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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

The Honorable Marvin H. Dukes, III
Beaufort County
Trial Court Case No. 2018-CP-07-01622

APPELLATE CASE NO. 2020-000862

J & W Corporation of Greenwood,

Appellant,

vs.

Broad Creek Marina of Hilton Head, LLC;
Broad Creek Marina Operations, LLC;
Broad Creek Marina Properties, LLC;
Broad Creek Marina and Development, LLC,

Respondents.

REPLY BRIEF OF APPELLANT

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Hilton Head Island, South Carolina
June 21, 2021

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Two Issue Rule

As to the Respondents' initial contention that the Appellant failed to appeal the Master's finding in favor of the Landlord on Landlord's breach of contract counterclaim, the Appellant's appeal of the Master's judgment in favor of the Landlord on the Appellant's breach of contract claim is an appeal of the Master's holding in favor of the Respondent on the Respondent's breach of contract claim.

The Appellant argues in its Initial Brief that the Master erred in failing to award the Plaintiff at least nominal damages for the breach of contract proven by a preponderance of the evidence. (Statement of Issues On Appeal, number 4, p. 5.) That contract, as set forth in the Amended Complaint filed March 28, 2016, was the "Release and Confidential Settlement Agreement" dated December 13, 2004 (R.p. 1208), which the Appellant Plaintiff alleged, was entered into due to disputes that arose between the parties as to the original 99-year Lease Agreement dated September 23, 1993. Although the Respondents contend the 99-year Lease Agreement was never amended (because of the wording that arguably supports their contentions regarding several issues in the case)(*see* Respondents' Brief, p. 5, "Since it was initially entered in 1993, the Lease has not been amended other than with respect to certain provisions that were clarified or further addressed in a settlement agreement that Land and Tenant entered in 2004…."), the 2004 Release and Confidential Settlement Agreement ("RCSA") on its face amended the terms of the 99-year lease by requiring the Respondent to provide Appellant "New Office Space" in substitution for the office space previously located in the floating store. (R.p. 1209.)

As is set forth in detail in the Appellant's Brief, the RCSA was a clear, new agreement on the Appellant's office space to be provided by the Landlord, negotiated and executed because

of the disputes that the poor wording of the initial 99-year Lease Agreement had already caused. Because the Respondents then failed to provide the New Office Space called for under the RCSA during the ensuing five years (2004-2009), and further having failed to build the Dockmaster's House or otherwise offer to place the Appellant in "a mutually agreeable location of a size, kind and quality at least comparable to the existing space" in an area "located in the center of the commercial and retail activity at the Marina" (R.p. 1209), the Respondent ceased payments due to the Landlord in an attempt to force him to honor the RCSA.

The Appellant's appeal of the Master's error in failing to rule for the Appellant on its breach of contract claim and award at least nominal damages, is an appeal of the Master's finding that it was the Appellant who actually breached the contract (then being composed of both the 99-year Lease Agreement and the RCSA).

As Justice Hearn wrote in her concurring in part and dissenting in part opinion in Atlantic Coast Builders & Contractors, LLC v. Lewis , 396 S.C. 479, 722 S.E.2d 213 (Ct. App. 2011), "Distilled to its basics, issue preservation requires that an issue be raised to and ruled upon by the trial judge. (Citation omitted.) So long as these two elements are met, an issue will be deemed preserved." Id. at 488. While the "two-issue" rule may be applicable where a trial judge has directed a verdict on the issues of statue of limitations and contributory negligence, and an appellant only appeals on one of the differing defenses, this case is diametrically different because the exact same issue (breach of contract) was appealed, and both emanated out of the same fact situation. *See* Anderson v. S.C. Dept. of Highways & Public Transportation, 233 S.C. 417, 420, n.1, 472 S.E.2d 253, 255 n.1 (1996).

FAILURE OF THE MASTER TO ENTER A DECLARATORY JUDGMENT FOR APPELLANT

The Appellant contends the Master's denial of the Appellant's prayer for a Declaratory Judgment holding that the Respondents breached the contract was not supported by any evidence of probative value. The Respondents do not contest the trial testimony cited in the Appellant's Brief (pp. 11- 15) showing the Respondents blatantly failed for five years to provide the New Office Space required under the RCSA, and then for the next ten years until trial, continued to refuse to provide the promised New Office Space, basically relegating the Appellant's business to an unpermitted and illegal boat garage that the Respondent knew did not meet the requirements of the RCSA, and the Town Code for a commercial office.

