THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Master-in-Equity

Marvin H. Dukes, III

Case No. 2020-000687

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SC Court of Appeals

Peter Michael Buonaiuto, Sr., individually, and on behalf of all others similarly situated, …… Appellant,

v.

The Town of Hilton Head Island, South Carolina, …….....Respondent.

APPELLANT'S INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED ON APPEAL

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STATEMENT OF ISSUES

I. Where the lower court ruled that Appellant's motion for summary judgment be denied and Respondent's granted, pursuant to Rule 56, SCRCP, did the lower court err in determining the "Contract for Professional Services" was not "contract for services" pursuant to Respondent's Procurement Code?

STATEMENT OF THE CASE

Appellant Peter Michael Buonaiuto Sr. filed this lawsuit on November 22, 2016 against Respondent The Town of Hilton Head Island, South Carolina. Appellant's complaint alleged that at Respondent's November 2015 meeting of Town Council, Respondent violated its own procurement code, specifically Section 11-1-112 of the Town Ordinances, when it failed to publicly offer for bid or otherwise subject to its procurement code, the agreement attached to Appellant's complaint. (R. pp. ___; summons and complaint.) The complaint's attached agreement, entitled "Contract for Professional Services" (hereinafter "contract"), provided that the Hilton Head Island-Bluffton Chamber of Commerce ("Chamber") would serve as Respondent's destination marketing organization ("DMO") and be able to supervise the "Promotional Fund" of accommodation tax revenue to promote tourism locally, pursuant to Code of Laws Title 6, Chapter 4. (R. pp. ___; summons and complaint.) The complaint sought a declaratory judgment that Respondent violated its procurement code, recission of Respondent's vote to enter the agreement, an injunction requiring Respondent to subject any proposed DMO contract to the town's procurement code before entering into the arrangement, and for an award of costs and attorney's fees pursuant to S.C Code Ann § 15-77-300. (R. pp. ___; summons and complaint.)

Gregory M. Alford, predecessor attorney for Respondent, accepted service of the summons and complaint on behalf of his client on December 15, 2016. On January 4, 2017, Respondent filed and served its motion to dismiss Appellant's complaint for failure to state facts sufficient constitute a cause of action. (R. pp. ___; motion to dismiss.) On March 15, 2017, counsel for the parties appeared before the Honorable

Carmen T. Mullen for a hearing on Respondent's motion to dismiss. On March 19, 2017, Judge Mullen denied Respondent's motion to dismiss. (R. pp. ___; order denying motion to dismiss.) Respondent filed and served its answer to Appellant's complaint on March 24, 2017. (R. pp. ___; answer.) Respondent's answer admitted paragraph 9 of the complaint that "[f]or more than thirty years, the Hilton Head Island-Bluffton Chamber of Commerce has received thirty percent fund A-Tax revenues from the town of Hilton Head Island and has served as the town's DMO." (R. pp. ___; answer; R. pp. ___; summons and complaint.) Respondent's answer also admitted that it entered the contract with the Chamber in November 2015, but denied that it "did not publicly bid, nor otherwise subject to its procurement code" the contract. (R. pp. ___; answer; R. pp. ___; summons and complaint.)

On August 22, 2017, an administrative order of reference was entered by Beaufort County Clerk of Court Jerri Roseneau, sending this matter to Beaufort County Master-in-Equity Marvin Dukes. (R. pp. ___; order of reference.) On March 1, 2019, a consent order substituting counsel for Respondent was entered, replacing Mr. Alford for Curtis L. Coltrane, Esquire, who also represents Respondent in this appeal. (R. pp. ___; order substituting counsel.)

