal at a certain data level point, which was industry standard, the owners of the real property that were utilizing the broadband Wi-Fi system were not parties to the contract. [See Exhibit A to all Complaints.] This distinction is critical in determining whether this agreement was for services to real property. It was the Respondent Association that would offer the broadband Wi-Fi signal to its property owners and collect a fee for its use. The end users, the actual property owners, were not parties to the contracts; therefore, the contracts were not for a service to real property.

Furthermore, the Circuit Court failed to determine how a broadband Wi-Fi signal was a service, repair or maintenance agreement to real property. As previously stated in the argument, the system providing the broadband Wi-fi signal was owned by the Appellant. All obligations for repair and maintenance of the system were on the Appellants. The broadband Wi-Fi service was ultimately used by end users by a computer, phone or device that can detect and operate a broadband signal through Wi-Fi. It is impossible to make the connection between providing a

service to real property when the internet signal can only be utilized by a computer, phone and or handheld device capable of utilizing a WiFi signal.

The court failed to make this distinction it its ultimate decision. In order for these agreements to be subject to service, repair or maintenance to real property, the service should be for the benefit of the real property. *See* NYGOL §5-903. In applying the facts to the contracts, the ultimate end user would be the homeowners of the four (4) Associations. As previously argued, the only contractual obligations for providing broadband Wi-Fi services to the real property owners would have been from the Association to its owners.

There was no evidence for which the court could make any finding that the agreement was for a service, repair or maintenance to or for any real property of the Respondents. The broadband WiFi signal is simply provided to the Respondents for their use to sell to the owners that are part of the Association.

CONCLUSION

In dismissing all of the Appellants claims in this case, the circuit court erred in applying the New York GOL § 5-903 to this case, erred in determining that the broadband Wi-Fi agreement was a service, repair or maintenance agreement to real property subject to New York GOL § 5-903, and relied on factual assertions not in the record. For these reasons, Appellant humbly request that the Court reverse the lower court's Orders and remand this case back to the Court of Common Pleas.

[Signature Page to Follow]

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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