THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Oct 08 2020
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Business Court

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-2325
Appellate Case No. 2019-001909

Stop-A-Minit #17, LLC, ...Appellant,

v.

Beck Enterprises, Inc., ...Respondent.

FINAL BRIEF OF APPELLANT

William H. Edwards
Moore Taylor Law Firm, P.A.
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, South Carolina 29171
Telephone: (803) 796-9160
Facisimile: (803) 791-8410
will@mttlaw.com
Attorney for Appellant.

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Standard of Review 3

Argument 2

I. The Indemnification Agreement is not an enforceable contract because there was no valid consideration given to SAM#17 by Beck for the Indemnification Agreement 4

II. If the Indemnification Agreement was supported by valid, legal consideration, the Indemnification Agreement should be found ambiguous because of the confusion created by the use of defined terms, undefined terms, and the conflict between the first and second paragraphs of the Agreement 5

III. Even if the Indemnification Agreement was supported by consideration and SAM#17 has not met its obligation under the Indemnification Agreement, Beck still cannot enforce the Indemnification Agreement because the Merebys misrepresented the amortization schedule and falsely indicated that they would not be liable for breaching their agreement with Cary 8

IV. If the Indemnification Agreement was supported by consideration, SAM#17 has not met its obligation, and the Merebys did not make material misrepresentations, SAM#17 still has no liability because the Indemnification Agreement only applies to breaches after the date signed 9

V. If the Indemnification Agreement was supported by consideration, SAM#17 has not met its obligation, the Merebys did not make material misrepresentations, and SAM#17 is liable for breaching agreements prior to the signing of the Indemnification Agreement, SAM#17 would only be liable for what Beck paid in attorney's fees and costs and not what the Merebys paid 9

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Rabon v. State Finance Corp., 203 S.C. 183, 26 S.E.2d 501 (1943)....................................4

Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996) 4

Garrett v. Stuart, 12 S.C.L. 514 (S.C. Const. App. 1821)..4

Farr v. Duke Power Co., 265, S.C. 356 (S.C. 1975)...7

Charles v. B&B Theatres, Inc., 234 S.C. 15, 106 S.E.2d 455 (1959)...................................7

Masonic Temple v. Ebert, 199 S.C. 5, 18 S.E.2d 584 (1942).....................................8

STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in finding the Indemnification and Hold Harmless Agreement dated June 7, 2010, and executed by the Appellant and the Respondent on a later date to be a valid, enforceable contract, and if so, in also finding that Appellant has not met its obligations thereunder or that Beck is entitled to more than Zero Dollars?

STATEMENT OF THE CASE

This is an appeal from Greenville County in the Business Court by Appellant, Stop-A-Minit #17, LLC (hereinafter also referred to as "SAM#17"), from a judgment entered on July 10, 2019, in favor of the Respondent, Beck Enterprises, Inc. (hereinafter also referred to as "Beck"). Appellant timely filed a Motion to Alter or Amend Judgment pursuant to Rule 59 of the South Carolina Rules of Civil Procedure on July 20, 2019 and served on July 22, 2019. On June 6, 2010, Drake Convenience, LLC, (hereinafter also referred to as "Drake") purchased the inventory and took possession of the personal and real property located at 1398 North Pleasantburg Drive, Greenville, South Carolina from Shirley and Mohamad Mereby. (R. p. 131-145). The real estate closing took place on June 7, 2010, between the Merebys as sellers and SAM#17 as the buyer, and the Indemnification and Hold Harmless Agreement (Indemnification Agreement) was signed by the parties hereto, SAM#17 and Defendant Beck Enterprises, Inc., (Beck) at the earliest, on June 9 and 10, 2010, after all consideration had already been given. (R. p. 38, 162-167). SAM#17 took possession of the location from the Merebys prior to the closing. (R. p. 37-38, 141-144). Cary Oil Co., Inc., (Cary) had a pre-existing motor fuel supply agreement (MFSA) with Beck for Exxon branded motor fuels to be sold at this location. (R. p. 42, 115-130). On or before June 6, 2010, Cary ceased supplying motor fuel to this station and O'Dell Oil Co., (O'Dell) began to supply Exxon branded motor fuel to SAM#17. (R. p. 36, 170-173).

