STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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Case No.: 2021-000171

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Resource Properties, Inc.,

Respondent,

v.

CSS Enterprises, LLC,
Douglas E. Crolley, and Jeff C. Crolley,

Appellants.

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FINAL BRIEF OF APPELLANTS

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II. STATEMENT OF THE CASE

A. STATEMENT OF MATERIAL FACTS

On or about July 21, 2016, Appellants CSS through its agents, Appellants Jeff C. Crolley (JCC) and Douglas E. Crolley (DEC) entered into an agreement with Respondent for commercial space located at Suite 140, The Business Park of St. Andrews, St. Andrews Road, Columbia, SC 29210 (the "Property"). At the time, Respondent Corporation was run exclusively by the deceased owner/president "Mike Duffy". Appellants had numerous dealings with someone purporting to be Mike Duffy and dealt exclusively with the individual believed to be Mr. Duffy. The communications were primarily accomplished via telephone and email. In email exchanges between July 17, 2016 through July 21, 2016, Duffy and Appellants discussed the terms under which the Property was to be leased and the interior improvements (Defendants' Exhibit 1). There were two brief, in person meetings with an individual believed to be Mr. Duffy. Thereafter, Appellants encountered Mr. Duffy (or an agent of Plaintiff believed to be Mr. Duffy) several times a week as he performed routine maintenance and landscaping at the property. Appellants' relationship with Mr. Duffy was very informal, congenial, and amicable (R. p. 42).

In or about October 2016, Appellants entered into a written side agreement with an agent of Respondent they believed to be Mr. Duffy as they performed increased work to the property at Mr. Duffy's direction. The agreement released Appellants from obligations and warranty responsibility in exchange for work and improvements completed on the Property. In addition to renovations performed in the occupied suite, Appellants performed work, maintenance, and repairs to the common areas of the building including the roof.

Prior to Mr. Duffy's death in 2017, the parties had a congenial relationship where most exchanges and dealings were done in an amicable "hand-shake" method of business dealings (R.

p. 85). Respondent did not notify Appellants of a change in management or of Mr. Duffy's passing. Appellants called Mr. Duffy's phone number numerous times to report issues with parking and landscape maintenance during the summer and fall of 2017. Appellants never received a response from Respondent.

In late 2017 Appellants began to receive correspondence from "Wilson Kibbler" (WK) regarding their tenancy. The correspondence failed to identify that WK had assumed control of the property management due to Mr. Duffy's death. WK demanded Appellants provide them with a copy of commercial liability insurance. This demand in 2018 was the first time Appellants were aware of any requirement for substantial commercial liability. There was no record in Respondent's file regarding Appellants' liability insurance despite Respondent's witnesses testifying at great length that Mr. Duffy was diligent and thorough in making notes and keeping records (R. pp. 188, 210). Moreover, Appellants did not have liability insurance for the property, it is reasonable to conclude Respondent did not require or enforce liability insurance coverage from Appellants in the lease agreement until after the death of the owner of Resource Properties.

On or about March 5, 2018, eighteen (18) months before the expiration of the alleged Lease Term, the Appellants alerted Respondent via a telephone call that due to the changes in management, demands for previously unenforced and waived obligations, and lack of landscaping upkeep at the Property, Appellants would be abandoning the property and no longer paying rent (R. p. 202). On or about March 30, 2018, the Respondent alerted Appellants that they were on notice of default (the "NoD"). Respondent acknowledged receiving actual notice of Appellants' intent to vacate (R. p. 202). Following Appellants vacating the Property, Respondent took little to no action to fill the vacancy. A "Lease Termination" was not completed until eleven (11) months after abandonment, in February 2019 (R. p. 404). Respondent testified at trial that

the unit could not be rented until after the "Lease Termination" paperwork was complete (R. pp. 163, 166). Additionally, the only actions allegedly taken by Respondent to re-lease the Property was cold-calling from a phone book, posting a flyer, and sending out an e-blast from a listserv. Respondent provided no evidence of when those alleged efforts were made. Other than an undated flier and uncorroborated testimony, Respondent provided no documentation of their claim to have been marketing the vacant property (R. pp. 138).