There was no evidence upon which the Master could have reasonably relied to deny the Appellant's prayer for a declaration of breach of the covenant to provide New Office Space. Mr. Freedman, the owner of the Respondent, admitted the boat shed office did not meet the RCSA, said it was supposed to be a "temporary" place (that lasted 12 years), admitted that as a developer he knew the office was required to be permitted by local authorities, and admitted no floating office was ever tendered. *See* Appellant's Brief and cites therein at page 14. The only argument made by the Respondents is the unsupported assertion that "There is evidence, and pleadings and orders, indicating that Tenant had obstructed and refused to accept the floating office. As a result, it is appropriate that the issue was resolved in Landlord's favor. Tenant's refusal was improper." (Respondent's Brief, pp. 19-20)

In point of fact, the following testimony by Mr. Freedman answers this question:

Taylor: My question to you, Mr. Freedman, is this: Have you, as we sit here today, at any time in the last nine years, had a floating store available or a floating office available on the dock and said to Mr. Scurry, "That's your floating office. Go to it."

Freedman: No, sir.

(R.p. 711, line 21 through p. 712, line 2.

THE MASTER ERRED IN ENTERING AN ORDER AT VARIANCE WITH SOUTH CAROLINA LAW

The Respondents do not contest the fact that S.C. Regulation 30-12 M (2) prohibits "offices that float" from being constructed, moored, or otherwise placed in or over tidelands and coastal water critical areas unless there is no significant environmental impact, an overriding public need can be demonstrated, and no feasible alternatives exist, but suggests the issue was not preserved for appeal. To the contrary, Appellant subpoenaed Trent Shaw, then the critical area permitting manager from OCRM, to trial and Mr. Shaw confirmed the contents of S.C. Regulation 30-12 M (2) at trial. (R.p. 369, line 12 through p. 370, line 2.)

This issue of whether or not a floating office is legal in South Carolina for a business that is selling tickets for a ferry and taking reservations was directly posited before the Master during trial:

Taylor: Your Honor, all of that was said in response to the question, which I asked Mr. Shaw was, to his knowledge as an OCRM permit manager, was he aware of any other regulation or law in the State of South Carolina that directly

impacts the prohibition on Number 2 of putting any floating offices, unless those three things can be shown.

Lesemann: Well, Your Honor, and, again, then I'll object to the characterization because term "floating office" does not appear here. The is nonwater dependent, and I think we can look at the fact that a marina is a water-dependent use by its definition. So I think if we just open this can or worms, I don't really have any idea where it's going to go. The law is the law. You have the constitutional authority to apply the law. So asking this witness whether he's aware of some other aspect of the law is, again, an inappropriate analysis. The law is what it is.

(R.p. 372, lines 1-23.)

Respondent argues that the issue was not raised with "sufficient specificity" (Respondent's Brief, p. 21), but there is no additional specificity needed as to a floating office that is specifically and clearly prohibited under Regulation 30-12 M (2). And the fact that one had been previously permitted by OCRM in 2005 (such permit having expired in February 2020) is not dispositive of the issue because Mr. Shaw testified that an application for an amendment to then existing (now expired) permit would be necessary (R.p. 382, lines 20-25), and then OCRM would consider it: "Should all applicable laws, regulations be met, we would move forward with permit issuance." (R.p. 383, lines 13-15.)

Of key importance in a review of this issue, is the fact that the Respondents acknowledged that they had not procured an OCRM permit for the floating office as of January 29, 2021 (the date of filing of the Respondent's Initial Brief, p. 23), presumably because OCRM realizes the

clear meaning of the Legislature's Regulation is to prohibit "floating offices" on the environmentally sensitive coastal waters unless there is a compelling reason the work of the office has to be conducted on the water (such as the dispensing of fuel). This Court should not be dissuaded from correcting a clear error of law in the Master's ruling simply because the Appellant's owner agreed to accept the "floating office" if it became a final Order of the Court.

THE MASTER ERRED IN ORDERING THE APPELLANT TO ACCEPT A FLOATING OFFICE AT VARIANCE WITH HIS EARLIER ORDER

The Master's Interim Order of May 29, 2019 (R.p. 8) commanded the Respondents to permit and provide a "new floating office with at least 300 square feet of commercially useable space and at least a 20-year anticipated service life." When the Appellant learned (after multiple requests) that the Respondents intended to fulfill the terms of the Order by providing a houseboat with a fiberglass bottom and no warranty, the Appellant requested permission to conduct limited discovery as to the specifications and warranty on the houseboat. See Plaintiff's Motion for Discovery, R.p. 202. In reply, the Respondents moved the Master to compel the Appellant to accept the houseboat, and the Master complied with that request, notwithstanding the fact that the Respondents' Affidavit from the houseboat manufacture's President Dirk Wiley, advised the Court and the parties ("THIS STATEMENT IS NOT A WARRANTY") that "[i]t is not possible to provide multi-year guarantees of performance." But he asserted that when properly maintained, "Aqua Lodges can remain in service for 20 years or longer." Exhibit 2 to Defendant's Motion to Implement. (R.pp. 138-139.)

