

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

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SC Court of Appeals

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

v.

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

**RETURN IN OPPOSITION TO RESPONDENT'S
MOTION TO SUPPLEMENT RECORD ON APPEAL
AND MEMORANDUM IN SUPPORT OF APPELLANT'S
MOTION TO STRIKE MATERIALS DESIGNATED BY
RESPONDENT FOR INCLUSION IN RECORD ON APPEAL**

This is a breach of contract action. After discovery, the case was tried non-jury by Circuit Court Judge Maite Murphy, and on July 13, 2020, Judge Murphy issued a Final Order entering judgment in favor of the Respondent Shem Creek Development Group, LLC ("SCDG") on the breach of contract action in the amount of \$2,604,316.00.

In its Notice of Appeal, the Appellant Town of Pleasant gave notice that it was appealing the lower court's Order Denying Defendant's Motion to Compel Plaintiff to Produce Documents Responsive to Defendant's Second Request for Production and, in the alternative, Compel the Production of the Same Documents in Response to Defendant's Subpoena to Related Entity, 101 Coleman Partners, LLC, filed January 22, 2020.

By way of background, on August 5, 2019, the Town had served a second set of requests for production on SCDG making fifteen separate requests for documents related to the financial performance of the parking garage. SCDG produced no documents in response to those requests for production. Instead, SCDG objected to thirteen of the fifteen requests at least in part on the ground that “[t]he financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and information relating to the financial projections for the project would not affect the damages to which Plaintiff is entitled in this case.” The Town filed a motion to compel on October 22, 2019, seeking in part an order compelling SCDG to produce documents responsive to the fifteen requests for production. By order filed January 22, 2020, the trial court denied that motion. The trial court ruled as follows:

The Town’s motion to compel the production of documents relating to the financial performance and operation of 101 Coleman Partners is denied because the information is not relevant to this litigation and the Town’s discovery requests are overly broad. SCDG and the Town agreed to a liquidated damages provision in the parking license agreement, and it fixes damages in the event of a breach. Therefore, the documents requested will not aid in the dispute’s resolution and are not relevant to the issue of damages.

(Order 01-22-20, p. 5).

In its opening brief, the Town challenged that ruling on appeal. The parties have designated for inclusion in the Record on Appeal all of the documents filed with respect to that motion to compel, including the motion itself and SCDG's opposition memorandum with exhibits. That is the *entire* lower court record with respect to that motion. In fact, SCDG concedes that point.

However, SCDG has attempted to enlarge or "supplement" the lower court record with documents that it admittedly never provided to that court nor argued to that court in order to

make arguments that were never made to that court. SCDG attempted this by designating three categories of documents for inclusion in the Record on Appeal that were never presented to nor filed with the lower court. Those items from SCDG's Designation of Matter to be Included in Record on Appeal are as follows:

8. Defendant's First Requests for Production to Plaintiff, dated May 4, 2018
18. Plaintiff's Supplemental Production to Defendant's First Requests for Production – 101 Coleman Partners' Financial Statements and Parking Garage Financials, Bates labeled SCDG00004005 through SCDG00004367
19. Email from Counsel for Plaintiff to Counsel for Defendants dated April 9, 2019 producing Plaintiff's Supplemental Production to Defendant's First Requests for Production – 101 Coleman Partners' Financial Statements and Parking Garage Financials, Bates labeled SCDG00004005 through SCDG00004367

Importantly, SCDG readily admits that these documents were never submitted to the lower court. Rule 209(b), SCACR, provides that “the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)].” Rule 210(c), SCACR, then provides that “[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal.”