B. PROCEDURAL HISTORY

Respondent commenced the present action with the filing of a Summons and Complaint on May 24, 2018. Respondent alleged one cause of action for "Breach of Contract."

Appellants answered on September 17, 2018, generally denying Respondent's allegations and plead affirmative defenses of laches, estoppel, waiver, failure to mitigate damages, and Respondent's prior breach. Additionally, the individual Appellants allege they were never intended to be parties to a lease agreement, and that the lease submitted by Respondent was not authentic. Appellants also made counterclaims for Breach of Contract, Bad Faith, and Unjust Enrichment.

Respondent called six witnesses: Douglas Crolley, Jeff Crolley, Anna Belle "Boo" Kibler-Moca, Kim Beasenburg, Wesley Shull, and Mickie Dawson. Appellants called the owner of CSS, LLC, Douglas Crolley, in his case in chief.

The Circuit Court hearing was held on June 30 – July 1, 2020. At the conclusion of the case, both parties moved for Directed Verdict. Respondent renewed his objection to the authenticity of the lease as a controlling document and argued that the lease could not be enforced since it was never entered into evidence as the authentic lease governing the rental of

the unit in dispute. The Court requested proposed Orders detailing all issues in the case. Appellant raised all current appellate issues in their Proposed Order (R. pp. 473-491). The Proposed Orders were submitted on or about July 20, 2020.

On January 8, 2021 the Court found that Plaintiff, herein Respondent, was entitled to a judgment against Defendants, herein Appellants, jointly and severally, for actual damages in the amount of $31,745.56 and attorney's fees and cost of this action (R. p. 13). Appellants' counterclaims were denied and dismissed. The Final Order did not address the evidentiary issue of "The Lease" being in evidence for purposes other than evidencing the agreement of the parties. The Final Order did not address Respondent's failure to mitigate damages.

III. STANDARD OF REVIEW

"An action for breach of contract seeking money damages is an action at law." *R & G Constr., Inc., v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 430, 540 S.E.2d 113, 117 (Ct. App. 2000). "In an action at law, on appeal of a case 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." *Townes Assocs. Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, "a reviewing court is free to decide questions of law with no particular deference to the trial court." *Hunt v. S.C. Forestry Comm'n*, 358 S.C. 564, 569, 595 S.E.2d 846, 848–49 (Ct.App.2004); *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 296, 468 S.E.2d 292, 295 (1996); *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion

accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id*. at 429–30, 632 S.E.2d at 848 (citations omitted).

IV. ARGUMENT

A. AUTHENTICATION

"It is black letter law that evidence must be authenticated or identified in order to be admissible." *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018). "A party offering evidence must meet "[t]he requirement of authentication ... as a condition precedent to admissibility." Rule 901(a), SCRE; *Deep Keel v. Atlantic Private Grp.*, 773 SE 2d 607 (S.C. Ct. App. 2015). Rule 901 contains examples of "authentication or identification conforming with the requirements of this rule." Rule 901(b), SCRE. The method at issue here is:

> (1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.

In order to authenticate the lease pursuant to 901(b)(1), a witness with first-hand, personal knowledge of the transaction is required.

The decedent's daughter and current President of Resource Properties, Kim Beasenburg, testified at trial that her father would never execute an incomplete lease; however, this directly contradicts her deposition testimony wherein she stated she did not know if "it was his practice to fill in the blanks on the template prior to having it signed" (R. pp. 211-212). Mrs. Beasenburg did not know why portions of the lease were hand written; she did not know if her father would have executed a lease before the parties were typed into it (R. p. 194). During trial, it was further revealed that Mrs. Beasenburg previously testified that "[she] wasn't there," "[she] wasn't

present when [the lease] was drawn up," and that she did not know who punched holes in the alleged lease (R. pp. 220, 221). She did not know who marked on the document with a highlighter (R. p. 222). She did not know why the date was hand written (R. p. 223). Although the bar to satisfy the authentication requirement is not a high bar, it still exists, and Mrs. Beasenburg's knowledge of the transaction in question is far-removed from what one would consider "personal knowledge."