The Respondents now seek to categorize Mr. Wiley's "Not a warranty" statement as an assertion that "when properly maintained, the Aqua Lodge should remain in service twenty

(20) years of longer." (Respondents' Brief, p. 23.) In fact, Mr. Wiley only suggested the Aqua Lodge "can" remain in service for twenty years or longer. This is analogous to the difference between a new vehicle warranty for 100,000 miles versus a dealer's pledge (BUT NOT A WARRANTY) that if properly maintained, the fine vehicle can remain in service for 100,000 miles. The Master erred in ordering the Appellant to accept a floating office with no reasonable basis whatsoever in the record of its reasonably expected longevity, when his prior Order requires "at least a 20-year anticipated service life." (R.p. 10.)

THE MASTER SHOULD HAVE AWARDED AT LEAST NOMINAL DAMAGES FOR THE RESPONDENT'S BREACH OF CONTRACT

The Master erred in failing to award the Appellant at least nominal damages in that the evidence fails to support any other conclusion than that the Respondents (admittedly) failed to provide the Tenant with the New Office Space promised in the RCSA. Every violation of a legal right imports damage and authorizes the maintenance of an action and the recovery of at least nominal damages. Stevens v. Allen, 342 S.C. 47, 53 n. 5, 536 S.E.2d 663, 665 n. 5 (2000). The law presumes existence of at least nominal damages for violation or infringement of legal rights. Grooms v. Medical Soc'y of South Carolina, 298 S.C. 399, 380 S.E.2d 855 (Ct. App. 1989).

The Master's Order acknowledged that he could "consider an award of nominal damages," but held that the Appellant had failed to prove a breach of contract by a preponderance of the evidence, "as Tenant was provided with office space throughout the term." The holding disregards almost all of the evidence and admissions of the Landlord Respondent, and embraces the legally unsupportable conclusion that the clear terms of the RCSA and its requirement that the Landlord provide New Office Space of a type specifically set forth therein,

was merely a suggestion and that the Landlord's relegating of the Appellant's business to a non-permitted, illegally converted boat shed for over 10 years somehow met the RCSA requirements.

The Master seems to have been persuaded by the Respondent's argument that because the Appellant could not prove specific lost profits (because not withstanding the placement of its staff in the vermin-invested boat shed, the Appellant stayed in business), then the Plaintiff should not recover on the breach of contract claim. That is punishment for the Appellant J & W's efforts and legally unsupportable.

THE MASTER ERRED IN FAILING TO APPLY EQUITABLE SET OFF OR RECOUPMENT TO HIS FINDING OF DAMAGES FOR RESPONDENT

Following the introduction of all the Plaintiff's evidence, the Plaintiff Appellant's counsel's, in response to the Defendant's Motion for a Directed Verdict, requested the Court equitably setoff a reasonable amount against any damages the Court might find on Counterclaim, based upon the equitable theory of setoff or recoupment. (R.p. 818, line 16 through p. 819, line 1.) The Plaintiff in essence requested the Court set off an appropriate amount from any damage award given the Defendant Counterclaimants as recoupment for the 10 years that J & W's staff and owners were forced to operate out of the illegal, un-permitted converted boat shed. No objection to the set off/recoupment request was made.

As Judge Anderson notes in his South Carolina Requests to Charge, Civil, at Section 19-25, Recoupment is the right of the defendant to cut down or diminish the claim of the plaintiff in consequence of his failure to comply with some provision of the contract sought to be enforced, or because he has violated some duty imposed upon him by law in the making or performance of the contract. The recoupment, unlike a counterclaim, only reduces the

plaintiff's claim. And unlike setoff, it must grow out of the identical transaction and not out of a different transaction. Id. The Defendant Counterclaimants having not objected to the propriety of the requested setoff or recoupment, it was properly before the Court. Brasington Tile Co., Inc. v. Worley, 327 S.C. 1997, 491 S.E.2d 244 (S.C.1997).