On or about September 2010, SAM#17 and Drake decided to de-brand the station and SAM#17 paid $48,648.00 for the cost of de-branding from Exxon before the fulfillment of the ten-year term of the MFSA. (R. p. 73, 77, 115-130, 170-174). Beck believes it is owed indemnification against claims for attorney's fees and costs related to claims made against Beck in a separate lawsuit related to an alleged breach of contract with Cary from the sale of the business to SAM#17. (R. p. 74). SAM#17 believes the Indemnification Agreement is not enforceable, or alternatively, that it has met all of its enforceable indemnification obligations even if the Indemnification agreement is found to be valid.

STANDARD OF REVIEW

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Gadson v. Hembree*, 364 S.C. 316, 613 S.E.2d 533 (2005); *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 608 S.E.2d 440 (S.C. App. 2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Baugus v. Wessinger*, 303 S.C. 412, 401 S.E.2d 169 (1991); *Nelson v. Charleston County Parks & Recreation Comm'n*, 362 S.C. 1, 605 S.E.2d 744 (S.C. App. 2004).

However, when reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted. *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (S.C. App. 2004). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 597 S.E.2d 181 (S.C. App. 2004).

Where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid–South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009); *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011).

ARGUMENT

I. The Indemnification Agreement is not an enforceable contract because there was no valid consideration given to SAM#17 by Beck for the Indemnification Agreement.

The Indemnification Agreement lacks sufficient consideration in order to be considered a valid, enforceable contract because all of the consideration given to SAM#17 by Beck was only for prior agreements. All of the consideration that was given to SAM#17 by Beck was for the execution of the Agreement of Purchase and Sale of Real Estate, executed on May 10, 2010, the Bill of Sale, executed on June 6, 2010 and the Bill of Sale, executed on June 7, 2010 . (R. p. 131-144). All personal property in the transaction was exchanged between Beck and SAM in the execution of these two agreements. When the Indemnification Agreement was executed on June 10, 2010, as evidenced by an email exchange between the attorney for Beck and the Merebys, there was no valid consideration left to be given to SAM#17 for executing the agreement. (R. p. 162-163). The Drakes testified at trial on behalf of Appellant that none of Appellant's agents were aware of the Indemnification Agreement until after the closing of the Agreement of Purchase and Sale of Real Estate and after the execution of the Bill of Sale, all of which occurred on or before June 7, 2010. (R. p. 29, 36).

The trial court did not make a specific ruling as to Plaintiff's motion to amend pleadings to conform to the evidence at trial pursuant to Rule 15(b), but did allow Plaintiff to introduce such evidence over Defendant's objection at trial. (R. p. 71). *See* S.C. R. Civ. Pro. 15(b). Plaintiff raised

this issue again, as it was not ruled upon by the trial court in its Motion to Alter or Amend Judgment filed on July 20, 2019. (R. p. 192-198).

A motion to make such amendment of the pleadings as to conform to the evidence may be made by a party "at any time, even after judgment." S.C. R. Civ. Pro. 15(b). Additionally, "if evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action shall be sub served thereby..." *Id.* The only time a court should not allow this is when the objecting party shows "that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." *Id.* Even in that situation though, the court could grant a continuance to enable the objecting party to have time to prepare their defense. *Id.*

In this matter, the trial court did not make a ruling, other than to allow Plaintiff to present evidence at trial as to the lack of consideration. There was no finding of prejudice against the Defendant. The issue of whether valid consideration was offered by Beck to SAM in signing the Indemnification Agreement is an issue in this case and is central to any conclusion as to the validity and enforceability of the Indemnification Agreement. As stated in Rule 15(b) of the South Carolina Rules of Civil Procedure, the trial court should have admitted and properly considered Plaintiff's evidence on the issue of whether there was valid consideration.