On September 10, 2019, Respondent filed and served its motion for summary judgment along with the affidavits of William G. Miles, Stephen G. Riley, and John M. Troyer. (R. pp. ___; Respondent motion for summary judgment with exhibits.) In addition to legal arguments and allusions to the record, Respondent's motion for summary judgment does provide "[t]he Town did not publicly bid the November 2015, contract between the Town and the Hilton Head Island-Bluffton Chamber of

Commerce, Inc." (R. pp. ___; Respondent motion for summary judgment with exhibits.) Respondent's motion argued that Appellant's claim for declaratory judgment "fails, as a matter of law because neither the distribution of the 'thirty per cent fund' in compliance with the requirements of S. C. Code Ann. § 6-4-10(3)(Supp. 2019), nor the Town's agreement with the Hilton Head Island-Bluffton Chamber of Commerce, Inc., are 'procurement' as defined in §1-1-111, et seq., The Municipal Code of the Town of Hilton Head Island, 1983." (R. pp. ___; Respondent motion for summary judgment with exhibits.) Respondent acknowledged that its procurement code applied to "expenditure of public funds" for the "procurement of supplies, services and construction" by it, but in its motion denied the Chamber delivered any "supplies, services or construction to the Town of Hilton Head Island, South Carolina, under the terms of the December 1, 2015 contract[1]." (R. pp. ___; Respondent motion for summary judgment with exhibits.) Respondent's motion also contended that the selection of organization to manage the fund ("DMO") "is not the procurement of services, supplies, or construction by the Town, rather, it is the fulfillment of the statutory mandate imposed on the Town by S. C. Code Ann. § 6-4-10(3)(Supp. 2019) to: '. . .select one or more organizations, such as a chamber of commerce, visitor and convention bureau, or regional tourism commission, which has an existing, ongoing tourist promotion program;' and, to: 'immediately . . . distribute the tourism promotion funds to the organizations selected or created to receive them.'" (R. pp. ___; Respondent motion for summary judgment with exhibits.)

[1] As Respondent correctly points out, the Contract, although entered into in November 2015, is dated December 1, 2015.

On January 31, 2020, Appellant filed and served his motion for summary judgment that attached the Contract. (R. pp. ___; Appellant motion for summary judgment with exhibit.) Appellant's motion specified "no material facts to the Court's determination in this matter are in dispute" and that the Contract is [s]pecifically, if not by the document's title 'Contract for Professional Services' (emphasis added), the terms of this contract establish several core and secondary responsibilities the Chamber must provide Defendant as services rendered." (R. pp. ___; Appellant motion for summary judgment with exhibit, emphasis original to motion.)

On February 4, 2020, Respondent filed and served the Affidavit of John M. Troyer. (R. pp. ___; affidavit of John Troyer.) Appellant filed and served his memorandum of law in support of his motion for summary judgment on February 7, 2020. (R. pp. ___; Appellant memorandum of law.) On February 9, 2020, Respondent filed and served its memorandum of law. (R. pp. ___; Respondent memorandum of law.) On February 10, 2020, the parties appeared before the Honorable Marvin H. Dukes III for a hearing[2] on their cross motions for summary judgment to resolve the matter. Counsel for Appellant and Respondent presented arguments and the lower Court relied on the documents e-filed, the authority presented and a copy of the approved minutes of Respondent's Town Council Meeting on November 17, 2015 when Respondent's Town Council voted to enter the Contract in question. (R. pp. ___; approved minutes.)

On March 23, 2020, the lower court entered its order granting summary judgment in favor of Respondent and denying Appellant's motion. (R. pp. ___; order.)

[2] No court reporter was present at the hearing.

Respondent served his notice of appeal on Appellant and filed it with this Court on April 22, 2020. (R. pp. ___; notice of appeal.)

