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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

Appellate Case No. 2020-001387
Case No. 2017-CP-10-5493

Shem Creek Development Group, LLC,... Respondent,

v.

The Town of Mount Pleasant, South Carolina,... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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S.C. Code Ann. § 33-31-620(b).

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Black's Law Dictionary (11th ed. 2019).

ARGUMENTS

I. The trial court erred in awarding liquidated damages of $2,604,316 constituting fifteen years of rent payments when the Parking License Agreement provides that the "sole and exclusive remedy" is the rent payments due at the time of the termination of the agreement.

A. The trial court erred in its construction and application of the language of Sections 6.01 and 8.17 of the Parking License Agreement.

The trial court ruled that the Respondent Shem Creek Development Group ("SCDG") is entitled to damages in the amount of rent for the initial fifteen years of the "License Term" reduced to present value. (Order, p. 40). The trial court reached that conclusion by misinterpreting and misapplying two provisions of the Parking License Agreement ("PLA") , specifically Sections 6.01 and 8.17.

In its response brief, SCDG argues that the trial court correctly construed those two provisions together to find that the parties intended to make the Appellant Town of Mount Pleasant ("Town") liable for all rents that would become due during the entire fifteen years of the "Rent Period" in the event of a default. That construction is counter to the plain and ordinary meaning of the language used in Section 6.01.

Section 6.01 is a limitation of liability clause that limits the remedy available to *both* parties in the event of a default. Using mandatory terms, Section 6.01 provides that the "sole and exclusive remedy *shall* be the Rent Payments *due* under this Agreement." (Pl. Ex. 7). (Emphasis added). Section 6.01 further provides that "[b]oth parties waive any claims that either may have to any consequential or punitive damages." (Pl. Ex. 7). Thus, by the contract terms, the sole and exclusive remedy is the "rent payments due." The Town has cited South Carolina Supreme Court authority to demonstrate that "[t]he word 'due' means 'owed or owing as a

debt.'" *Mathis v. Brown & Brown of South Carolina, Inc.*, 389 S.C. 299, 698 S.E.2d 773, 783 (2010). This is also consistent with Black's Law Dictionary, which defines "due" as "owing or payable; constituting a debt." Black's Law Dictionary (11th ed. 2019). The term "due" – which means "owed," "owing," and "payable" -- does not include future indebtedness that has not yet accrued.

This interpretation is actually supported by the 1922 case cited by SCDG – although SCDG disingenuously did not include the *full* citation and analysis in its brief in an attempt to give the false impression that the Supreme Court was construing the meaning of the word "due" in that case. In *Ex Parte American Fertilizing Co.*, 122 S.C. 171, 115 S.E. 236 (1922), the Supreme Court printed the trial court's decision and then "affirmed for the reasons therein stated." 115 S.E. at 238. The trial court was actually construing the words "may be due," and concluded that "the words 'may be due' contemplate future indebtedness." *Id.* Referring to "may be due," the trial court wrote:

> The phrase has a prospective slant. The use of the word "due" does not necessarily imply that the debt has already matured. It is often used by business men in the sense of "owing irrespective of the time of payment." Century Dictionary. In the case of *Shoemaker v. Smith*, 37 Ind. 128, the court says: "The words 'may be' are peculiarly appropriate to express the future and not the past." In the case of *Griggs v. St. Paul*, 56 Minn. 150, 57 N.W. 461, a contractor drew an order on the city for a certain sum of money, authorizing the deduction thereof "from any money which may be due me on account of the grading of Park avenue." The court held that the words "may be due" did not refer exclusively to what was presently due and payable at the date of the order, but also included moneys that might thereafter become due and payable under the contract. The court said: "The word 'may', as here used, implies, contingency, possibility, or probability and is broad enough to include whatever might become due and payable."

Id. Thus, the trial court placed great weight on the use of the words "may be" which allowed the court to find that future indebtedness was included.