It has long since been established in South Carolina law that "no contract is complete without a valid, legal consideration." *Rabon v. State Finance Corp.*, 203 S.C. 183, 26 S.E.2d 501 (1943). When there is no valid, legal consideration given for the execution of a contract, there cannot be an enforceable agreement. *Id.* Additionally, it has also been well established in South Carolina that "consideration that is wholly past is not valuable consideration." *Future Group, II v.*

Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996). There must be some valid, beneficial consideration given to a party for the present exchange in order for an agreement to be considered enforceable. *Id.* Wholly past consideration, or consideration given for prior agreements, is not and has never been considered as valid, legal consideration for exchanges between parties in future agreements. *Id.* Past consideration is no consideration. "Promises made on a consideration that is wholly past, without any new consideration moving to it, are void, as being without consideration." *Garrett v. Stuart*, 12 S.C.L. 514 (S.C. Const. App. 1821).

As evidenced in the Agreement of Purchase and Sale of Real Estate and the Bill of Sale, Beck had already given all personal property to be exchanged in the sale to SAM#17 prior to the drafting of the Indemnification Agreement. The Indemnification Agreement was not executed as part of the Agreement of Purchase and Sale of Real Estate or the Bill of Sale. Instead, the Indemnification Agreement was executed as a wholly separate agreement after the execution of the Purchase and Sale of Real Estate and the Bill of Sale. As stated in *Future Group*, the property given to SAM#17 pursuant to the prior Agreement of Purchase and Sale of Real Estate and the Bill of Sale cannot be considered valid consideration for the Indemnification Agreement as it is wholly past consideration. With no valid consideration available to be given by Beck for the Indemnification Agreement, the Indemnification Agreement cannot be considered a valid, enforceable contract. Therefore, the Indemnification Agreement cannot be enforced as a separate agreement because it requires separate consideration.

II. If the Indemnification Agreement was supported by valid, legal consideration, the Indemnification Agreement should be found ambiguous because of the confusion created by the use of defined terms, undefined terms, and the conflict between the first and second paragraphs of the Agreement

Even if the Court finds that the Indemnification Agreement was supported by valid, legal consideration, the Indemnification Agreement includes ambiguous terms that causes confusion

between the parties. As seen in the Indemnification Agreement, the use of defined terms "Seller" and "Purchaser" that are later confused by undefined terms "Owner" and "Buyer" causes a conflict between the first and second paragraphs of the Indemnification Agreement. The use of the defined terms "Seller" and "Purchaser" that are later muddled by the use of the undefined terms "Owner" and "Buyer" creates confusion through the Indemnification Agreement. The reason for using defined terms in contractual agreements is to eliminate confusion. But to create defined terms only to later drop those defined terms for new, undefined terms defeats the purpose of eliminating confusion. Simply trying to connect the dots to figure out the meaning of the undefined terms in relation to the defined terms does not remove the confusion and ambiguities created by this mistake. This ambiguity in terms within the Indemnification Agreement causes confusion amongst the parties.

Further, paragraphs one and two create a significant amount of confusion as to the responsibility of SAM to Beck in the Indemnification Agreement. While paragraph one seems to place a responsibility on SAM to indemnify Beck for any claims against Beck in connection with the MFSA *without limitation*, paragraph two clearly places a *financial limitation* on the amount of responsibility that SAM would owe Beck by giving SAM a maximum liability for early termination of the MFSA. When SAM terminated the MFSA with Cary, SAM paid the maximum liability under the Indemnification Agreement of $48,648. Moreover, the damages, costs, and reasonable attorney's fees that the Defendant is claiming are a result of the early termination of the MFSA by SAM. If SAM has already paid its maximum liability under the Indemnification Agreement for terminating the MFSA early, it would be unfair to continue to hold them liable for damages, costs, and reasonable attorney's fees that Defendant incurs. At the very least, even if it seems more likely that Beck intended SAM to be responsible for more than the maximum liability

Beck clearly outlined in paragraph two of the agreement, it is clear that these two paragraphs create some confusion and ambiguities. Based upon the testimony of Brent Drake at trial, the two paragraphs can be read together with legitimate meaning: the maximum limit of any enforceable indemnification obligation is expressed in the first paragraph, while the obligation for the amortized incentive pay back could be less if SAM had operated the store for additional 12 month periods during the underlying litigation but SAM could be required to indemnify Beck for costs and attorney's fees incurred until the maximum limit was reached by the second paragraph. (R. p. 72-73). It was never the intent of SAM to have an unending, unlimited indemnity obligation to Beck for Beck's breaches of contract with Cary. (R. p. 30). Interpreting the Indemnification Agreement as the trial court does, creates this unintended, unfair and economically absurd result. "Where a construction of a contract makes it unusual or extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail. An interpretation which evolves the more reasonable and probable contract should be adopted, and a construction leading to an absurd result should be avoided. *Farr v. Duke Power Co.*, 265, S.C. 356 (S.C. 1975).

