THE STATE OF SOUTH CAROLINA
In The 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 RESPONDENT

December 17, 2020
Mauldin, South Carolina

The Barbare Law Firm, PA

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STATEMENT OF ISSUES ON APPEAL

The Trial Court correctly determined the rights between the parties by declaring the Indemnification and Hold Harmless Agreement to be a valid, enforceable contract, that Appellant has not met all of its obligations pursuant to the Indemnification and Hold Harmless Agreement, and that Appellant owes further indemnity to Respondent.

STATEMENT OF THE CASE

On April 3, 2012, Appellant, Stop-A-Minit # 17, LLC ("SAM") brought this action seeking a Declaratory Judgment pursuant to S.C. Code Ann. § 15-53-10 et. seq. (R. pp. 12-15). Respondent, Beck Enterprises, Inc. ("Beck") filed an Answer on June 15, 2012 joining in the relief requested by the Appellant. (R. pp. 16-17)

On May 31, 2019, the case was tried by the Business Court without a jury. The Business Court ruled in favor of the Respondent by Order filed on July 10, 2019 ("Order"). (R. pp. 1-10). On July 20, 2019, SAM filed a Motion to Alter or Amend the Order. (R. pp. 192-198). On October 18, 2019 the Business Court filed an order denying SAM's Motion to Alter or Amend. (R. p. 11). On November 15, 2019, SAM filed a Notice of Appeal.

STANDARD OF REVIEW

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County, 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006); Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009). "A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally." Campbell v. Beacon Mfg. Co., 313 S.C. 451,453,438 S.E.2d 271,272 (Ct. App. 1993). "Contract

actions are actions at law." Hofer v. St. Clair, 298 S.C. 503, 508, 381 S.E.2d 736, 739 (1989). "In actions at law tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Id. "In law actions, the lower court must be affirmed where there is 'any evidence' to support its findings." Felts v. Richland Cty., 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "An issue [that is] essentially one at law will not be transformed into one in equity simply because declaratory relief is sought." Id.

FACTS

This dispute concerns an Indemnification and Hold Harmless Agreement ("Indemnification") executed by the parties as part of the negotiation and sale of a gas station and convenience store located at 1398 North Pleasantburg Drive in Greenville County, South Carolina ("The Property") (R. pp. 162-163). The convenience store was owned and operated by Beck as an Exxon branded dealer under the provisions of a Motor Fuel Supply Agreement ("MFSA") with Cary Oil Co., Inc. ("Cary") (R. pp. 115-130). The MFSA was for a term of ten years beginning March 15, 2003 and ending March 14, 2013 and obligated Beck to keep the gas station as an Exxon branded station. (R. pp. 115-130)

The MFSA provided that if the station did not remain branded as Exxon prior to its expiration, Beck was required to reimburse Exxon for certain payments Beck received from Exxon. (R. pp. 115-130)

As part of the sale of the business and its inventory between SAM and Beck, SAM agreed to indemnify Beck from a breach of the MFSA as set forth in the Indemnification. (R. pp. 162-163)

Following the sale, on or about September 2010, SAM and Drake decided to de-brand the station and, as required by the Indemnification, SAM paid $48,648.00 for the cost of de-branding from Exxon before the fulfillment of the ten- year term of the MFSA. (R. pp. 115-130) (R. pp. 170-173) (R. p. 174,) (R. p. 73, lines 13-24) (R. p. 77, lines 13-15.)

However, a dispute arose between Cary and SAM over other damages for early termination of the MFSA. Drake and SAM sued Cary, who in turn filed a third-party action against Beck and its principals Mohamad Mereby and Shirley Mereby (Mereby) for breach of the MFSA. (R. p. 2) Mereby and Beck filed a cross-complaint against SAM seeking indemnification from the damages claimed by Cary in the third-party action. (R. p. 2). That action (2011-CP-23-05746) ("the underlying action") was stayed by Order of the Honorable G. Edward Welmaker on May 24, 2012 in order for this Declaratory Judgment case to be resolved. (R p. 2)