STATEMENT OF THE FACTS

On November 17, 2015, the Hilton Town of Hilton Head Island, South Carolina, (Respondent) held its town council meeting at 4:00 p.m. (R. pp. ___; approved minutes.) At the town council meeting of Respondent, town council members voted 4-3 to adopt a "Contract for Professional Services with the Hilton Head Island-Bluffton Chamber of Commerce." (R. pp. ___; approved minutes.) The Contract was later signed by Stephen Riley, then town manager of Respondent and William G. Miles, president and CEO of the Chamber. (R. pp. ___; summons and complaint.) At no point prior to signing this agreement did Respondent publicly bid the November 2015 contract between the Town and the Hilton Head Island-Bluffton Chamber of Commerce, Inc. or subject this document/relationship to Respondent's Procurement Code. (R. pp. ___; Respondent motion for summary judgment with exhibits; R. pp. ___; approved minutes.)

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." In re: Care and Treatment of Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011).

"In an action at law tried without a jury, the trial judge's findings have the force and effect of a jury verdict upon the issues and are conclusive on appeal when supported by competent evidence." Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 307, 698 S.E.2d 773, 777 (2010). Accordingly, in an appeal from the results of a bench trial of an action at law, an appellate court can correct errors of law but "will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings." Branche Builders, Inc. v. Coggins, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009).

"Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

As the parties essentially tried the case on facts they agreed were not in dispute, the Court reviews the trial court's legal conclusions, but not its factual findings, de novo.

ARGUMENT

I. The trial court's ruling that the "Contract for Professional Services" was not a "contract for services" as defined by Respondent's Procurement Code was an error of law.

Appellant's only cause of action before the trial court was one for declaratory judgment. (R. pp. ___; summons and complaint.)

> 20. Plaintiff is entitled to a declaratory judgment, under S.C. Code of Laws § 15-53-10 et seq., that Defendant violated its Code of Ordinances, and specifically its procurement code, when it entered the attached agreement with the Chamber.
>
> 21. Plaintiff is also entitled to rescission of the agreement and an injunction requiring Defendant to subject any proposed DMO contract to the town's procurement code prior to Defendant entering such an arrangement.

(R. pp. ___; summons and complaint.)

Because the material facts underpinning the trial court's determination of the declaratory judgment were not in dispute, this case was resolved on cross motions for summary judgment, pursuant to Rule 56, SCRCP. Consequently, the trial court's legal determination regarding the Contract's nature was the dispositive issue before the trial court. If the trial court were to grant Appellant's motion for summary judgment then it would have necessarily agreed the "Contract for Professional Services" was a "contract for services," and thus Respondent violated its town ordinances when it entered into the Contract. Instead, the trial court committed an error of law when it denied Appellant's motion but granted Respondent's. The Contract is one for services.

The "Procurement Code of the Town of Hilton Head Island," Section 11-1-111 et seq., provides in Section 11-1-112: "The purpose of this chapter is to provide for the fair and equitable treatment of all purposes involved in public purchasing by the town, to maximize the purchasing value of public funds in procurement, and to provide

safeguards for maintaining a procurement system of quality and integrity." The Procurement Code "applies to contracts for the procurement of supplies, services, and construction, entered into by this town after the effective date of this chapter unless the parties agree to its application to contracts entered into prior to the effective date. It shall apply to every expenditure of public funds irrespective of their source." Section 11-1-113. Defendant's Procurement Code defines "services" as follows in S.C. Code Ann. § 11-35-310:

> (29) 'Services' means the furnishing of labor, time, or effort by a contractor not required to deliver a specific end product, other than reports which are merely incidental to required performance. This term includes consultant services other than architectural, engineering, land surveying, construction management, and related services. This term does not include employment agreements or services as defined in Section 11-35-310(1)(d).

Although neither "contract for services" nor "services contract" are defined terms under Respondent's Procurement Code, Appellant thinks the above language may be instructive in understanding what binding authority exists to explain the type of contract that is at issue. The contract at issue specifies certain duties the Chamber will have to perform under its terms. And please remember: logic dictates that it was how Respondent viewed this Contract before it was entered to by vote at the Town Council meeting on November 17, 2015, that controls whether it was a violation to skip the procurement process then. This matter concerns the process used by Respondent to enter this agreement, not Respondent's choice as to who it chose to enter the agreement with or for how long. It is not relevant how persons who work for Respondent or the Chamber describe how A-Tax revenue is used or whether, as a matter of fact, services are rendered. See R. pp. ___; Respondent motion for summary judgment with exhibits;

and R. pp. ___; affidavit of John Troyer. All that matters for purposes of this appeal is whether when Respondent decided to have a written contract for the Chamber to serve as DMO for Respondent, should that contract have been considered one for services, forcing Respondent to subject it to its Procurement Code?