Of course, the language in Section 6.01 of the PLA says "due" – not "may be due." It is the use of the words "may be" that led the Supreme Court in 1922 to find that future indebtedness was also recoverable. Thus, the absence of the words "may be" and the explanation given by the Supreme Court in *Mathis* compel the conclusion that "rent payments due" does not include future indebtedness.

In an attempt to construe the word "due" differently from the plain and ordinary meaning cited in *Mathis*, SCDG also cites to *Bluffton Towne Center, LLC v. Gilleland-Prince*, 412 S.C. 554, 772 S.E.2d 882 (Ct. App. 2015), which again is disingenuous. In *Bluffton*, the default section of the lease at issue did not even include the word "due" so this Court was not even construing a lease provision that used the word "due." Instead, this Court simply used the word "due" in writing its opinion, but on each occasion where the word "due" is used, this Court followed it with the modifying language "during the full term of the lease" or "during the full term." 772 S.E.2d at 890, 893. Thus, as this Court used the word "due" as part of the vernacular, it required modification by the phrase "during the full term of the lease" in order to be read as including future indebtedness. Accordingly, the cases cited by SCDG do not support the notion that the word "due" – without any modifying language – means more than what the Supreme Court found in *Mathis* – "owed" or "owing" which is not inclusive of future indebtedness that has not yet accrued.

SCDG also makes the argument that if the parties intended to *exclude* future rent payments not yet due and payable as part of the "sole and exclusive remedy," it could have expressly stated such. Of course, that is assuming that the word "due" – without any modifying language – may even be read as including future rental payments, which is contrary to *Mathis*. Nonetheless, the same can be said of the converse as well. If the parties had intended to *include*

future rent payments not yet due and payable as part of the "sole and exclusive remedy," they could have expressly stated such – just as this Court did in *Bluffton* when it modified the word "due" with the phrase "during the full term of the lease."

SCDG also argues that Section 6.01 "was drafted by the Town" inferring that that somehow impacts the construction to be given to Section 6.01. However, it is important to recognize that such an argument is at odds with Section 8.08 of the PLA which expressly states: "There shall be no interpretation or construing of this License favorable or unfavorable to either party by virtue of the preparation by Licensor." (Pl. Ex. 7). This language demonstrates that the PLA was prepared by Licensor, that being SCDG, and it further states that there is no inference or construction in favor of either party based on who the drafter is.

In its response brief, SCDG continues to misconstrue and misapply Section 8.17. SCDG argues that Section 8.17 "expresses the parties' intent that the Town's obligation to pay rent survives the expiration or other termination of the PLA because rent is the only payment obligation that the Town had under the PLA." *See*, Respondent's Brief, p. 17. SCDG then reasons that Section 8.17 is rendered meaningless if it does not apply to indebtedness for future, non-incurred rent payments. That reasoning is flawed for several reasons. First, Section 8.17 preserves an already incurred obligation once the PLA expires or is terminated. Thus, if at the time of termination, the Town owed some amount of incurred but unpaid rent, the termination of the lease does not extinguish that existing indebtedness. In effect, Section 8.17 would not be "meaningless," as SCDG suggests, when construed as the Town contends it should be based on the plain and ordinary meaning of the phrase "rent payments due."

Additionally, this reading of Section 8.17 is also correct given the phrase "sum owing." Like the use of the word "due," as discussed above, the use of the phrase "sum owing" means the

sum that was already incurred and is due and payable. That is also consistent with the definition of "due" in *Mathis* such that "[t]he word 'due' means 'owed or owing as a debt.'" *Mathis,* 698 S.E.2d at 783. "Due" and "owing" are synonyms.

Finally, SCDG engages in a misreading of the Supreme Court's opinion in *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018), to argue that the term "obligation" as used in Section 8.17 refers to future indebtedness. While SCDG points to the Supreme Court's use of the word "obligation" at times to refer interchangeably to both past or already-incurred indebtedness as well as future commitments or future indebtedness, that only shows that some of the Supreme Court's word choices could have been more carefully selected. What is important is the actual holding in *Dennis*, where the Supreme Court drew the distinction created by statute, namely Section 33-31-620(b), between what the Court itself called "two categories of debt for which a resigned member continues to be responsible after resignation: (1) 'obligations incurred … before resignation' and (2) 'commitments made before resignation.'" 821 S.E.2d at 673. That is the very point that the Town has made in reliance on *Dennis* – that there is a distinction between past obligations and future commitments. Section 8.17, given the totality of the language used, addresses obligations that were incurred prior to termination and not future commitments or future indebtedness.