As set forth in the Complaint and Answer in the instant case, the purpose of the Declaratory Judgment action is to resolve a dispute between Appellant and Respondent over the scope of the Indemnification. (R. pp. 14-15), (R. pp. 16-17) Appellant's Complaint succinctly states the question to be resolved by this Declaratory Judgement Action: "SAM believes it has met all its indemnification obligations under the Indemnification and Hold Harmless Agreement by ensuring that Forty Eight Thousand Six Hundred and Forty Eight and 00/100 ($48,648.00) was paid to Exxon, while Beck believes it is owed further indemnification against claims made by Cary and costs incurred therefor. The parties to this suit disagree over applications of Paragraphs 1 and 2 of the Indemnification and Hold Harmless Agreement and whether and how it applies to the underlying lawsuit. A determination of the rights of the parties in this lawsuit will impact the outcome of the underlying suit and may enable the parties to resolve the

underlying suit." (R. pp. 14-15, Paragraph 8). This allegation was admitted by Respondent in its Answer. (R. p. 17, Paragraph 4).

The Trial Court found that SAM has not met all of its obligations pursuant to the Indemnification and SAM owes Beck further indemnification for, at a minimum, the damages sought by Cary in the underlying action, reasonable attorney's fees and costs incurred by Beck in the underlying action (R, p. 10).

At trial and in its post-trial motion, Appellant attempted to raise additional arguments not set forth in the Complaint or Answer. Respondent timely objected to the introduction of evidence probative of these issues and opposed Appellant's motion to amend its complaint (R p. 55, lines 22-25; R p. 56 lines 1-25; R p.57, lines 1-25; R. p.59 lines 6-12; R p. 63 lines 6-15; R. R. 70 lines 24-25; R. p. 71 lines 10-13); . The Court denied Appellant's motion to amend its complaint in the Court's order on Appellant's post-trial motion (R. p. 11) and constrained its ruling to the issues raised in the pleadings. (R. p. 6).

ARGUMENTS

I. THE INDEMNIFICATION IS NOT AMBIGUOUS, IS CAPABLE OF INTERPRETATION ON ITS OWN TERMS, AND THE TRIAL COURT CORRECTLY DETERMINED THE RIGHTS BETWEEN THE PARTIES

In its Argument II, Appellant contends that the Indemnification is ambiguous. Appellant's primary contention in this regard is that Paragraph Numbered Two (2) of the Indemnification used the undefined terms "Owner" and "Buyer," rather than "Purchaser" and "Seller." The Trial Court found that the use of these terms was a mere clerical error and that none of the parties was prejudiced by it. At trial, Brent Drake, who testified on behalf of Appellant, admitted that there was no intent for Beck to indemnify SAM for any matter:

"Q: Well, there is not a real dispute about what's intended there, is there?

A: As far as who is providing the Indemnification and who is receiving it, I don't think there is a dispute.

Q: Right. Stop A Minit 17 is supposed to indemnify Beck, is that correct?

A: I would—I would think that's what the drafter intended." (R. p 76, line 25; R. p. 77, lines 1-8).

At trial, Counsel for Appellant likewise agreed that the use of these terms was simply a clerical error, stating "[w]ell, Your Honor, I think that the – probably the purchaser-seller owner-buyer is likely a clerical error." (R. p. 67 lines 17-21).

No party to the Indemnification was actually confused by this clerical error or had any misapprehension about what was required of either party as a result of this error. Importantly, this error is found in a paragraph in the Indemnification that *Appellant has already performed* and is not the focus of this dispute. Appellant has already performed its obligations pursuant to this paragraph by paying Forty- Eight Thousand Six Hundred and Forty-Eight and 00/100 ($48,648.00) on behalf of Beck for early termination of the MFSA. It is clear that Appellant understood what was required of it by this Paragraph, as it has completely satisfied its obligations required by this paragraph.