It is a long-standing principle in South Carolina law that when parties have reduced their contract to writing, "the court can only look to the terms in which the parties have expressed their intentions in such writing." *Charles v. B&B Theatres, Inc.*, 234 S.C. 15, 106 S.E.2d 455 (1959); *Lagrone v. Timmerman*, 46 S.C. 372, 24 S.E. 290; *Blackwell v. Faucett*, 117 S.C. 60, 108 S.E. 295; *Mallard v. Duke*, 131 S.C. 175, 126 S.E. 525; *McPherson v. J. E. Sirrine & Co.*, 266 S.C. 183, 33 S.E.2d 501. However, when a written agreement contains ambiguous terms, parol and other extrinsic evidence is allowed to determine the intent of the parties. *Id.*

Based upon testimony at trial, SAM#17 never intended to be required to indemnify Beck for more than $48,648.00 as set out by the Indemnification Agreement. (R. p. 73). In compliance with the Indemnification Agreement, SAM#17 has already paid the $48,648.00 set out by the Indemnification Agreement. (R. p. 73-74, 77, 170-174). Therefore, SAM#17 has met the maximum enforceable obligation it would have been held to, according to the terms of the Indemnification Agreement, and is not obligated to pay anything else to Beck under the Indemnification Agreement. The Indemnification Agreement must be read and interpreted fairly and on its own. The only way to give a fair reading to both the first and second paragraphs of the Indemnification Agreement is to interpret the payouts in the second paragraph as the ceiling for SAM#17's indemnification liability, as the amortized amount would have been less if SAM#17 had de-branded a year later. In reading the first and second paragraphs of the Indemnification Agreement in this fair manner, there is no other conclusion that can be reached other than that SAM#17 was liable to pay a maximum of $48,648.00 under the agreement. Since SAM#17 has already paid this amount to Beck, SAM#17 cannot be held liable for any more payment under the Indemnification Agreement.

III. Even if the Indemnification Agreement was supported by consideration and SAM#17 has not met its obligation under the Indemnification Agreement, Beck still cannot enforce the Indemnification Agreement because the Merebys misrepresented the amortization schedule and falsely indicated that they would not be liable for breaching their agreement with Cary.

The Merebys represented to SAM#17 that the signing of the Agreement for Purchase and Sale of Real Estate and the closing would not breach any agreements with Cary. (R. p. 135-136). However, this was a misrepresentation by the Merebys, as the Agreement for Purchase and Sale of Real Estate and the closing did breach a prior contract between Beck and Cary, which resulted in Cary bringing claims against Beck and the Merebys for breach of the MFSA and personal

guarantees. (R. p. 39, 103-104, 168-169). The execution of the Agreement for Purchase and Sale of Real Estate violated the MFSA between Beck and Cary, which was misrepresented by the Merebys to SAM#17 during negotiations and again at the closing of the Agreement for Purchase and Sale of Real Estate.

When entering into an agreement, if a party is "induced to make the contract by reason of any material misrepresentation" by the other party to the agreement or his agent, "specific performance will be denied, whether the misrepresentation was willful and intended, or made innocently or with an honest belief in its truth." *Masonic Temple v. Ebert*, 199 S.C. 5, 18 S.E.2d 584 (1942). This is true even if "there existed and were accessible to defendant the means and opportunity of detecting the truth by ordinary prudence." *Id.*