B. The trial court erred in reading a rent acceleration clause into the Parking License Agreement when the parties specifically rejected such a provision.

SCDG also disputes that the trial court simply read into the PLA a rent acceleration clause that does not otherwise exist and was specifically rejected by the parties. As SCDG acknowledges, the record is undisputed that the parties specifically agreed to delete a rent

acceleration clause that had been written into an earlier draft. That was admitted in testimony by one of SCDG's principals, Tyler Flesch. (Tr. 240, 319-320). However, the record reflects that the trial court read Sections 6.01 and 8.17 as allowing for rent acceleration, and that constitutes reversible error.

SCDG makes the flawed argument that the trial court's acceleration of all rent due over the fifteen year "Rent Period" was not "rent acceleration" because, if it had been "rent acceleration," the future rent payments would not have been reduced to present value. Not surprisingly, SCDG does not cite to any published South Carolina decision for that proposition. SCDG only cites to the unpublished decision of this Court in *Allegiant v. Emerald Inns, Inc.*, Op. No. 2007-UP-325 (Ct. App. 2007), which actually does not support SCDG's position but rather supports the opposite view. In *Allegiant*, the lease included what the trial court found to be an acceleration clause, although the language of that clause is not stated verbatim in the opinion. The trial court allowed the plaintiff to recover "as damages the aggregate of all of the payments that would have become due under the lease." This Court reversed and held that "[t]he correct measure of damages would include the balance due at the time of the default plus the present value of all unaccrued payments at the time of the default." Thus, as the *Allegiant* decision shows, rent acceleration under South Carolina law does include future rent payments that are reduced to present value. That is exactly what the trial court awarded in the case at bar, despite the undisputed fact that the parties agreed to delete a rent acceleration clause from the PLA. As such, the trial court did err in reading a rent acceleration provision into the PLA which does not exist and which the parties agreed would not be part of the agreement.

C. The trial court erred in construing Section 6.01 of the Parking License Agreement as a liquidated damages provision.

The Town asserts that the trial court erred in ruling that Section 6.01 of the PLA is a liquidated damages provision. In actuality, Section 6.01 is a limitation of liability clause. SCDG does not necessarily disagree with that, but argues instead that a liquidated damages clause is a limitation of liability clause. That is not correct. A limitation of liability clause is a type of exculpatory clause which extinguishes liability for certain types of claims or damages. *See*, *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013) ("[t]his Court has generally upheld limitations of liability and exculpatory clauses, finding they are commercially reasonable"). In contrast, a liquidated damages provision is used to "allow parties to prospectively set an amount of damages for breach." *Erie Insurance Co. v. Winter Construction Co.*, 393 S.C. 455, 713 S.E.2d 318, 321 (Ct. App. 2011). They are different. Section 6.01 is a limitation of liability clause.

Under South Carolina law, "[i]n liquidated-damages cases, the amount is usually a sum certain, or at least the amount is capable of ascertainment by computation." *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 656 S.E.2d 765, 769 (Ct. App. 2007). Moreover, liquidated damages are defined as "[a]n amount contractually stipulated in contrast to unliquidated damages which are damages that cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury." *Id*. Importantly, Section 6.01 does not provide for a sum certain nor does Section 6.01 provide for the ascertainment of damages by a fixed mathematical calculation. In order for damages to be ascertained for a breach, the factfinder needs a factual basis for determining the rental payments due at the time of the breach as well as the "adjustments" to the Fixed Minimum Rent based on the financial performance of the parking garage. A determination of those

"adjustments" under Section 1.07(b) requires a factual basis that may be subject to disputed evidence and thus would not be capable of determination as a sum certain. In short, Section 6.01 is not a liquidated damages provision.