The issue to be resolved by this dispute, as framed by the pleadings, is whether or not Appellant has fully satisfied its obligations required by the Indemnification. This issue is resolved by reference to Paragraph Numbered One (1), which uses the defined terms of "Purchaser" and "Seller." Appellant does not argue that there is any confusion caused by the use of these terms, and they are defined in the preamble to the Indemnification. (R. pp. 162-163)

The Trial Court permitted the plaintiff to introduce parol evidence over Respondent's objections to permit it to explain its intentions with respect to the Indemnification. However, because the Trial Court found that the Indemnification was unambiguous and capable of construction without resort to parol evidence, the parol evidence admitted at trial was excluded from the Trial Court's consideration of the issues before the Court. (R pp. 6-7).

Next, Appellant turns to the sole issue it pled in its complaint: has Appellant met its obligations pursuant to the Indemnification? Appellant argues it has, and that the financial limitations placed in Paragraph Numbered Two (2) of the Indemnification act as an absolute limit on its indemnity obligations. However, the Trial Court rejected this argument, finding that

> A plain reading of the Indemnification leads this Court to conclude that Paragraph numbered One (1) explicitly requires SAM to indemnify Beck from "all claims, damages, actions, suits, proceedings, demands, assessments, adjustments, costs and expenses (including specifically, but without limitation, reasonable attorneys' fees)." Cary's third-party claim against Beck is unquestionably, at a minimum, a claim, action, suit and proceeding in which it is seeking damages and in which Beck has incurred attorney's fees. Accordingly, Cary's third-party claim triggers Paragraph Numbered One (1) of the Indemnification.
>
> Furthermore, the express language used in the Indemnification states that the limitations in Paragraphs 2 (A) and 2 (B) are ***for early termination*** of the MFSA, but do not include other matters such as damages sought by Cary Oil, reasonable attorney's and costs related to the defense of the underlying suit. The amounts listed as limitations are derived directly from the penalty provisions for early termination of the MFSA found in the MFSA itself.
>
> SAM essentially asks the Court to insert language into the Indemnification that would include attorney's fees in the limitations provision for early termination. That language is not present in Paragraph Numbered Two (2). In fact, the converse is true, as Paragraph Numbered One (1) expressly states that SAM must indemnify Beck from damages and reasonable attorney's fees incurred as a result of or incident to the MFSA, "***without limitation***."
>
> Reading both Paragraphs Numbered One (1) and Two (2) together, it is clear that the parties intended that SAM indemnify Beck for precisely the type of suit, damages and attorney's fees brought by Cary against Beck and that they did not intend for Paragraph Numbered Two (2) to act as an absolute limitation of SAM's indemnification liability to

Beck. (R, pp.4-5) (Emphasis added)

While Appellant argues that the Trial Court should have considered Appellant's self-serving testimony as to its intent for the Indemnification, the Trial Court properly excluded this parol evidence from consideration in its decision. The Trial Court properly considered only the four corners of the Indemnification, as it is capable of interpretation on its own terms. "One cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties." S.C. Dep't of Transp. v. M & T Enters. of Mount Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 12 (Ct. App. 2008) (citation omitted). "To determine the intention of the parties, the court must first look at the language of the contract." Id. at 655, 667 S.E.2d at 12-13 (citation and quotation marks omitted). "The construction of a clear and unambiguous contract presents a question of law for the court." Id. at 655, 667 S.E.2d at 13 (citation omitted). "It is also a question of law whether the language of a contract is ambiguous." Id. at 655, 667 S.E.2d at 13 (citation omitted). "When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense." Id. "Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it." Id. (citation omitted). "We are without authority to alter an unambiguous contract by construction or to make new contracts for the parties." Id. "A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Id. When construing terms in a contract, a court must first look at the language of the contract to determine the intentions of the parties. Furthermore, a court must gather the parties' intention from the contents of the entire agreement, not from any particular clause therein. If practical, a court

should interpret the agreement so as to give effect to all of its provisions. It is fundamental that, in the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning. Generally, a contract is interpreted according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense. Bluffton Towne Ctr., LLC v. Gilleland-Prince, 412 S.C. 554, 559, 772 S.E.2d 882, 885, 2015 (Ct. App. 2015).