Plaintiff did not produce the witness whose signature appeared on the purported lease. Plaintiff could not locate the alleged witness. Douglas Crolley, the then sole owner of CSS, testified that several employees and agents had signatory authority for CSS, so he could not assure whether he actually signed Exhibit 11in his individual capacity. The purported lease, on its face, has been unstapled and re-stapled. The purported lease contains markings that cannot be accounted for, such as highlighted portions and hole-punches, confirming unexplained manipulation of the original document.

There is a dearth of case law in South Carolina regarding SCRE 901; however, the authentication requirement is standard in American jurisprudence. In *Deep Keel*, *supra*, the court relied on interpretations of Fed.R.Evid. 901(a) and 29A Am. Jur. 2d Evidence § 1045 (2008). The New York evidentiary rule for authentication is identical to the South Carolina Rule. *See*, NYRE 9.07. In *Malloy v. V.W. Credit Leasing, Ltd.*, the New York Appellate Court summarized the matter by reasoning:

> "Thus, even if […], the proponent of the lease, laid the foundation for the document as a business record or other exception to the rule against hearsay, [the proponent] still must satisfy the authentication requirement.

Freeman v. Kirkland, 184 A.D.2d 331, 332 (1st Dep't 1992); *Fanelli v. Lorenzo*, 187 AD 2d 1004, 1005 (4th Dep't 1992); *People v. Winley*, 105 Misc. 2d 474, 481 (Sup. Ct. NYCo. 1980). **If a party does not authenticate the lease, it is inadmissible.** *Bermudez v. Ruiz*, 185 A.D.2d 212, 214 (1st Dep't 1992); *People v. Michallow*, 201 AD2d 915, 916-17 (4th Dep't 1994); *Wilson v. Bodian*, 130 A.D.2d 221, 233 (2d Dep't 1987); *People v. Winley*, 105 Misc. 2d at 481." 2008 N.Y. Slip Op 52035(U) (N.Y. Sup. Ct. 2008) (citations in original; emphasis added).

Absent testimony from a witness with personal knowledge, the Court has no way of determining if the purported lease offered as Plaintiff's Exhibit 11 is an authentic and genuine lease entered into between the parties. Therefore, it was improper for the Court to admit the purported lease into evidence as authentic. Since it was never authenticated at the agreement between the parties, it was never entered into evidence as the controlling agreement.

B. THE LOWER COURT IMPROPERLY ALLOWED FOR THE INTRODUCTION OF EXHIBIT 11 FOR THE PURPOSE OF SHOWING CONTRACTUAL AGREEMENT BETWEEN THE PARTIES

The alleged lease (R. pp. 253-256) was not admitted into evidence for the purpose of being the contractual agreement between the parties. An exhibit to a Complaint that is never admitted into evidence at trial for the purpose it is referenced in the Complaint cannot be used as a basis for the trier of fact's decision (SCRCP 43(g)). "[W]hen evidence is admissible for one

purpose but not for another, the court, upon request, shall restrict the evidence to its proper scope." *State v. Benton*, 526 S.E. 2d 228 (2000); *State v. Bottoms*, 260 S.C. 187, 195 S.E.2d 116 (1973); *State v. Bagwell*, 201 S.C. 387, 23 S.E.2d 244 (1942); SCRE 105.

The document was admitted as Plaintiff's Exhibit 11 for the limited purpose of showing it was the document received by WK and relevant to the issues of WK's alleged bad faith, but it was never re-offered into evidence as the lease the parties operated under.