Respondent was correct in his memorandum of law when he stated that "neither the form of a contract nor the name given it by the parties controls its interpretation. Bolt v. Ligon, 144 S.C. 218, 142 S.E. 504, 505 (1928). See Also: Greenwood Mfg. Co. v. Worley, 222 S.C. 156, 161, 71 S.E.2d 889, 891 (1952), in which the South Carolina Supreme Court held: 'The primary test as to the character of the contract is the intention of the parties to be gathered from the whole scope and effect of the language used; and mere verbal formulas, if inconsistent with the real intention, are to be disregard[ed].' 12 Am.Jur., § 242, page 776; 46 Am.Jur., § 17, page 211." While not controlling, a document's title does provide some, if not the primary, indication of the nature of the document: "Contract for Professional Services". (R. pp. ___; summons and complaint.)

Also, indicative of the contract's nature will be the contracted parties written statements of factual predicate to a meeting of their minds in agreement: whereas clauses. The contract's first whereas provides the chief duty of serving as the destination marketing organization for Respondent, as defined by Title 6 of the State Code of Laws:

> WHEREAS, accommodations tax is a state and local tax that is levied on the lodging industry and South Carolina Code Section 6-4-10(3) requires thirty percent of the state received accommodation tax be awarded to a nonprofit corporation and allocated to a special fund used only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity ("Promotional Fund").

(R. pp. ___; summons and complaint.)

Respondent contends that the Chamber's duties under Chapter 4, Title 6 of state law, as the selected[3] DMO, could not be reasonably construed as "services" provided to Respondent. It strains credulity to believe the management and expenditure of public funds as the DMO is not the providing of services to Respondent. In fact, the legislature intended for these DMOs to provide services when they passed the A-Tax statutory framework.

> The funds received by a county or municipality which has a high concentration of tourism activity may be used to provide ***additional county and municipal services*** . . .. The funds must not be used as an additional source of revenue to provide services normally provided by the country or municipality but to promote tourism and enlarge its economic benefits through advertising, promotion, ***and providing those facilities and services which enhance the ability of the county or municipality to attract and provide for tourists*.**

S.C. Code Ann. § 6-4-10(4)(b)(emphasis added).

"The Accommodations Tax Act was enacted to raise revenue for the purpose of promoting tourism and providing for facilities ***and services*** which enhance the ability of counties and municipalities to attract and provide for tourists." Thompson v. Horry County, 294 S.C. 81, 82, 362 S.E.2d 646, 647 (Ct. App. 1987) (emphasis added).

Regardless of the intentions of the S.C. General Assembly, the parties to the Contract, or counsel for Respondent, an examination of the plain ordinary meaning of the words of the Contract reveal it is one for services that should have been subjected to Respondent's Procurement Code. The trial court's determination that the Contract was not one for services was an error of law.

[3] Again, Respondent keeps incorrectly viewing the responsibilities of a DMO after it is selected to control this inquiry which is solely about whether the selection process itself was proper before selection.

CONCLUSION

This court should reverse the trial court's decision to grant summary judgment in favor of Respondent, should grant summary judgment in favor of Appellant, and remand this matter for additional proceedings regarding the requested remedies and an award of reasonable attorney's fees.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I served Appellant's initial brief and designation of matter to be included in the record on appeal by attaching it to email correspondence and sending that email correspondence on October 30, 2020, addressed as follows:

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Respectfully submitted,

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