II. APPELLANT'S ARGUMENTS I, III, IV AND V ON APPEAL ARE MATTERS OUTSIDE THE SCOPE OF THE PLEADINGS.

Appellant raises five arguments on appeal but all, except one, involve matters that are outside the scope of the pleadings and are issues and arguments that the Trial Court properly excluded from consideration. "Due process requires notice. Therefore, the pleading limits the areas into which the court may allow the parties to go, given proper objections." Bass v. Bass, 272 S.C. 177, 249 S.E. 2d 903 (1978). "A matter is not in issue if it has not been pled." State v. Bailey, 226 S.C. 612, 86 S.E. 2d 472 (1955).

Appellant moved the Court to amend its complaint for the first time orally at trial (R. p. 71, lines 6-7) and subsequently in a post-trial motion (R. p. 192-198), and the Court properly denied the post-trial motion (R, p.11).

The Trial Court properly denied Appellant's motion to amend its pleadings and confined the parties to the matters pled in the Complaint and Answer. It is important to consider the timing of Appellant's Motion to Amend. This was not a pre-trial motion made when Respondent would have had time to conduct further discovery, prepare these issues for trial and to present

evidence as to these issues, but rather a motion made orally for the first time at trial and subsequently in a post-trial motion. Appellant sought to amend its complaint to address issues wholly distinct from the issue it pled in its complaint and for which Respondent was unprepared to address. Permitting Appellant to amend its Complaint at trial or after trial to address an issue that Respondent had no notice of is fundamentally unfair and violates due process. Respondent would have been deprived of the opportunity to discover facts that would have been relevant to these issues, to research the law on these issues and to properly prepare these issues for presentation to the Court.

Permitting Appellant to amend its complaint and have these issues considered would amount to a "trial by ambush." It is precisely this type of prejudice to Respondent that our Courts have envisioned when denying motions to amend pleadings. "The prejudice Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it." Stanley v. Kirkpatrick, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2004). "Prejudice occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action." Holland ex rel. Knox v. Morbark, Inc., 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014). "'It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice.' Pruitt v. Bowers, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct.App.1998). Courts have wide latitude in amending pleadings and '[w]hile this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal.' Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct.App.1997). 'The trial judge's finding will not be overturned without an abuse of discretion or

unless manifest injustice has occurred.' Id." Duncan v. CRS Sirrine Engineers, Inc., 337 S.C. 537, 542, 524 S.E.2d 115, 118 (Ct. App. 1999).

Respondent submits that this Court should likewise reject Appellant's attempts to interject new issues into this dispute at this late date and affirm the Trial Court.

This action was commenced on April 3, 2012. (R. p, 12). The underlying action, which is still being held in abeyance pending resolution of this action, was filed on September 17, 2010 (Appendix, p. 9). The underlying action cannot proceed until a final result in the case at bar is achieved.

Respondent is reluctant to address most of the issues Appellant raises on appeal because Respondent is at an unfair advantage in responding to these issues, was not afforded the opportunity to conduct discovery on these issues and had limited opportunity to offer evidence at trial to rebut these arguments. However, Respondent does wish to offer some observations.

A, **Consideration for the Indemnification**

Appellant contends, in its Argument I, that the Indemnification is not an enforceable contract because it is not supported by consideration.

Respondent asserts that Appellant in fact received the consideration set forth in the Indemnification and thus received the benefit of its bargain. Appellant's representative admitted as much at trial:

"Q: You admit that Stop A Minit received personal property and inventory from Beck Enterprises, is that correct.

A: Yes, that was before then.

Q: But you did receive it, is that right?

A: Yeah. " (R. p. 77, lines 5-10).

Further, there is no dispute that Appellant performed part of the Indemnification by payment of $48,648.00 to Cary Oil. The obligation stems solely from the Indemnification and from no other agreement between the parties. (R.p.77, lines 17-24).

Appellant argued for the first time at trial, in its post-trial motion and now on appeal that there was no consideration for an agreement it had already partly performed. There is no evidence in the record that Appellant did not receive the consideration stated in the Indemnification. Over seven (7) years after this Declaratory Action was filed, almost nine (9) years after the Indemnification was executed by the parties, and over eight (8) years after Appellant paid $48,648.00 pursuant to the Indemnification, it now claims for the first time that the Indemnification is unsupported by consideration and thus is not an enforceable contract.