SCDG improperly included those documents in its Designation of Matter to be Included in Record on Appeal and has only now moved to "supplement the Record on Appeal" because the Town's counsel caught the issue and challenged that designation in an email exchange dated May 19, 2021. *See*, May 19, 2021 Emails. (Exhibit 1). This is actually a misnomer – SCDG is not trying to "supplement" the Record on Appeal – it is trying to supplement the lower court record. If SCDG thought it was appropriate to supplement the lower court record, it should have done so by petitioning this Court *prior to* filing its Initial Respondent's Brief although the Town

disputes any suggestion that Rule 212 even allows the supplementation of the lower court record *after* the case is on appeal.¹ Nonetheless, it is clear that SCDG has attempted instead to designate materials in violation of the mandatory command of Rule 210(c), SCACR, as well as the spirit of the rule, rather than make any legitimate attempt to supplement the lower court record.

In addition, the Town strongly disputes SCDG's accusation that the Town has made misrepresentations on appeal about being deprived of needed discovery and that it already possessed the financial records at issue. The lower court record – which is properly included in the appellate record – demonstrates otherwise. While SCDG argues that the Town already had responsive financial records sought by the second set of requests for production, SCDG's responses indicate otherwise. SCDG objected to thirteen of the fifteen requests based on relevance. SCDG did not take the position in its responses or in its opposition memorandum submitted to the circuit court that the Town was already in possession of the requested records. Instead, SCDG refused to produce any documents. Admittedly, in a few of the responses, SCDG references prior documents produced during discovery, but the documents that SCDG wishes to add to the lower court record – Bates numbered SCDG-4005 to SCDG-4367 – are never mentioned in those responses nor in SCDG's memorandum in opposition to the motion to compel. *See*, Plaintiff's Responses to Defendant's Second Set of Requests for Production. (Exhibit 2). If, in reality, the Town already had possession of all of the requested financial records as SCDG now insists, that begs the question – why did SCDG then object to their production in response to the second set of requests for production?

Furthermore, if the Court allows SCDG to supplement the lower court record for the motion to compel, the Town should then also be permitted to file additional documents to

¹ Instead, Rule 212 is designed to supplement the *appellate* record with materials presented to the lower court but for whatever reasons had been left out of the appellate record.

counter what SCDG is allowed to submit. Yet, that is counter to how an appeal is supposed to work – the lower court record should be closed; parties should not be able to supplement the record with documents or other evidence that was never submitted to or available to the lower court. That is the very essence of the limitations created by Rule 210(c), SCACR.

Finally, SCDG does not contend that it needs the improperly designated materials to defend the merits of the lower court's ruling on the motion to compel. Instead, they are seeking to supplement the lower court record in order to assert an additional sustaining ground which is raised for the first time on appeal. That is counter to what an additional sustaining ground actually is. An additional sustaining ground must be evident from the *existing* lower court record – not a lower court record that is supplemented on appeal with material never presented in the lower court. In fact, as the Supreme Court has made clear, "[a]n appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record." *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 723 (2000). Here, SCDG admits that the documents at issue were never submitted to the lower court, and accordingly, they are not available to support any additional sustaining ground. It bears repeating that, had SCDG believed these documents were pertinent to its defense of the motion to compel, SCDG should have submitted those documents into the lower court record *while the case was still pending in the lower court*. They did not do so and should not be given a second chance to raise new arguments for the first time on appeal and to submit new evidence into the lower court record while the case is on appeal. That is entirely at odds with our appellate jurisprudence.

In sum, the items as identified above, which were never presented to nor considered by the lower court, should not be included in the Record on Appeal. The Town, therefore, requests that this Court issue an order directing that the designated materials as identified above be excluded from the Record on Appeal. The Court is further requested to order that the excluded

materials not be referred to nor cited in SCDG's response brief. SCDG should be required to file an amended brief excluding reference to the improperly designated documents and the Town should then be granted the opportunity to amend its reply brief accordingly.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

DAVID PAGLIARINI #8850
Corporation Counsel
Town of Mount Pleasant
100 Ann Edwards Lane
Mount Pleasant, South Carolina 29465
(843) 849-2020

CLAUDIUS O. TACKETT, II #72988
CLAUDE TACKETT LAW FIRM, LLC
Post Office Box 429
Mount Pleasant, South Carolina 29465
(843) 800-1126

*Counsel for Appellant
Town of Mount Pleasant*

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