The Merebys made a misrepresentation to SAM#17 regarding the MFSA and the Unconditional Guaranty located within the MFSA. This misrepresentation by the Merebys created a situation whereby Cary kept control of SAM#17's credit card sales, after the execution of the Agreement for the Sale and Purchase of Real Estate, as compensation for Beck and the Merebys breaching the MFSA and Unconditional Guaranty. (R. p. 27, 36). Furthermore, a reasonable inference can be made that around the time of the real estate closing, the Merebys realized that they and Beck were breaching their agreements with Cary, leading to the insistence for the Indemnification Agreement after the signing of the closing documents. This can be inferred due to the Merebys' attorney informing the closing attorney for the transaction by email correspondence that the Indemnification Agreement was not needed. (R. p. 41, 182). Therefore, Beck is barred from enforcing the Indemnification Agreement due to the material misrepresentations to SAM#17 regarding Beck's obligations to Cary in the MFSA and the Unconditional Guaranty. "When a contract is not performed, the party who is guilty of the first

breach, is generally the one upon whom all liability for the nonperformance rests." *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 658 S.E.2d 539 (Ct. App. 2008). "Whenever there is a concealment, or misrepresentation of material facts, whether designedly or not, or a material breach of contract by the other party, * * * equity will not enforce the contract against him." *Sumner v. Bankhead*, 119 S.C. 78, 111 S.E. 891 (1922).

IV. If the Indemnification Agreement was supported by consideration, SAM#17 has not met its obligation, and the Merebys did not make material misrepresentations, SAM#17 still has no liability because the Indemnification Agreement only applies to breaches after the date signed.

Any breach of contract by Beck would have occurred prior to the signing of the Indemnification Agreement by the parties. As evidenced by Plaintiff's Exhibit 12, the Indemnification Agreement was signed by the parties no sooner than June 9 or 10, 2010. The Indemnification Agreement was therefore signed days after any agreement between or among Beck, the Merebys, and Cary had been breached, and SAM#17 is not liable to Beck under the Indemnification Agreement. (R. p. 72, 162-163).

V. If the Indemnification Agreement was supported by consideration, SAM#17 has not met its obligation, the Merebys did not make material misrepresentations, and SAM#17 is liable for breaching agreements prior to the signing of the Indemnification Agreement, SAM#17 would only be liable for what Beck paid in attorney's fees and costs and not what the Merebys paid.

SAM#17 would only owe Beck for what it has paid in attorney's fees and costs and not for any payouts by or on behalf of the Merebys for attorney's fees and costs, as both Beck and the Merebys were sued by Cary and were defended by the same firm in the suit, and the only evidence in the record is that Beck did not pay any attorney's fees in the case with Cary. (R. p. 175-178).

CONCLUSION

In conclusion, the Court should overturn the lower court's ruling on the issue of whether there was valid consideration given by Beck to SAM for the Indemnification Agreement and the issue of the ambiguity created by the hastily drafted Indemnification Agreement after the closing through the use of ambiguous terms and the conflict between paragraphs one and two. Considering the lack of valid, legal consideration given in the execution of the Indemnification Agreement and the ambiguities present in paragraphs one and two of the Indemnification Agreement, the Indemnification Agreement cannot and should not be considered a valid, enforceable agreement between Beck and SAM#17. Alternatively, if this Court determines the Indemnification Agreement is valid and enforceable by Beck, this Court should overturn the trial court and direct a finding that SAM#17 has either met its obligations thereunder or that Beck is not entitled to further indemnification.

Respectfully Submitted By:

s/ William H. Edwards
William H. Edwards, SC Bar 71199
Moore Taylor Law Firm, P.A.
1700 Sunset Boulevard
Post Office Box 5709
West Columbia, SC 29171
Telephone: (803) 796-9160
Facsimile: (803) 791-8410
Attorney for the Plaintiff

West Columbia, SC
October 8, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Business Court

Edward W. Miller, Circuit Court Judge

RECEIVED
Oct 08 2020
SC Court of Appeals

Civil Action No.: 2012-CP-23-2325
Appellate Case No. 2019-001909

Stop-A-Minit #17, LLC ....Appellant,

v.

Beck Enterprises, Inc.,..Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

By: /s/William H. Edwards

Moore Taylor Law Firm
William H. Edwards
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
803-796-9160
will@mttlaw.com
Attorney for Appellant.

October 8, 2020