During trial, the following colloquy took place (R. p. 16):

> THE COURT: And so are you trying to offer it as it being the lease that they entered into?
> MR. BIBLE: I'm offering it for the purposes of establishing that Resource Properties had an agreement for Unit 140 at the time of Wilson Kibler receiving the files and this is the agreement that Wilson Kibler received for Unit 140.
> THE COURT: And that doesn't have anything to do with the authenticity of the signatures or anything else.
> MR. LALIMA: Okay.
> THE COURT: So I'll admit it.

Therefore, it was improper for the Court to utilize Plaintiff's Exhibit 11 as the authentic agreement between the parties as a basis for its decision. Basing a decision on a document not in evidence as the authentic document is a legal error, and therefore, an abuse of discretion under South Carolina law.

C. THE LOWER COURT ERRED IN FAILING TO CONSIDER PLAINTIFF'S FAILURE TO MITIGATE DAMAGES

Appellants alleged that Respondent breached their duty to mitigate damages. Respondent's witness, Wesley Shull, admitted that even though the Property had been vacated by Appellants on or about March 2018, a lease termination for the Property was not filled out

until on or about February 8, 2019 (R. p. 404). Mr. Shull admitted that until on or about February 8, 2019, the Property was marked as "occupied" in WK's records (R. p. 163). Mr. Shull further admitted that there was not even potential for WK to lease out the Property to another lessee unless the property was classified as "vacant." Therefore until February 8, 2019, more than eleven (11) months after Appellants had abandoned the property, the Property's status was inaccurately represented as "occupied" and had no potential to be re-leased to a potential lessee. Mr. Shull testified that WK didn't clean the unit or replace ceiling tiles until February 2019 (R. p. 164). Moreover, the documentation and testimony from Respondent was that in March 2018 they were awaiting further instructions from their attorney before marketing the unit (R. pp. 346, 347).

Respondent offered a marketing flyer as evidence Respondent satisfied their duty to mitigate damages (R. pp. 343, 344). However, the marketing flyer contained no date to indicate when the flyer was made. Additionally, no evidence was provided to indicate where the flyer was posted or when the flyer was disseminated, if ever. Respondent further alleges that a "For Rent" sign was placed in the window of the Property, however Respondent produced no evidence to show a "For Rent" sign had ever been placed in the window of the Property, despite pictures of the Property appearing in the marketing flyer (R. p. 343).

A party who has suffered injury or damage from the actionable conduct of another is under a duty to make all reasonable efforts to minimize the damages incurred and cannot recover damages that might have been avoided by the use of reasonable care and diligence. *Newman v. Brown*, 228 S.C. 472, 480, 90 S.E.2d 649, 653 (1955). "The duty to mitigate losses applies to contracts." *Cisson Constr., Inc. v. Reynolds & Assocs., Inc.*, 311 S.C. 499, 503, 429 S.E.2d 847, 849 (Ct.App.1993); *Mid–Continent Refrigerator Co. v. Way*, 263 S.C. 101, 106, 208 S.E.2d 31,

33 (1974); *U.S. Rubber Co. v. White Tire Co*., 231 S.C. 84, 95, 97 S.E.2d 403, 409 (1956) (holding a landlord is under a duty to minimize damages upon a tenant's breach of lease); *Burkhalter v. Townsend*, 139 S.C. 324, 332, 138 S.E. 34, 37 (1927). The extent of such mitigation must be "possible and reasonable." *Chastain v. Owens Carolina, Inc.*, 310 S.C. 417, 420, 426 S.E.2d 834, 835 (1993); *Moore v. Moore*, 360 S.C. 241, 262, 599 S.E.2d 467, 478 (Ct.App.2004). The efforts put forth by Respondents to advertise and market the Property were minimal at best, especially when considering that the Property, while vacant, results in a loss of potential income.

The Lower Court failed to address the issue of mitigation at all in the Final Order; the failure to address an issue raised by a party is an abuse of discretion.