Nonetheless, in an attempt to maintain that Section 6.01 is a liquidated damages provision, as the trial court erroneously ruled, SCDG argues that only a portion of Section 1.07 entitled "Rent" remains applicable while the remainder of Section 1.07 "does not survive" the termination of the PLA. There is no basis in the contract or in law for that contrived dichotomy. In effect, SCDG contends that the amount of rent payable as damages is based strictly on Section 1.07(a), which provides for "Fixed Minimum Rent" of $185,000 per year for the fifteen-year "Rent Period," but SCDG (as did the trial court) then reads out of the contract the language in Section 1.07(a) making the "Fixed Minimum Rent" "subject only to the adjustments set forth herein." (Pl. Ex. 7). Those "adjustments," as detailed in Section 1.07(b), are based upon the "Net Operating Profit" derived from the operation of the parking garage. Under Section 1.07(b), when the operation of the parking garage results in an annual net operating profit, the "Fixed Minimum Rent" is to be reduced by a pro rata share based on the formula agreed upon. However, SCDG insists that the "adjustments" constitute a "right" that somehow was extinguished by the termination of the PLA. Nonetheless, SCDG relies on the "Rent" portion of the PLA to claim damages. If a portion of that Section 1.07 survives the termination, the entirety of the provision survives – not just the portion cherry-picked by SCDG and the trial court. In fact, if the trial court's interpretation of Sections 6.01 and 8.17 is correct, then the survival of the entirety of Section 1.07 beyond termination is required by Section 8.17. If that is not the case, SCDG's theory of liability fails and the Town cannot be liable for future rental payments at all.

D. The Respondent's attempt to raise an ambiguity in the Parking License Agreement as an additional sustaining ground should be rejected for both procedural and substantive reasons.

Lastly, SCDG makes the argument – which is raised for the first time on appeal – that Sections 6.01 and 8.17 of the PLA are ambiguous and should be construed against the interests of the Town. There are many flaws with this argument.

First, the ambiguity of Sections 6.01 and 8.17 was never an issue in the trial court. SCDG did not take the position that those sections are ambiguous in its pleadings or at trial. As indicated, this is an issue raised for the first time on appeal.

Second, the trial court never ruled that Sections 6.01 and 8.17 are ambiguous. SCDG concedes this point: "the trial court did not express whether it found the relevant provisions ambiguous." *See*, Respondent's Brief, p. 33. The trial court likewise made no findings of fact as to the intent of the parties with respect to Sections 6.01 and 8.17, which is further evidence that the trial court did not find the provisions to be ambiguous.

Third, by raising ambiguity as an additional sustaining ground, SCDG is improperly attempting to use Rule 220(c), SCACR, to convert an issue of law into an issue of fact and then to ask the appellate court to serve as the factfinder. There is no precedent allowing an appellate court to become a factfinder and decide an additional sustaining ground on a fact issue that the trial court never addressed. The only authority cited by SCDG is *Brooklyn Bridge, Inc. v. South Carolina Ins. Co.*, 309 S.C. 141, 420 S.E.2d 511 (Ct. App. 1992), in which this Court agreed with the trial court that the insurance policy language at issue was unambiguous. But, in the alternative, this Court found that, even if the insurer's interpretation was reasonable, that still presented only an issue of law because, in the insurance context, where the "policy is susceptible of more than one reasonable interpretation, one of which would provide coverage, coverage must

be found as a matter of law." 420 S.E.2d at 513. Thus, this Court in *Brooklyn Bridge* decided an issue of law, which is well within its province under Rule 220(c). This Court did not, however, use its authority under Rule 220(c) to decide the case based on factual findings that were made for the first time on appeal and not in the trial court. Yet, that is precisely what SCDG is asking this Court to do. SCDG suggests that this Court could find Sections 6.01 and 8.17 to be ambiguous and then decide by a preponderance of the evidence what the parties intended. It is well settled that when construing a contract, "[t]he issue of intent is a question for the factfinder." *Harleysville Group Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288, 302 (2017). Yet, in its appellate capacity, this Court only reviews the evidence "not to determine the preponderance of the evidence thereof but to determine whether there is any evidence which reasonably supports the factual findings of the judge." *Townes Associates v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 776 (1976).