B. Misrepresentation of the Amortization Schedule

As with the issue of the consideration of the Indemnification, Appellant's Argument III was not a matter pled in the Complaint and one which Respondent had no notice. It was thus properly excluded from the Trial Court's consideration of this matter.

This argument goes well beyond the scope of the instant Declaratory Judgment action and makes allegations for which there is no evidence in the record. Specifically, Appellant contends that there were "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. 168) (R. p. 36, lines 15-19, R. p. 103, lines 18-24, R. p. 104, lines 1-8.)."

Respondent disputes Appellant's contention that the claims against Respondent in the underlying action pertain to the sale of the business and real estate to Appellant. Rather,

Respondent contends that these claims are as a result of Appellant's decision to debrand the gas station after the sale of the business. (R. p. 89 ln. 5-25; R. p. 90 lines 1-21). The third-party complaint in the underlying action does not allege that its claims are as a result of the sale of the business and real property, but rather makes claims of breach of contract of the MFSA against Respondent and the Merebys. (Appendix, pp. 8-41). Furthermore, Appellant's citation to the record for this allegation does not establish that the underlying action is a claim for a breach of contract due to the sale of the business and real estate.

Respondent concedes that the extent of Appellant's indemnity to Respondent is as set forth in the Indemnification and Appellant does not owe Respondent indemnity for matters outside its scope. (R p. 89, lines 24-25; R. p. 90, lines 1, 19-21).

As framed by the pleadings, this Declaratory Judgment action is one to determine the narrow question of whether or not Appellant has met all of its obligations pursuant to the Indemnification. (R. p. 12, Appendix p.1, R. p. 16.) It is not one to determine the exact amount of Appellant's indemnification obligation, and this is a matter that will properly be addressed in the underlying action.

C. Effective Date of the Indemnification

In Argument IV, Appellant again raises issues not raised in its Complaint and that the Trial Court properly excluded.

Additionally, Appellant again asserts that the claims of breach of the MFSA that the Third-Party Plaintiff has made against Respondent are for matters that occurred prior to the effective date of the Indemnification. There is no evidence in the record for this assertion. Appellant's citations to the record establish only the effective date of the Indemnification, a matter that Respondent does not dispute.

Appellant concedes in its brief that it debranded the gas station subsequent to the execution of the Indemnification. (Appellant's Brief, p.2) Respondent contends that it is this event that led to the breach of the MFSA claims brought against Respondent, and not the sale of the business and real estate from Respondent to Appellant. (R. p. 89, lines 17-23).

Moreover, Respondent does not seek indemnification from Appellant for any alleged breach prior to the effective date of the Indemnification and has not alleged any such indemnity is due to Respondent. (R, p. 89, lines 24-25; R. p. 90, lines 1, 19-21). Respondent simply seeks indemnification from Appellant for the matters specified in the Indemnification, which relate to the debranding of the gas station which occurred after the effective date of the Indemnification and are thus within its scope. (R p. 89 lines 20-25; R. p. 90, line 1).

D. Payor of Attorney's Fees

As with all of the other arguments in this section, Appellant's Argument V was outside of the scope of the Complaint and the Trial Court properly excluded this evidence and argument. As a consequence, Respondent was not able to offer evidence to refute these contentions.

Furthermore, at best, this argument again goes to the exact amount of the indemnity owed by Appellant. This argument does not address whether or not Appellant has satisfied all of its obligations pursuant to the Indemnification, which is the issue framed by the pleadings in this case and the only issue before this Court.

The exact amount of the indemnity is a matter to be resolved in the underlying action.

III. THIS COURT SHOULD AFFIRM THE TRIAL COURT UPON ANY GROUND APPEARING IN THE RECORD ON APPEAL

Respondent incorporates Rule 220 (c), SCACR herein and asks the Court to affirm the trial court's order upon any ground(s) appearing in the Record on Appeal.

CONCLUSION

For the reasons stated, this Court should affirm the declaratory judgment of the Business Court.

December 17, 2020
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