D. THE LOWER COURT ERRED IN CONCLUDING PLAINTIFFS DID NOT BREACH THE LEASE FIRST.

The Court erred in failing to find that Plaintiff/Respondent breached the lease prior to Defendant/Appellant vacating the property. The Final Order fails to address the materiality of the change in insurance obligation as a factor evidencing Plaintiff/Respondent's breach. The materiality of the change in insurance requirement was extensively discussed at trial and fully briefed in Appellant's Proposed Final Order (R. pp. 476, 477). The Final Order briefly addresses some facts surrounding Appellant's assertion that Respondent breached the lease; however, it fails to address the issue prior case law regards as a "material breach"; i.e., the insurance obligation (R. pp. 1-13).

As a matter of law, since the alleged lease was not admitted into evidence, the court is left to divine the contract based on the course of dealing and pre-occupation discussions. The

Court reasonably found that Defendant CSS Enterprises entered into some lease agreement with Plaintiff . These facts are clear from the operation of the parties and the pre-possession email correspondence referenced above. "In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered. *Klutts Resort Realty, Inc.*, 268 S.C. at 89, 232 S.E.2d at 25; *Mattox v. Cassady*, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct.App.1986). Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions. *Blakeley*, 266 S.C. at 73, 221 S.E.2d at 769; accord *Kable v. Simmons*, 217 S.C. 161, 166, 60 S.E.2d 79, 81 (1950)." *Ellie, Inc. v. Miccichi*, 594 S.E.2d 485, 358 S.C. 78 (S.C. App. 2004).

Whether the Respondent/Plaintiff breached the agreement when their agent, WK, assumed control of the management and threatened to evict Defendants for not having liability insurance should have been at least discussed in the Final Order. And as a matter of law, bringing in a third party property management company which demands to be added to insurance is a material and substantial alteration of the parties' original agreement. Even assuming the Plaintiff's version of the lease was in evidence, Defendants would not have been obligated to obtain liability insurance protecting WK as WK demanded. It is clear from the operation of the parties that the decedent owner of Plaintiff never mandated liability insurance coverage. Even if Plaintiff's version of the lease had been in evidence, there is still no mandate that Defendant CSS obtain $2,000,000.00 in liability coverage insuring WK. The Defendants raised the issue of "Bad Faith" in their counterclaim, and Plaintiff's Exhibit 11 is relevant only to the issue as to whether WK acted reasonably on a good faith belief that the lease in their possession was genuine.

A breach of contract claim warranting rescission of the contract must be so substantial and fundamental as to defeat the purpose of the contract. *Palmetto Mortuary Transp., Inc. v.*

Knight Sys., Inc., 424 S.C. 444, 818 S.E.2d 724 (2018). The demand to name a non-party as an insured, after having waived the insurance obligation by course of dealing is a material breach of the contract. Our courts have previously found disputes over insurance coverage in a commercial lease are material breaches of the rental contract. *Ellie, Inc. v. Miccichi*, 594 S.E.2d 485, 358 S.C. 78, 98 (Ct. App. 2004). Defendants testified that providing liability insurance coverage for other people or entities is material due to both the cost of a $2,000,000.00 policy and due to the likelihood of being sued if they insure WK (R. p. 95).

V. CONCLUSION

Since the Plaintiff failed to authenticate a disputed lease, it could not be entered into evidence for the purpose of being the operative lease. There was no evidence admitted that the individual appellants entered into a lease in their individual capacity. The Trial Court erred in enforcing a lease which was never entered into evidence for purposes of being the operative lease.

It was an abuse of discretion for the Trial Court to fail to consider Plaintiff's failure to mitigate damages. And the Trial Court erred in concluding Plaintiff did not breach the lease prior to Defendants' breach since the Final Order does not address the materiality of the change in insurance requirement.

For the foregoing reasons the Trial Court's Order should be reversed and remanded for a new hearing removing the individual defendants and an Order addressing the materiality of the change in insurance requirements and failure to mitigate should be issued.

Respectfully Submitted,

August 20, 2021

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