This was a classic example of a case demanding recoupment, given the uncontested facts admitted and established at trial of the Respondents' refusal to honor the RCSA. And the issue was tried by consent, effectively becoming an amendment to the pleadings. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Rule 15(b), S.C.R.Civ.P. *See also* Dunbar v. Carlson, 341 S.C. 261, 533 S.E.2d 913 (Ct.App. 2000).

THE MASTER ERRED IN AWARDING MONETARY DAMAGES TO THE DEFENDANT FOR HURRICANE MATTHEW DAMAGES TO THE LEASEHOLD

There was no evidence produced at trial showing that the hurricane damage to the leasehold docks was caused by the Plaintiff's vessels being moored to them during the storm. The 99-year Lease Agreement provided that the Tenant was to repair the docks or pay Landlord all costs "attributed to its use." Paragraph 6. (R.p. 1192.) Paragraph 30 states that Tenant shall indemnify and save Landlord harmless from any and all claims, damages, costs and expenses, including reasonable attorneys' fees arising from the occupancy or use by Tenant of the Property. (R.pp. 1198-1199.) Read together, even before the execution of the RCSA with its agreement that the Tenant would begin to pay its share of insurance as a "common charge," the Tenant is only responsible for damages caused by the Tenant or attributed to its use of the docks. The damages were caused by Hurricane Matthew, a *force majer*, and not the

responsibility of the Tenant. The contentions asserted in the Respondents' Brief that there is evidence in the record demonstrating that Tenant's operations caused the damage is simply wrong, as is the assertion that the Landlord instructed the Tenant to move the vessels from the dock. And as is noted in the Appellant's Brief, the Respondent's General Manager Nate Jones testified that the damage was a result of the combination of natural forces, and "I don't know that we can properly allot what [was] wave action, wind action and boat action." (R.p. 942, lines 22-25.)

THE MASTER ERRED IN NOT ENTERING A DECLARATORY JUDGMENT THAT THE PARTIES AMENDED THE INSURANCE REQUIREMENTS IN THE RCSA

In probably the most impactful error of the case, the Master erred by not entering a declaratory judgment that the parties had mutually agreed under the RCSA to amend the requirements of insurance under the 99-year Lease Agreement. There is no evidence in the record contradicting Mr. Scurry's assertion that the parties intended under the RCSA for the Respondents to insure all the docks at Broad Creek Marina—including the leasehold of J & W—and J & W agreed to pay its prorated share for the insurance. The 7.5 percent monthly contribution toward "Insurance: General Liability, Docks, Wharves and Piers" cannot be reasonably interpreted any other way than as the agreement Mr. Scurry testified it was.

THE MASTER ERRED IN QUASHING THE SUBPOENA TO ROBBIN RACHEL AND IN AWARDING THE $56,371.27 IN DAMAGES THAT WERE NOT PROVEN

The record shows clearly that Robbin Rachels never produced the documentation supporting the alleged "insurance" charges that made up a substantial amount of the $56,371.27 damage award. Although the Respondents in their Brief assert that they "had

already presented the documentation that was being requested," (p. 36), that is simply wrong. As the Appellant pointed out in it Brief at p. 31, Ms. Rachels in January of 2019, four months prior to the trial, testified in her portion of the 30(b)(6) deposition, that she did not then and there have documentation proving the insurance amounts charged back to J & W, and "That is something we would have to do. That is something we are in the—we are in the progress of working on." (See mistakenly unnumbered Record Page between pages 640 and 641, lines 2-7.) When asked if she could gather the information and produce it, she earlier replied "Yes, it will take some time." (R.p. 342, lines 6-7.)

When the information necessary to establish the authenticity of the insurance billing was never voluntarily produced, the Plaintiff issued a trial subpoena, which was not honored, and was quashed by Judge Dukes. While the admission of evidence is a matter left to the discretion of the trial judge, a clear abuse of that discretion (as here) amounts to an error of law. And not only was it error, but the Plaintiff Appellant was also clearly prejudiced in that J & W was never given the opportunity to verify the insurance "bill backs" despite repeated demands for the documents. Having demanded the information four months prior to trial, and having received assurances that it would be forthcoming, the Plaintiff had no other option than to send the trial subpoena for the documents, which should have been upheld. And the Court's judgment against the Appellant is therefor without proper foundation.

The Court should take judicial notice that the Respondents had no problem with producing voluminous paperwork that supported it positions, but in the months prior to trial, admittedly never produced the requested insurance back-up documentation. Thus, the award by the Master includes at least $10,566.47 in damages that had no back-up documentation.

Respectfully submitted,

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