Fourth, SCDG argues that Section 6.01 should be construed against the Town because it drafted that provision. Note that SCDC does not claim that Section 8.17, which it also contends is ambiguous, was drafted by the Town. Nonetheless, SCDG's position, on its face, is contrary to Section 8.08 of the PLA, which states: "There shall be no interpretation or construing of this License favorable or unfavorable to either party by virtue of its preparation by Licensor [SCDG]." (Pl. Ex. 7). Thus, not only does SCDG admit to be the preparer of the PLA (and not just portions of it), Section 8.08 denies both parties the benefit of the rule of construction that favors the interpretation proffered by the non-drafting party. In this case, the PLA was the result of an arms-length negotiation by sophisticated parties represented by counsel, and accordingly, it should not be construed in favor of or against either party on the basis of who drafted the provisions at issue.

Finally, SCDG argues that the Town's interpretation of Sections 6.01 and 8.17 would create an "unreasonable, unfair, and unjust result" and would allow the Town to breach the PLA with impunity. However, "[i]t is not the function of the court to rewrite contracts for the parties." *Low County Open Land Trust v. Charleston Southern Univ.*, 376 S.C. 399, 656 S.E.2d 775, 781 (Ct. App. 2008). "Courts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or to make new contracts for the parties." *Id.* Moreover, the construction of the PLA required by the actual language of Sections 6.01 and 8.17 does not permit a breach of contract with impunity, as SCDG suggests, given that the Town would be liable for rents payments that accrued at the time the PLA was terminated. In this case, SCDG terminated the PLA before any rent payments became due and payable. Nonetheless, there is no valid basis for excusing SCDG from its burden of proving all three elements of its breach of contract claim, including "the existence of a contract, its breach, and damages caused by such breach." *Johnson v. Little*, 426 S.C. 423, 827 S.E.2d 207, 210 (Ct. App. 2019). The failure to prove recoverable damages is fatal to SCDG's claim. Yet, SCDG asks this Court to excuse that failure by asking this Court to rewrite the PLA to provide more favorable terms. That is not the role of this Court – and particularly not under its Rule 220(c) authority. The additional sustaining ground should be rejected.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant Town of Mount Pleasant respectfully renews its request that the Court reverse the judgment entered in favor of the Respondent Shem Creek Development Group, including the award of attorney's fees and costs, and remand for entry of judgment in favor of the Town. In the alternative, the Appellant Town requests that the Court remand for a new trial absolute on all liability and damages issues in accordance with S.C. Code Ann. § 15-33-125.

Respectfully submitted,

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APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

Appellate Case No. 2020-001387
Case No. 2017-CP-10-5493

Shem Creek Development Group, LLC,.. Respondent,

v.

The Town of Mount Pleasant, South Carolina,... Appellant.

CERTIFICATE OF SERVICE

Pursuant to Section (g)(3) of the Supreme Court's Order Re: Operation of the Trial Courts During the Coronavirus Emergency (as amended May 29, 2020), the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellant, does hereby certify that service of the **Initial Reply Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** was made upon all counsel of record by email only this the 17th day of May 2021:

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May 17, 2021

Via Email Only
The Honorable Jenny Abbott Kitchings
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RE: Shem Creek Development Group, LLC v. The Town of Mount Pleasant, South Carolina
Appellate Case Number: 2020-001387
Civil Action Number: 2017-CP-10-5493
Our File Number: 79.20381

Dear Ms. Kitching:

In accordance with Section (c)(5) of the Supreme Court's Order RE: Operation of the Appellate Courts During the Coronavirus Emergency (as amended May 29, 2020), please find enclosed for filing by email only the **Initial Reply Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. In accordance with Section (g)(3) of this same order, I am hereby serving copies on all counsel of record by email only. If you have any questions, please advise.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: E. Brandon Gaskins, Esquire *(w/ Enclosures, Via Email Only)*
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